Chapter 1

WHO HAS AUTHORITY TO TAKE THE COUNTRY TO WAR?

In early 2012 President Quaddafi's suppression of popular uprisings in Libya began to arouse concern domestically and abroad. Attention began to focus on what, if any, the US response would be. By late February the UN Security Council adopted a resolution expressing "grave concern" about Libya, and the US Senate unanimously approved a resolution calling for the Security Council to impose a Libyan no-fly zone.[1] By March, the Security Council had authorized member states to use force to protect Libyan civilians, and the House simmered with dispute about the president's constitutional war authority.[2] On March 18 President Obama deployed troops to Libya.

The president's domestic authority to intervene in Libya was conditioned by two authoritative texts: the US Constitution, which grants him the power to command the military, and Congress the power to declare war; and the War Powers Resolution of 1973 (WPR), which creates procedural and reporting requirements for deployments. The WPR declares that presidents may introduce US armed forces into "hostilities" "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States."[3] With none of these conditions in place, the president's legal authority

1 UN Security Council Resolution 1970 (Feb. 26, 2011); S. Res. 85, *Congressional Record*, 112th Cong., 1st Sess. (March 1, 2011).

2 UN Security Council Resolution 1973 (March 17, 2011); *Congressional Record*, 112th Cong., 1st Sess., 2011 (March 10, 2011); H. Con. Res. 31, 112th Cong., 1st Sess. (March 15, 2011); see also the House's hearings on Libya, *Congressional Record*, 112th Cong., 1st Sess., 2011 (March 31, 2011). This book refers to the president with male gender pronouns for the sake of historic accuracy as of 2013.

3 War Powers Resolution, Section 2(c).

to intervene in Libya under the WPR was suspect from the beginning.[4] Nonetheless, the WPR's procedural requirements created a set of structured expectations about how the branches would respond to one another over the Libyan incursion. On March 21 Obama reported to Congress "consistent with the War Powers Resolution."[5] When US military operations continued past the time horizons of the WPR, still without legislative authorization, members of Congress challenged the president's constitutional and statutory faithfulness.[6]

Instead of either challenging the constitutionality of the WPR, or discontinuing operations, the executive branch argued that the deployments did not amount either to "hostilities" or to "war in the constitutional sense." By early June, a restive House resolved that the Libyan mission had not been legislatively authorized and stated the legislature's prerogative to withdraw funding.[7] Hundreds of senators and representatives expressed constitutional concerns, but this did not translate into a willingness to either authorize or shut down operations.[8]

The legislature's challenge and the president's response constitute a revealing window into characteristic features of a constitutional war powers debate. Consider first that the debate was nowhere judicialized. Members of the House sued the president, but the US District Court threw the case out, noting its "frustration" at being asked to hear the case given

4 Presidents have often claimed constitutional empowerment beyond the terms of the WPR.

5 The White House, "Letter from the President regarding the commencement of operations in Libya" (March 21, 2011). Available at http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya (accessed March 7, 2012).

6 See S. Res. 194 (May 23, 2011), supportive of the president, submitted by John McCain and debated on June 14, 2011; S. J. Res. 13, S. J. Res.14 (both on May 23, 2011), emphasizing the importance of legislative war authority and authorizing the war in Libya, submitted by Ron Paul; Amendment SA 381 by Sen. Paul to bill S. 990 (May 25, 2011), stating that the president needed authorization from Congress for the incursion; Kucinich Resolution (H. Con. Res. 51) (June 3, 2011) mandating the president remove troops in 15 days (failed 148–265).

7 Boehner Resolution (H. Res 292) (June 3, 2011) restraining the president from introducing ground troops and stating that "the president has not given Congress a compelling rationale for the operations" (adopted 268–145).

8 268 members of the House voted for the Boehner Resolution; 148 voted for the Kucinich Resolution mandating that the president remove troops in fifteen days. H. J. Res. 68 would have authorized Obama's actions in support of the NATO mission but failed on June 24, 2011 by 295–123. H.R. 2278 would have blocked the president's use of Defense Department funds for the Libyan intervention, but failed by 238–180 on June 24, 2011. Congress did restrict the president's use of defense department funds for Libya in limited ways (Amendments 8 and 13 to H.R. 2219, adopted July 7, 2011).

long-standing precedent.[9] This controversy would be decided through nonjudicial politics. Indeed, the politics of the moment were on vivid display in the reasoning of three prominent executive branch officials—President Obama, Vice President Biden, and Secretary of State Clinton—all of whom argued that this use of the military was constitutional, but all of whom, when they were Democratic senators challenging a Republican president, had emphasized the importance of legislative authorization for war.[10]

The debate pivoted around the meaning of "war"—in the language of the Office of Legal Counsel (OLC), "war for constitutional purposes."[11] Despite air strikes and remote drones, the administration claimed that the Libyan intervention was neither "war" nor "hostilities."[12] President Obama interpreted the meaning of "war" and "hostilities" not through international law, or judicial precedent, or close readings of the Constitution's text. Rather, the administration invoked policy concerns, structural and governance reasons, and historic precedent. State Department legal advisor Harold Koh told Congress that it should interpret the WPR's language in light of the security consequences of their chosen readings, emphasizing that a "mechanical reading of the statute could lead to unintended automatic cutoffs . . . where more flexibility is required."[13] The

9 *Dennis Kucinich et. al v. Barack Obama* (2011), Civil Action No. 11-1096 (RBW), p. 7, fn. 4.

10 On Biden, see Adam Leech, "Biden: Impeachment If Bush Bombs Iran," *Seacoast online.com* (Nov. 29, 2007), available at http://www.seacoastonline.com/apps/pbcs.dll/article?/AID=/20071129/NEWS (accessed January 27, 2012). On Clinton, see Charlie Savage, "Hillary Clinton Q&A," *Boston Globe* (Dec. 20, 2007), available at http://www.boston.com/news/politics/2008/specials/CandidateQA/ClintonQA/?page=full (accessed June 12, 2012). On Obama, see Charlie Savage, "Barack Obama's Q&A," *Boston Globe* (Dec. 20, 2007), available at http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/?page=full (accessed June 12, 2012).

11 Caroline D. Krass, Office of the Legal Counsel, "Authority to Use Military Force in Libya" (April 1, 2011), p. 8 (henceforth *OLC April 1*). Available at http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf (accessed January 29, 2012).

12 The administration developed this argument in a series of reports and statements. See *OLC April 1*; The White House, "United States Activities in Libya" (June 15, 2011) (henceforth Libya Activities June 15), available at http://www.politifact.com/truth-o-meter/article/2011/jun/22/are-us-actions-libya-subject-war-powers-resolution/ (accessed January 29, 2012); Harold H. Koh, Legal Advisor, US Dept. of State, "Libya and War Powers: Headings before the Senate Committee on Foreign Relations," 112th Cong. (2011) (henceforth *Libya Hearings*), at http://foreign.senate.gov/imo/media/doc/Koh.Testimony.pdf (accessed January 29, 2012); Barack Obama, "Remarks by the President in Address to the Nation on Libya," National Defense University (March 28, 2011) (henceforth *Remarks on Libya*), available at http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript (accessed January 29, 2012).

13 *Libya Hearings*, 5–6.

administration described the importance of US intervention for regional security, for UN and NATO credibility, for humanitarian needs, and for international alliances, especially given the foreign policy imperatives of the Arab Spring. The OLC made these policy reasons one element of a constitutional test, arguing that the president's war authority depended upon whether the intervention served "sufficiently important national interests."[14]

The administration also gave reasons that spoke to the governing capacities of the branches. For example, it cited the president's capacity to respond to "rapidly evolving military and diplomatic circumstances."[15] It emphasized that costs and casualties would be low and that the administration would not ask Congress for appropriations.[16] Apparently concerned about policy intersections between Libya and other legislative security priorities, the administration argued that the intervention would have few policy consequences elsewhere. For example, the intervention would not impact operations in Iraq and Afghanistan, nor was it likely to escalate.[17] The OLC argued that only operations sufficiently extensive in "nature, scope, and duration" required legislative approval.[18] Finally, its citation of OLC reasoning during the Clinton administration amounted to a precedent-based claim.[19]

To argue for the constitutionality of a president's deployment because of its importance for domestic security interests would seem to violate one central effort of constitutional law: to seek answers about procedural authority precisely so as to *avoid* controversy over topics like Libya's security significance. Legal objections either condemned Obama for playing fast and loose with constitutional and statutory language, or challenged the integrity of the OLC's legal process.[20] No constitutional

14 *OLC April 1*, 10.

15 *OLC April 1*, 7.

16 *Libya Activities June 15*, 15–16.

17 *Libya Activities June 15*, 21; *Libya Hearings*, 7–10.

18 *OLC April 1*, 10. These arguments were consonant with ones developed during the Clinton administration. See Walter Dellinger for the Office of Legal Counsel, "Deployment of United States Armed Forces into Haiti" (September 27, 1994), 1; Walter Dellinger for the Office of Legal Counsel, "Proposed Deployment of United States Armed Forces into Bosnia" (November 30, 1995); Walter Dellinger, "Did Obama Buck Congress on Libya?" *Politico.com* (March 22, 2011), available at http://www.politico.com/arena/perm/Walter_Dellinger_67654F65-2026-4BE1-A4B9-6D18C15BC77E.html (accessed January 23, 2012).

19 *OLC April 1*, 9. On Clinton administration precedents, see too Jane C. Stromseth, "Understanding Constitutional War Powers Today: Why Methodology Matters," *Yale Law Journal* 106:3 (1996): 845–915, fn. 139.

20 Bruce Ackerman, "Obama's Unconstitutional War," *Foreign Policy* (March 24, 2011); Robert J. Delahunty, "War Powers Irresolution: The Obama Administration and the Libyan Intervention," *Engage* 1 U of St. Thomas Legal Studies Research Paper No. 11–

scholarship found Obama's substantive claims worth investigating: for example, whether the Libyan intervention actually was as significant to regional peace, NATO and UN credibility, and US domestic interests as Obama claimed.[21] Nor did constitutional scholars engage the structural arguments that Obama offered for presidential war governance. Perceiving that the administration was being strategic in its interpretation of constitutional language, some argued that the War Powers Resolution—and perhaps the Constitution itself—were shoddy in their legal draftsmanship, especially in allocating interbranch war authority with reference to a set of slippery terms ("war," "hostilities") that have little definitive content.[22]

It is true that the US Constitution's allocation of the power to initiate hostilities is ambiguous.[23] That the Constitution empowers a federal government to wage war is beyond dispute.[24] But which branch has the power to initiate hostilities? Congress is vested with the power to "declare war," a power whose scope could range from the simple legal

17, 12 (September 2011): 122–28; Louis Fisher, "Military Operations in Libya: No War? No Hostilities?," *Presidential Studies Quarterly* 42:1 (2012): 176–89; Trevor W. Morrison, "Libya, 'Hostilities,' The Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation," *Harvard Law Review Forum* 124:62 (2011): 62–74; Michael Isikoff, "On Libya, President Obama Evaded Rules on Legal Disputes" *NBC News* (June 21, 2011), available at http://www.msnbc.msn.com/id/43474045/ns/politics-white_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/#.T7BbYWUbroA (accessed May 13, 2011).

21 For a notable exception see Michael J. Glennon, "The Cost of 'Empty Words': A Comment on the Justice Department's Libya Opinion" *Harvard National Security Journal* (2011), *available at* http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon_Final-Version.pdf (accessed April 4, 2012), pp. 6–7.

22 Louis Henkin, "Foreign Affairs and the Constitution," *Foreign Affairs* 66:2 (1987): 284–310, 300 (lamenting that "above all, the [WPR] suffers gravely from a lack of any definition of 'hostilities' ").

23 A technical legal language distinguishes "vagueness," "ambiguity," and "underdeterminacy." An "ambiguous" text has more than one distinct meaning. A "vague" concept has indefinite applications. An "underdeterminate" text constrains, without fully fixing, a legal outcome. Vagueness and ambiguity are two routes toward underdeterminacy. The Constitution's war powers language is both vague and ambiguous. The concept of "war" is vague, and the allocation of the power to "declare war" to Congress is ambiguous as to whether Congress has the power to authorize all military confrontation, or simply the power to name a confrontation as war. See Ralf Poscher, "Ambiguity and Vagueness in Legal Interpretation," *Oxford Handbook on Language and Law*, Lawrence Solum and Peter Tiersma, eds. (Oxford University Press, 2011).

24 Daniel Deudney, *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton: Princeton University Press, 2007); David Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2006); Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (Wilmington, DE: Rowman & Littlefield, 1986); Michael Oren, *Power, Faith and Fantasy: America in the Middle East, 1776 to the Present* (New York: W. W. Norton & Co., 2007).

power of naming, to an exclusive power to authorize any and all military confrontation. Congress can also pass laws and appropriate funds, regulate the military, and create the structure of the executive bureaucracy, including security-related bureaus. Finally, Congress is vested with the power to "issue letters of marque and reprisal," a common form of limited and undeclared war of the eighteenth century.[25] Yet the president is granted a vague "executive power," and the Constitution designates him "Commander in Chief . . . when called into the actual Service of the United States." Unlike the legislature and judiciary, the presidency never adjourns, and the structure of the branch is comparatively efficient and unitary. Article II Section 1 also requires the president to swear to "preserve, protect, and defend" the Constitution. These features imply some independent war powers, and the oath implies that those powers are for defensive purposes. The contours of those powers, and the conditions under which they may be used, are never specified. Nor do originalist sources reveal any bright lines.[26] Justice Jackson said that the answer to this question "must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[27]

The Constitution also fails to provide for one authoritative institution to settle this controversy. Whereas the South African Constitution designates its Constitutional Court as the "highest court on all constitutional matters," and specifies that the Court "makes the final decision whether a matter is a constitutional matter,"[28] the US Constitution never concretely establishes judicial review. The power of the US Supreme Court to interpret the Constitution is implied, not explicit, and its origins rest in judicial constitutional reasoning that has been sustained and reinforced by other political actors, rather than being mandated, or even explicitly

25 Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967), 27–29; Stromseth, "Understanding," 860.

26 Michael Ramsey's originalist reading of the "declare war" clause in *The Constitution's Text in Foreign Affairs* (Cambridge: Harvard University Press, 2007), chs. 11 and 12, resists the common idea that originalist sources are incomplete. Ramsey admits that his reading was not transparent to all members of the founding generation (pp. 244–45). The Constitutional Convention spent less than a day discussing war powers, and neither the Virginia Plan nor the Paterson Plan contained any procedures governing the power to commence hostilities. Christopher Collier and James Lincoln Collier, *Decision In Philadelphia: The Constitutional Convention of 1787* (Ballentine Books: New York, 1986), 330. Perhaps debates were cursory because delegates were fatigued at the end of the proceedings. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996), 83–84. See also Stromseth, "Understanding."

27 *Youngstown Sheet & Tube Company, et al v. Charles Sawyer, Secretary of Commerce* 343 U.S. 579 (1952), Jackson concurrence.

28 Republic of South Africa Const, Chap 8, Sec 167, § 3.

contemplated, by the text.[29] In its constructions of constitutional meaning, the judiciary has chosen to limit its scrutiny of "political questions" like the nature of constitutionally authoritative procedures for going to war.[30]

In the domain of war powers, the agents who have advanced and judged claims of war authority are not courts but the elected branches themselves as they formulate and defend their policies to one another and to the electorate. They have often done so in ways that are transparently linked to institutional or partisan policy advantage. Presidents in the twentieth century have made vast claims for independent war-making authority. Truman, Ford, Kennedy, Johnson, Nixon, Reagan, George H. W. Bush, Clinton, and Obama all claimed the power to initiate hostilities without congressional authorization—a claim premised on the executive's authority to decide on his own what constitutes a threat and an appropriate response to threat. Although it was unusual for nineteenth-century presidents to state it explicitly, presidents from Jefferson to Polk to Lincoln to Wilson behaved as if congressional authorization for military hostilities was optional. In fact, while George W. Bush is remembered for bellicosity, his effort to achieve congressional authorization to fight wars in Iraq and Afghanistan was notably sensitive to legislative prerogatives in war. Many presidents have behaved as though whether to engage in military hostilities is not a relevant question for Congress.

Congress, too, has been actively engaged on its own behalf. Early Congresses made assertions of constitutional authority that are breathtaking to modern ears. The debate between Pacificus and Helvidius, one of the first showdowns between the branches, concerned whether or not it is constitutionally appropriate for the president to offer a *point of view* about how a treaty should be interpreted. Partisans of Congress worried that a president's speech about the meaning of a defense treaty would unduly contort the legislature's deliberative space. Many of Congress's esteemed members—Senators Vandenberg, Nye, Taft, Mansfield, Fulbright—were known for their sustained challenges to executive war authority. In 1973 congressional solicitude for its own institutional honor reached a new level of mobilization in the War Powers Resolution. The Iran-Contra hearings and contemporary agitation about executive authority for interventions in Libya show us that even in the age of the "imperial presidency," the legislative branch has its defenders.

29 Keith Whittington, *Political Foundations of Judicial Supremacy* (Princeton: Princeton University Press, 2007).

30 See e.g., *Massachusetts v. Laird*, 400 U.S. 886 (1970) and *DaCosta v. Laird*, 405 U.S. 979 (1972) where the Court denies certiorari over the constitutionality of the Vietnam War; *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (rejecting a suit to enjoin the Iraq War on constitutional and statutory grounds).

Both the Constitution's text—which apparently commits the elaboration of the meaning of "war" to a potentially rivalrous interbranch relationship—and the history of war powers debates, where the branches' interpretive claims are transparently driven by partisan, institutional, and policy rivalries, generate one common conclusion: core features of this area of constitutional policy do not intersect well with standard presumptions about the conditions of faithful constitutional interpretation. Conventional beliefs about constitutional reasoning emphasize neutrality, impartial review, and the value of making policy in conformity with the Constitution's procedural requirements as specified either explicitly in the text or through judicial construction. With underdeterminate constitutional language, an interpretive process driven by the politics of motivated and strategic officeholders, and the absence of a final arbiter, the structural conditions of the war powers debate are repugnant to core conditions thought necessary for achieving good practices of constitutional interpretation.[31]

The idea that constitutional fidelity means adhering to the meaning of determinate text, or adhering to the decisions of one authoritative, impartial adjudicator is sustained by reference to an idea about constitutional authority called the *settlement thesis*. The settlement thesis claims that the very point of constitutions is to resolve conflict over basic political questions like the allocation of power between institutions. For the Constitution to be authoritative in disciplining war powers *is* for the Constitution to resolve the basic question of where war authority resides and for all agents to conform their behavior to that settled understanding. Policies may be more or less legitimate, more or less in accord with the "spirit" of the Constitution.[32] But the Constitution as authoritative text is the Constitution whose translation into politics is determinate.

The hope is that constitutions can contain policy controversy within a set of uncontroversial decision procedures. If a constitution offers a set of clear boundaries, then actors can uncontroversially assess the constitutionality of their behavior, and a core function of the constitutional order—to create a stable, procedural, lawful framework—is achieved. The link between settlement theory and judicial supremacy should be transparent: if the primary function of a constitution is to resolve interpretive conflict, then it is important to identify a single institution whose impartial reasoning about vague language can be accepted as authoritative by all others.

Yet establishing stable, legal, procedural frameworks is only one task of a constitutional order. Constitutions also create resources—textual,

31 On "underdeterminacy," see footnote 23.

32 Many thanks to Mitch Berman and Colin Bird for their challenges on this front.

ideological, and institutional—through which actors occupy various roles, or offices, and in turn use those offices to advance their aims in politics. The Constitution creates a politics every bit as much as it creates a legal order. The aims that politicians pursue in this constitutional universe are premised on, and have implications for, the policies and institutions that surround them. The Cold War ferocity of the Republican Party in the 1970s and 1980s was linked to an interpretive claim about presidential war powers; so too, apparently, is the Obama administration's conception of liberal international order. The availability of these textual, ideological, and institutional resources for ordinary politics makes it appropriate to assess constitutional fidelity not only in terms of respect for a legal framework, but also in terms of officials' relationships to a structured politics that is created and sustained through constitutional language and institutions.

Can this politics be assessed in any meaningfully constitutionalist way? Evaluating the behavior and rhetoric of strategic, partisan, and motivated public officials in terms of their adherence to neutral, procedural, nonpartisan standards seems to promise only disappointment. For this reason, some say that we should not assess constitutional fidelity in the area of war powers at all. John McGinnis and Mark Tushnet both argue that the Constitution's failure to advance determinate rules over war powers means that the constitutional text is consistent with, in Tushnet's words, "*whatever* the political process produces."[33]

But it is precisely this constitutional politics that determines the allocation of war authority in practice. And war has been endemic to American statecraft. Since the constitutional founding, the United States has been in an almost continuous state of war, and war has arguably been the single most important engine behind the development of the US state.[34] To refrain from evaluating the interpretive politics behind this tremendous exertion of resources is to remove highly consequential domains of governance from constitutional scrutiny. At the same time, we should be skeptical of accounts of constitutional fidelity that begin with the premise that the ordinary behavior of elected officials is constitutionally deficient.

33 Mark Tushnet, "The Political Constitution of Emergency Powers: Some Lessons from *Hamdan*," *Minnesota Law Review* 91:5 (2007): 1451–72, 1468; John O. McGinnis, "The Spontaneous Order of War Powers," *Case Western Reserve Law Review* 47:4 (1996): 1317–29 and "Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers," *Law & Contemporary Problems* 56:4 (1993): 293–325.

34 Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012); David R. Mayhew, "War and American Politics," *Perspectives on Politics* 3:03 (2005): 473–93.

Assessing the branches' war powers politics requires an altogether different way of theorizing constitutional fidelity. This book demonstrates that the constitutional politics of war powers can be meaningfully assessed in terms that are congruent, rather than repugnant, to their animating conditions. Constitutional theory need not be disabled in its confrontation with an interpretive politics that is shot through with vagueness, underdeterminacy, structured interbranch conflict, and partisan and policy rivalries. We can generate standards for assessing interpretive fidelity that capture, track, and engage this constitutional politics rather than resist, ignore, and condemn it. Doing so requires new and different theories about constitutional authority. This book is simultaneously about the war power, about the best way to interpret the Constitution's interbranch allocation of war authority; but it also offers a broader way of conceiving constitutional authority, one that is relevant for other dimensions of constitutional policy whose structuring premises, like those of war powers, fit poorly with the terms of settlement theory.

THE PRESIDENT VERSUS CONGRESS: INSULARIST CONCEPTIONS OF WAR AUTHORITY

Constitutional scholarship shares a broad premise that the Constitution should be read to settle basic questions of institutional competence like which institution has the power to start wars. Dispute focuses on what, exactly, it is that the Constitution settles. Since the mid-twentieth century, one set of commentators has elaborated the executive branch's claim that it has the constitutional authority to initiate military hostilities without legislation. Its opponents, dominant since the founding, are partisans of the legislature, arguing that only Congress enjoys the power to authorize hostilities.

Controversy about whether the authority to initiate war rests with Congress, or the presidency, conceals a more basic agreement that structures the war powers literature. Both sides, seeking to shield the constitutional war powers structure from the effects of policy controversy, would locate the sovereign war power in a single branch (perhaps with a few narrow exceptions). If procedures for authorizing war are settled beforehand, then constitutional fidelity involves acting in congruence with those procedures, rather than considering in any fresh way which branch *ought* to be empowered given the context. The branches need not review and justify their interpretations of the war power, so much as act in congruence with settled procedures. Vesting the authority to initiate war in settled, noncontroversial procedures protects the branches from the burden of justifying their constitutional politics to one another. I name these

"insular" theories of war authority. An insular account of war authority is one that seeks to shield its favored institution from the burdens of justifying its interpretive position to its rival. In the context of war powers, insular conceptions of war authority run up against obdurate features of constitutional text and politics.

PRO-CONGRESS INSULARISM

For advocates of the legislature, Congress's power to declare war, to pass laws and appropriate funds, to issue letters of marque and reprisal (authorize limited war), and to make rules and regulations for the military all indicate legislative empowerment over war.[35] Louis Henkin writes that the Constitution "gave the decision as to whether to put the country into war to Congress," and doubts that that power can be delegated.[36] Pro-Congress insularists believe that "Congress has the exclusive power to determine whether to introduce forces into war, though in emergencies the President may act."[37]

This last proviso is the wedge that splinters pro-Congress insularism. For no scholar denies that there are contexts in which the president may act on his own authority.[38] This authority is structurally implied: the executive branch is always in session and heads the military. Founding debates reinforce the idea of an implied presidential war power. Congress was empowered to "declare," rather than "make" war, in an effort to grant the executive "the power to repel sudden attacks."[39] The power to "declare" war, which is Congress's, then amounts to something less than a power to authorize all military confrontation. What distinguishes

35 Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 1995); Michael J. Glennon, *Constitutional Diplomacy* (Princeton: Princeton University Press, 1990); Charles A. Lofgren, "War-Making under the Constitution: The Original Understanding," *Yale Law Journal* 81:4 (1972): 672–702; William Michael Treanor, "Fame, the Founding, and the Power to Declare War," *Cornell Law Review* 82:4 (1997): 695–772.

36 Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990), 39.

37 Glennon, *Diplomacy,* 84; Philip Bobbit, "War Powers: An Essay on John Hart Ely's 'War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath,'" *Michigan Law Review* 92:6 (1994): 1364–400, 1373–74; Stephen Griffin, *Long Wars and the Constitution: Presidents and the Constitutional Order from Truman to Obama* (Cambridge: Harvard University Press, forthcoming 2013), p. 60 in manuscript.

38 See, e.g., Louis Fisher, *Constitutional Abdication on War & Spending* (College Station: Texas A&M University Press, 2000), ch. 2. This book refers to the president using historically accurate male pronouns.

39 See deliberations between Madison, Gerry, and Sharman (August 17, 1787). James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Athens: Ohio University Press, 1966), 476.

military confrontations where the president is empowered from those where congressional authority is plenary?

This is among the central questions of the war powers debate. From within settlement terms, the answer to the question should be relatively formal so as to avoid interpretive controversy. It will not do to argue that the president is empowered to quickly respond when he *should* do so, or when national security calls for him to do so, or when his office positions him well to respond to the security needs of the moment, because such answers replicate the political controversy that it is a core aim of settlement to curtail. What are the security needs of the moment? Often, the answer is politically contentious. Settlement theorists need criteria that are not subject to political controversy. And yet the Constitution's text provides no clear guidance.

Lacking clear textual answers, pro-Congress insularists may point to a founding-era consensus that the president may repel sudden attacks at territorial borders. But does this mean that a president must wait until the attack has actually occurred to respond? If he is allowed to respond with force as attack is unfolding, how much force? How long can the president fight without legislative authorization? And what does it mean for "attack to be unfolding" when a finely tuned diplomatic and bureaucratic politics holds the key to nuclear war?

Some scholars believe that there are also founding-era consensus answers to these questions that can guide us today. Even if there were, consensus politics, on its own, is a weak place to vest constitutional authority, not least because a modern consensus has emerged in politics that the president is empowered to engage in short-term military hostilities as long as his bellicosity can plausibly be named something other than "war." It is precisely this modern consensus that pro-Congress insularists wish to dislodge. Their reliance on the consensus politics of yesterday hence raises conceptual problems.

There are other good reasons to resist reading consensus politics of the founding into the Constitution's war powers order. Even during the founding, there was a consensus that not all military strikes amounted to "war." President Washington sent federal troops to put down Native American resistance to white settlement of the Pacific Northwest.[40] President Jackson paid militiamen to repel attacks by Native Americans in Missouri, Michigan, and Indiana without specific legislative authorization.[41] In the Second Seminole War in Florida, the War Department

40 David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb—A Constitutional History," *Harvard Law Review* 121:4 (2008): 941–1113, 962.

41 See Henry Bartholomew Cox, *War, Foreign Affairs, and Constitutional Power 1829–1901* (Cambridge, MA: Ballinger Publishing Co., 1976), 16.

lent muskets and provisions and dispatched army companies to Florida to fight alongside state militia forces. Federal army units were dispersed throughout the West during the Indian Wars of the mid-nineteenth century. Congress appropriated funds for these and other like ventures, but did not authorize war.[42] Public officials apparently did not conceive of themselves as engaging in war despite the fact that the US government had entered into treaties with Native American tribes, implicitly recognizing some sovereignty. Theodore Roosevelt used these precedents to guide his thinking about legislatively unauthorized bellicosity in Central and South America and the Caribbean. Harry Truman, and later Lyndon Johnson, followed Roosevelt's path when they characterized executive branch belligerency as "police action," not war; today President Obama, with the counsel of war powers scholar Harold Koh, argues that the strikes in Libya amount to a "limited mission," not war.[43] What counts as war is a matter of political judgment, and national consensus has often permitted forms of executive bellicosity that pro-Congress insularists would or should condemn. Looseness in the very concept of war creates textual space for opportunistic presidents to evade the restrictions that pro-Congress insularists demand. Neither the consensus politics of the founding, nor those of today, are reliable resources for pro-Congress insularists.

The concept of "war" corresponds to dividing lines for institutional empowerment, and the Constitution creates branches with the political capacity to challenge one another. The basic tension between Congress's and the executive's authority over military control—a tension not resolved through textually specified consultation procedures—makes textual vagueness consequential for war politics. For these reasons, we should expect enduring struggle over the meaning of that term. Moreover, such challenge is legitimate insofar as some cases of military confrontation truly do not amount to "war." The branches must determine the scope of these exceptions. That Congress's insular power to authorize war is subject to poorly defined exceptions begs the question of how officials and the public are to judge when a state of affairs exists that could justify independent presidential action. Pro-Congress insularism depends on the sensitive judgment of officials, yet offers only limited resources for training that judgment.

42 Cox, *War*, 23, 64–65, 205–206, 211, 302–304; see also Barron and Lederman, "Lowest," 991.

43 Charlie Savage and Mark Landler, "White House Defends Continuing U.S. Role in Libya Operation," *New York Times* (June 15, 2011) available at http://www.nytimes.com/2011/06/16/us/politics/16powers.html?_r=1&pagewanted=all (accessed May 14, 2012).

PRO-PRESIDENCY INSULARISM

Pro-presidency insularism argues that the executive branch has the constitutional authority to engage in defensive military hostilities, and that the president is the only judge of the practical meaning of this category. Truman made the claim prominent when he defended his actions in the Korean War as inherently authorized by the commander-in-chief clause. Since Truman, presidents have used striking language to advance this claim. Although President George H. W. Bush obtained authorization for hostilities in the first Gulf War, he emphasized that "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait."[44] When Clinton sent troops to Haiti, he argued that "[l]ike my predecessors of both parties, I have not agreed that I was constitutionally mandated" to achieve congressional approval.[45] After the executive branch raised the claim to political prominence, a few scholars took up the work of elaborating and defending what is essentially a political claim deployed in the heat of struggle.

Pro-Executive insularists argue for "exclusive" presidential control over the armed forces.[46] Eugene Rostow tells us that, although the executive's power to call the military into service is a limited power "confined to cases of actual invasion, or of imminent danger of invasion," nevertheless the president himself must be the "sole and exclusive judge" as to when these cases have arisen.[47] Congress's war power is then construed as residual and secondary—perhaps a power to endorse or refrain from endorsing, but never a full power to authorize or bar. Some partisans of the president would interpret the power to "declare war" as a simple power

44 "Remarks of President George Bush before the Texas State Republican Convention," Federal News Service (June 20, 1992) as cited by William Michael Treanor, "Fame, the Founding, and the Power to Declare War," *Cornell Law Review* 82:695 (1996): 703.

45 "Presidential News Conference: Health Care, Haiti and Crime Transcript of President Clinton's News Conference at the White House," *New York Times* (August 4, 1994), A16, as cited by Treanor, "Fame," 704.

46 Bobbit, "War Powers," 1373–74; John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2005); J. Terry Emerson, "The War Powers Resolution Tested: The President's Independent Defense Power," *Notre Dame Law Review* 51:2 (1975): 187–216; Henry S. Commager, *The Defeat of America* (New York: Simon and Schuster, 1974); Robert F. Turner, "War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility," *Virginia Journal of International Law* 34:4 (1994): 903–79. See also L. Gordon Crovitz and Jeremy A. Rabkin, eds., *The Fettered Presidency: Legal Constraints on the Executive Branch* (American Enterprise Institute for Public Policy Research, 1989).

47 Eugene V. Rostow, "Great Cases Make Bad Law: The War Powers Act," *Texas Law Review* 50:5 (1972): 833–900, 854.

to determine whether a state of hostilities should be called "war" for purposes of international law.[48] This does not insulate the president's use of war powers from review by the electorate. But it does advocate norms of deference to insulate the president's use of powers from repudiation by other institutions. It would shield the president from the political heft of rival institutionalized authority.

Three of the most important arguments for presidential insularism include an argument based on flexibility; an argument that challenge is dangerous; and an argument based on practice. Pro-Presidency insularists often emphasize flexibility.[49] Rostow argued against "put[ting] the Presidency in a straitjacket of a rigid code, and prevent[ing] new categories of action from emerging, in response to the necessities of a tense and unstable world."[50] "[M]odern conditions" require the president to "act quickly, and often alone."[51] Congress, then, should understand its role in terms of cooperating with the president to support his negotiations and diplomacy.

While policy flexibility is important, the relationship between policy flexibility and interbranch behavior is more complex than insularists claim. The president's capacity to independently respond to crisis is structurally guaranteed by a fixed term and by high barriers to impeachment. Given a massive military establishment, he can pursue his policies even if very few people agree with him at all. Congress cannot, except under exceptional circumstances, remove him personally from office. The need for flexibility through independence is guaranteed at the structural level.

There are good reasons not to expand this structurally guaranteed independence into a norm of political insularity. In part, this is because the president's decision space may be restricted by many forces beyond Congress. Presidents who govern unilaterally may discover that their strategy becomes more and more determined by the imperatives of a single force, say the views of a single cabinet. In fact, engaging the conflicting demands of different political realities and institutions can open space for an agent to make flexible decisions in a broader space. A president "freed" from Congress may end up chained by party. In the prelude to World War II, Senator Nye sought restrictive legislation out of a worry that open presidential discretion would leave the president beholden to

48 See Rostow, "Great Cases"; Curtis A. Bradley & Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review* 118:7 (2005): 2047–133, at 2061–65.

49 Bork has written that Congress is "institutionally incapable" of achieving "swift responses with military force." Robert H. Bork, "Erosion of the President's Power in Foreign Affairs," *Washington University Law Quarterly* 68:3 (1990): 693–706, 693, 698.

50 Rostow, "Great Cases," 838; see also Bobbit, "War Powers," 1382.

51 Rostow, "Great Cases," 871.

economic interests against his own will.[52] Roosevelt affirmed this worry, telling certain senators that "[i]f war came in Europe, [he] did not want to be forced to defend American commercial interests blindly—we would prefer to conduct American policy free from emotional and economic pressures."[53] Even imagining a presidency that faces no external pressures at all, groupthink in the cabinet may still restrict the branch's flexibility. Politicians can sometimes achieve policy flexibility in the US constitutional system by working through a crossroads of conflicting imperatives, rather than being freed from any one of them.

Moreover, flexibility is not the only value for achieving a sound security policy. Wisdom, deliberateness, stability, and consistency are also values, and Congress is well-positioned to contribute here. The right response to a threat is often unclear. Diplomacy, embargoes, and even ignoring the incident may sometimes be more skillful than war.[54] Some legislators have more expertise than the president on particular security problems, and they may have creative perspectives borne of long experience in difficult areas.

So too, the inertia associated with decision-making in large groups can be a positive good for achieving policy stability. In certain contexts, like the provision of security guarantees to other nations, long-term policy stability is required for a policy's success. The time and effort it takes to respond to Congress is time and effort spent toward convincing many people that the policy chosen is in the national interest, and toward building and sustaining policy architectures along that path.[55]

A second pro-presidency insularist argument is that the challenging characteristic of interbranch deliberation endangers the well-being of troops in the field by exposing a troubling lack of will.[56] Legislators also sometimes say they cannot cut off funds for an unconstitutional war because that would amount to stranding soldiers. This argument is largely drawn from a Cold War security context where an almost global security guarantee seemed important for US security interests. In some contexts, the concern may be sound. But not all security dilemmas are like those

52 Wayne S. Cole, *Senator Gerald P. Nye and American Foreign Relations* (Minneapolis: University of Minnesota Press, 1962), 80.

53 Robert A. Divine, *The Reluctant Belligerent: American Entry into World War II* (New York: John Wiley & Sons, Inc., 1965), 22.

54 Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* 2nd ed. (Urbana, Il: University of Illinois Press, 1989), 21.

55 J. William Fulbright, "Foreword," in Glennon, *Diplomacy*, xiv.

56 Rostow, "Great Cases," 869, quoting Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W. W. Norton, Inc., 1969), 414–15. See also Rostow, "Great Cases," 839; Bork, "Erosion," 699.

of the Cold War. Nor should we overlook the costs of the security order that Cold War Congresses built. In many, if not all cases, the soundness of the actual policies that the president and Congress enact should have greater consequence for enemies than the tenor of public conversation. If contentiousness contributes to better-crafted security policies, then contentiousness can also support security. Today we know that the contentiousness of democratic politics may keep the country from entering or sustaining unwise hostilities, hostilities that themselves pose enormous costs to troops.[57] Finally, a refusal to fund continuing operations does not mean leaving troops in the field unprotected. The president continues to bear responsibility for troops even as they withdraw.

A third pro-presidency argument is based on practice. John Yoo is incredulous that many pro-Congress scholars believe "many of the wars of the last half-century . . . were all illegal because they were not accompanied by a declaration of war or its functional equivalent."[58] The State Department estimates that the United States has placed the military into hostilities at least 125 times, and the Congressional Research Service counts 215. Yet the country has declared war only five times.[59] Some of these were legislatively approved by statutes or resolutions; some never formally approved, but were supported by appropriated funds. Given Congress's ultimately decisive control over the military, moreover, this

57 Dan Reiter and Allan Stam, *Democracies at War* (Princeton: Princeton University Press, 2002); Kenneth A. Shultz, *Democracy and Coercive Diplomacy* (Cambridge: Cambridge University Press, 2001); William Dixon, "Democracy and the Peaceful Settlement of International Conflict," *American Political Science Review* 88:1 (1994): 14–33; Bruce Russett, *Grasping the Democratic Peace: Principles for a Post–Cold War World* (Princeton: Princeton University Press, 1994); T. Clifton Morgan and Valerie Schwebach, "Take Two Democracies and Call Me in the Morning: A Prescription for Peace?" *International Interactions* 17:4 (1992): 305–20; Bruce Bueno de Mesquita and David Lalman, *War and Reason: Domestic and International Imperatives* (New Haven: Yale University Press, 1992); Bruce Bueno de Mesquita, James Morrow, Randolph Siverson, and Alastair Smith, "An Institutional Explanation of the Democratic Peace," *American Political Science Review* 93:4 (1999): 791–807; Michael Koch and Scott Sigmund Gartner, "Casualties and Constituencies: Democratic Accountability, Electoral Institutions, and Costly Conflicts," *The Journal of Conflict Resolution* 49:6 (2005): 874–94.

58 John Yoo, "War and the Constitutional Text," *University of Chicago Law Review* 69:4 (2002): 1639–84.

59 Ibid., "The Continuation of Politics by Other Means: The Original Understanding of War Powers," *California Law Review* 84:2 (1996): 167–305, 177. See also Office of the Legal Advisor, U.S. Dept. of State, "The Legality of United States Participation in the Defense of Viet-Nam (1966)," reprinted in *The Vietnam War and International Law*, *Vol. 1*, ed. Richard A. Falk (Princeton: Princeton University Press, 1968), 583, 597; Congressional Research Service, *Instances of Use of United States Armed Forces Abroad, 1798–1989,* ed. Ellen C. Collier (Dec. 4, 1989), reprinted in Thomas M. Franck and Michael J. Glennon, *Foreign Relations and National Security Law, 2nd ed.* (West Group, 1993), 650.

historic precedent implies some legislative permissiveness toward presidential war. Such long-standing interbranch agreement, presidentialists argue, is decisive of the constitutional question.[60]

The argument based on practice gains most of its force from the Cold War. Within that specific historical context, permissive legislation and legislative quiescence have sustained insularism around the executive's war and emergency powers.[61] Still, the meaning of the Cold War precedent is itself a question to be interrogated. No plausible general theory of constitutional authority tells us that long-standing practice on its own is authoritative.[62]

As importantly, the practice of war does not speak univocally. Prolonged periods of contentious interbranch relationship coexist with long histories of deference. While few wars have been declared, many have been authorized, and even more have been supported with resolutions. Before Truman, no president ever claimed a power to engage troops in large-scale hostilities regardless of Congress's will.[63]

While there may be good structural and functional reasons for presidentialism in war, there are also good structural and functional reasons for legislative war authority. With no outside arbiter, the branches themselves must interpret and enforce the proper meaning of the Constitution's textual war powers regime. Without a textually fixed horizon, with no neutral institution formally empowered to answer the dispute, how can elected officials assess the authority of each branch's constitutional claims?

This book advances a web of alternative standards that, all together, I name the *relational conception* of war authority. I argue that the branches' powerful governance and epistemic capacities can be used to support constructions of constitutional war powers that are well adapted to the security context of their own time. Instead of evaluating whether the branches adhere to determinate textual meaning, we can evaluate them in terms of how well they bring their special institutional capacities to bear

60 Henry P. Monaghan, "Presidential War-Making," *Boston University Law Review* 50:5 (1970): 19–33, 19, 31. See also Emerson, "War Powers Legislation," 53, 72.

61 See Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven: Yale University Press, 1990); Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford University Press, 1997).

62 Political practices far more durable than the Cold War may violate the Constitution: consider Southern racial apartheid after the Civil War. For an effort to theorize historic practice in credible ways, see Curtis A. Bradley and Trevor W. Morrison, "Historical Gloss and the Separation of Powers," 126 *Harvard Law Review* (2012). For an illuminating discussion of practice-based interpretive accounts of war powers, see Griffin, *Long Wars*.

63 For a strong repudiation of the practice-based argument for pro-presidency insularism, see Barron and Lederman, "Lowest," 941–1112.

on the problem of interpreting the Constitution's substantive standards about war.

The next sections excavate these standards in two sets. First are the substantive standards pertaining to war, defense, and security. Next are what I call *processualist* standards, which are derived from the branches' structural positions in the constitutional order. The processual standards are for assessing the processes through which the branches deliberate over war powers in practice. Together, these substantive and processual standards form a web for evaluating the branches' politics of war authority which is called the relational conception.

SUBSTANTIVE STANDARDS

The Constitution's text offers a set of substantive standards for disciplining the war power. The preamble commits all institutions to an aspirational standard that they advance the "general welfare" and a system of "common defense." The president vows to "preserve, protect, and defend" the constitutional order. The legislature is granted authority to "declare war." Assessing the branches' fidelity to these concepts is one starting point for analyzing the constitutionality of their behavior.[64]

These substantive terms are important for disciplining any investigation of the contours of each branch's war authority. Consider the meaning of "war," whose declaration is committed to Congress. What is the meaning of this word, or, as the OLC puts it, "war in the constitutional sense"?[65] Does "war" signify any international conflict using military force? Does it mean military action not sanctioned by international law? Does it mean military action that imposes the likelihood of high domestic costs for the United States? Or, is "war" a legal term of art, not necessarily referring to force at all but instead a piece of jargon referring to "the ability of the President to act in a legislative manner"?[66]

One common way of distinguishing between "war" that requires legislative authorization, and conflict that the presidency may authorize, is with reference to scale. Perhaps "war in the constitutional sense" refers to wars that are expensive, time consuming, and pose heavy risks of casualties—big wars. This distinction, though, raises a series of conceptual problems.

64 While preserving, protecting, and declaring are arguably procedures too, I name them substantive standards because constitutional dispute centers on the substantive content of the categories—i.e., what is the meaning of "war" or "defense."

65 E.g., *OLC April 1*.

66 For a discussion of legal approaches to the problem of defining war, see Seth Weinberger, "Presidential War Powers in a Never-Ending 'War' " *ILSA Journal of International & Comparative Law* 13:1 (2006), 11.

First is that the Constitution's explicit commitment of the power to issue letters of marque and reprisal to Congress implies a measure of legislative authority over small as well as big wars.[67] Reprisals were "the most common form of limited and undeclared war" at the time of the founding.[68] Second is a problem of practice: while the polity came to accept small presidential strikes during the Cold War and in the late nineteenth- and early twentieth-century period of imperial expansion, the legislature has not otherwise been friendly to the claim that presidents may unilaterally fight small wars.[69] Third is the problem that wars anticipated to be little and cheap can become big and expensive. Even wars that stay little may be highly consequential for foreign policy, and Article I Section 8 clearly gives Congress a substantial role in foreign policy development. And for good reason: legislatures can be useful institutions for developing sound foreign policy in a complex world. There are good reasons not to accept the distinction between big and little wars as a constitutionally significant dividing line for all contexts.

A second important substantive standard is that of defense, present in the Constitution's preamble and made especially relevant to the presidency through his oath to "preserve, protect, and defend." This oath, along with the fact that the president's war powers are implied, is widely accepted as indicating that a president's use of military force must be for defensive purposes. Perhaps the concept of defense is the right dividing line for adjudicating between legislative and presidential war powers claims.[70] Pro-Congress insularists would interpret this defensive standard narrowly, as a power to "repel sudden attacks"; pro-presidency insularists broaden this standard's scope by arguing that, whatever its content, the president must be the only judge of its meaning. But this way of theorizing the boundary between the two institutions is also, on its own, insufficient. Wars of aggression are now prohibited by international law.[71] Does this mean that the legislature no longer has any constitutional authority over war? In addition, some defensive wars are long, costly, and highly consequential in ways that seem to call for legislative engagement. A purely defensive standard, on its own, implies that Roosevelt needed no authorization to fight Japan in World War II.

67 When the Constitution was ratified the power to issue letters of marque and reprisal had come "to signify any intermediate or low-intensity hostility short of declared war that utilized public *or* private forces, although the emphasis on the use of private forces remained." Stromseth, "Understanding," 854.

68 Ibid., 860, citing Bailyn, *Ideological Origins*, 27–29.

69 Stromseth, "Understanding," 885.

70 Turner, "Forgotten," 906–10; Ramsey, *Foreign Affairs*; J. Terry Emerson, "Making War Without a Declaration," *Journal of Legislation* 17:1 (1990): 23–64, 30–31.

71 Stromseth, "Understanding," 897.

While the Constitution's allocation of the authority to make war seems to call for some important distinctions, war, repelling attack, and defensive action are capacious categories whose meaning must be politically constructed. The distinctions between war, hostilities, and police actions, or between repelling attacks, defensive war, and offensive war, are not formal distinctions but rather pertain to the meaning of hostilities which is itself a core political question at stake in the Constitution's allocation of security power. As such, these categories—the distinction between aggressive and defensive bellicosity, for example—should not be understood only as legal or formal categories, but as already politicized in a way that settlement theory hopes to avoid.

To call an account of war or defense "political" is to say, in part, that it rests on deeply contestable judgments about where security resides. That these categories are political does not mean that they cannot be sensibly evaluated. Setting off a nuclear bomb, unprovoked, for aesthetic pleasure clearly does not count as a defensive action. While it was once acceptable to commit genocide to restore honor among city-states, this cannot today be offered as one more option in the policy tool kits of nations.[72] Acknowledging that the content of these terms is contestable, I nonetheless argue for substantive elaboration of categories like "defense" as one standard of constitutional assessment.

While the evaluator's independent assessment of the best meaning of these terms is relevant, recognizing that the operational meaning of these categories is constructed through politics also turns attention to whether these processes of construction can themselves be constitutionally defended. Through what processes should the polity engage these disputes about the meaning of war or defense?

THE STRUCTURAL CONDITIONS OF WAR POWERS

Given the lack of an ultimately authoritative interpreter, it is the branches themselves that must construct useful meaning out of these substantive terms. How should the branches set about the task of generating good answers to these difficult interpretive questions? The relational conception advances a set of "processual" standards for disciplining the branches' political process, no less than the outcomes they generate. But because the processual standards are based on the branches' distinctive governance capacities and structural positions, understanding the processual

72 Hans van Wees, "Genocide in Ancient Greece," *The Oxford Handbook of Genocide Studies*, Donald Bloxham and A. Dirk Moses, eds. (Oxford: Oxford University Press, 2010).

standards requires us to take a brief detour into discussing the structural conditions of the branches' war politics.

Departmentalist constitutional theory offers a useful starting point for interrogating these structural conditions. There, political scientists, historians, and academic lawyers have generated a robust body of research that reveals the extent to which the branches regularly interpret the Constitution according to their own lights.[73] One departmentalist literature argues that the Constitution's strategy around war powers amounts to an "invitation to struggle" between the president and Congress.[74]

Departmentalists are correct to note that without a single authoritative interpreter, interpretive struggle (or its endemic possibility) is a defining empirical characteristic of war powers. For all its rich empirical insight, departmentalist scholarship today has not yet developed useful standards for assessing these constitutional politics. While judicial interpreters have theorists like Ronald Dworkin, John Ely, and Justice Scalia to reflect on how judges should interpret the Constitution, the elected branches will find that departmentalist literature gives their institutions little guidance. On what basis should Congress, or the presidency, develop

73 Mark Tushnet, *Taking the Constitution Away from the Court* (Princeton: Princeton University Press, 2000); Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (Lawrence: University Press of Kansas, 1992); Edward Corwin, *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government* (Buffalo, NY: W. S. Hein, 1938); Neal Devins, *Shaping Constitutional Values* (Baltimore: Johns Hopkins University Press, 1996); Christopher L. Eisgruber, "The Most Competent Branches: A Response to Professor Paulsen," *Georgetown Law Journal* 83: 2 (1994): 347–70; Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: Princeton University Press, 1989); Louis Fisher, *Constitutional Conflicts Between Congress and the President* (Lawrence: University Press of Kansas, 1997); Scott E. Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution," *Hastings Constitutional Law Quarterly* 24:2 (1997): 359–440; Kent Greenfield, "Original Penumbras: Constitutional Interpretation in the First Year of Congress," 26 *Connecticut Law Review* (1993): 79–144; Michael Stokes Paulsen, "The Most Dangerous Branch: Executive Power to Say What the Law Is," *Georgetown Law Journal* 84: 2 (1994): 217–345; Wayne Moore, *Constitutional Rights and the Powers of the People* (Princeton: Princeton University Press, 1996); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999); Steven G. Calebresi, "Caesarism, Departmentalism, and Professor Paulsen," *Minnesota Law Review* 83: 5 (1999): 1421–22; Gary Lawson & Christopher D. Moore, "The Executive Power of Constitutional Interpretation," *Iowa Law Review* 81: 5 (1996): 1267–330.

74 Edward Corwin, *The President: Office and Powers* (New York: New York University Press, 1984); Roger Davidson, ed., *Congress and the Presidency: Invitation to Struggle* (Beverly Hills: Sage Publications, 1988); Cecil Crabb and Pat Holt, *Invitation to Struggle: Congress, the President, and Foreign Policy* (Washington, DC: CQ Press, 1989); Louis Fisher, *Conflicts*; Charles Jones, *The Presidency in a Separated System* (Washington, DC: Brookings Institution Press, 2005). Certain forms of departmentalism are compatible with the settlement thesis. See Gant, "Interpretation," 359–440.

its constitutional understandings? What distinguishes a strong legislative interpretive position from a weak one? Does Congress's independence from the judiciary carry any implications for the forms of reasoning Congress should apply to its interpretive task? Should legislators interpret ambiguities in a way that advances the fortunes of their party? Should the president always interpret so as to advance the primacy of that branch? What if the needs of security conflict with the maintenance of a branch's prestige, as many legislators worried during the Cold War?

The few standards on offer in departmentalist research are reactive to judicial norms, and ill-adapted to the war powers context.[75] For example, departmentalist scholar Dawn Johnsen asks that, to be considered authoritative, a "President's contrary legal views result from a principled, deliberative, transparent process," deliberation that "transcends politics" and offers "candor."[76] Mitch Pickerill's sustained investigation in *Constitutional Deliberation in Congress* operationalizes constitutional deliberation in the legislature as deliberation about the questions the Supreme Court rules on. In the war powers context, where a scanty case law advances tests that are already highly deferential to the elected branches, that standard would render invisible much of the branches' constitutional

75 One line of research resists the Rehnquist Court's efforts to enforce standards of "due deliberation" on the legislature that are inconsistent with basic features of legislative governance like strategic interaction, but stops short of articulating what standards should govern legislative or presidential constitutional elaboration. See Philip P. Frickey and Steven S. Smith, "Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique," *Yale Law Journal* 111:6 (2001): 1707–56; William W. Buzbee and Robert A. Schapiro, "Legislative Record Review," *Stanford Law Review* 54:1 (2001): 87–161; Ruth Colker and James J. Brudney, "Dissing Congress," *Michigan Law Review* 100:1 (2001): 80–144. Paul Brest's hopefully titled canonical work, "The Conscientious Legislator's Guide to Constitutional Interpretation," *Stanford Law Review* 27: 3 (1975): 585–602, asks legislators to apply judicial tests to their own conduct rather than wait for courts to do so. Departmentalists may resist "judicial overhang," a tendency of officials to apply the constitutional reasoning of the courts instead of exercising their own judgment. See Graham K. Wilson, "Symposium: The Most Disparaged Branch: The Role of Congress in the Twenty-First Century," *Boston University Law Review* 89:2 (2009): 331–869, especially Mark Tushnet, "Some Notes on Congressional Capacity to Interpret the Constitution," *Boston University Law Review* 89: 2 (2009): 499–510. Resisting judicial overhang simply opens the question of what positive standards should be used in legislative constitutional elaboration. See Keith Whittington, "On the Need for a Theory of Constitutional Ethics," *The Good Society: A PEGS Journal* 9:3 (2000): 60–66; Jeremy Waldron has called for a "rosy" account of congressional constitutional authority, one that "matche[s], in its normativity, perhaps in its naivete, certainly in its aspirational quality, the picture of courts . . . that we present." *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

76 Dawn E. Johnsen, "Functional Departmentalism and NonJudicial Interpretation: Who Determines Constitutional Meaning?," *Law and Contemporary Problems* 67: 3 (2004): 105–47, 131–32.

deliberations.[77] Later chapters in this book challenge the straightforward relevance of juristic norms to the elected branches' war powers politics.

Instead of emphasizing legal principle, the promising departmentalist research agendas of Neal Katyal, Reva Siegel and Robert Post, and Jack Balkin all emphasize democratic accountability in constitutional interpretation. Katyal calls for Congress to exercise its interpretive powers in ways that are responsive to public opinion.[78] In a series of pathbreaking articles Siegel and Post have defended legislative constitutional interpretation as "a structural mechanism of democratic accountability," and have emphasized the legislature's capacity to "apply constitutional values in a manner that coordinates multiple and potentially competing commitments," as well as the legislature's capacity to gather facts, recognize patterns, draw inferences about social trends, mobilize publics through advocacy, and to legislate in support of constitutional values.[79] But this body of research stops short of translating those capacities into standards according to which Congress can be assessed. So far, the research of these democratically minded scholars calls for the judiciary to respect the legislature's distinctive capacities, rather than elaborating standards that Congress should use to assess its own work.

The fact that the operational meaning of the substantive categories by which the Constitution allocates war authority is constructed in political process suggests that we can assess fidelity not only by assessing whether branches behave in ways that are substantively congruent with the Constitution's terms, but also by assessing whether an interpretive politics is unfolding in ways that are faithfully related to the structural conditions that the Constitution establishes. The design features of the branches suggest

77 J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Durham, NC: Duke University Press, 2004). Much scholarship defines constitutional deliberation either as deliberation that uses the word "constitution," or as deliberation with reference to the outcomes of judicial decisions or interpretive theories developed for use by the judiciary. For examples, see the outstanding essays in Neal Devins and Keith E. Whittington, eds., *Congress and the Constitution* (Durham, NC: Duke University Press, 2005).

78 Neal Kumar Katyal, "Legislative Constitutional Interpretation," *Duke Law Journal* 50: 5 (2001): 1335–94. See also Jack Balkin's *Living Originalism* (Cambridge: Harvard University Press, 2011), which uses a complex democratic standard to evaluate constitutional constructions.

79 Robert C. Post and Reva B. Siegel, "Equal Protection by Law: Federal Antidiscrimination Legislation after *Morrison* and *Kimel*," *Yale Law Journal* 110: 3 (2000): 441–526; "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act," *Yale Law Journal* 112:8 (2003): 1943–2059; "Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power," *Indiana Law Journal* 78:1 (2003): 1–46. Quotations in text are from: "Policentric," 2026; "Policentric," 2007; "Protecting the Constitution," 14, 16.

a set of governance values that in turn suggest standards for assessing the branches' interpretive work.

Using structural features as a basis for generating interpretive standards is a common move in constitutional scholarship. For example, the judiciary's relative insulation from the electorate and from the process of generating public policy routinely generates the demand that the judiciary reason in ways that bracket the desirability of various public policy options. The existence of a national elected legislature is often thought to imply a constitutional commitment to a democratic or republican form of governance, which suggests a democratic standard for assessing the constitutional politics of Congress.

In fact, the Constitution has a series of design features that act as structural conditions for the ordinary and constitutional politics of national security.[80] Loosely following classical separation of powers theory, three of these conditions are especially worth noting. The first is that each branch enjoys an *independent source of political authority*. No single constituency—the Electoral College, the Senate, state legislatures, or variously configured electoral districts—names the occupant of more than one constitutional office, and officials may not serve in more than one branch. The president and legislators are elected from different geographical bases, at different times of year. The elections of House and Senate members are staggered in time, and their electoral bases differ; the judiciary is composed of officials appointed after a process in which both branches participate.[81] The branches also enjoy independent representational authority in that they do not rely upon one another for continuity in office. Apart from the high barriers of impeachment, officials' continued service is not dependent on the evaluations of rival branches.

80 My articulation of these structural capacities follows the work of Jeffrey Tulis, George Thomas, Reva Siegel and Robert Post, Joseph Bessette, Lawrence Sager, and others. See Jeffrey Tulis, "Deliberation Between Institutions," in *Debating Deliberative Democracy*, James S. Fishkin and Peter Laslett, eds. (Malden, MA: Blackwell Publishing, 2003); George Thomas, *Madisonian Constitutionalism* (Baltimore, MD: The Johns Hopkins University Press, 2008); Siegel and Post, "Policentric," "Juricentric"; Joseph M. Bessette, *The Mild Voice of Reason* (Chicago: University of Chicago Press, 1994), Waldron, *Dignity*, Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004).

81 For conceptions of democratic proceduralism that are not reducible to majoritarianism, see Mariah Zeisberg, "Should We Elect the Supreme Court?" *Perspectives on Politics* 7: 4 (2009): 785–803; Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (New York: Oxford University Press, 2002); David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008); Christopher Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001).

The second structural condition is that the branches have *distinctive governance capacities*. The rules that configure the offices—their terms of service, their powers, their existence as a plural or unitary body, the number of members whose decisions are necessary to constitute the judgment of that branch, the policy areas they address—support the branches in performing diverse governance functions. For example, the president and Congress together have a distinctive governance capacity, vis-à-vis the judiciary, in their ability to link the judgments of electoral publics with public policy. They also have the distinctive governance capacity, vis-à-vis the judiciary, to design and carry out public policy. These two capacities do a great deal to explain why war powers has been vested in the two branches; the Court is responsive in only limited ways to electoral publics, and it has limited or no expertise in national security policy.

Congress and the presidency also have distinctive governance capacities vis-à-vis each other. The legislature is structured to enact law that provides for the welfare of a polity with diverse views about politics. Relative to the president, the legislature also provides a platform for the articulation of marginal points of view. Legislatures enjoy a special capacity to clarify the dimensions of conflict that exist in civil society; to harness the intelligence of their members, who may have important experience in security; they also have special capacities to advance broad consensuses and to make general law that accommodates many different points of view.[82] The executive is a unitary office, the most efficient of the three, with the capacity to deliver quick military responses, provide initiative to the legislature, and provide for law enforcement. The executive branch also has diplomatic, intelligence, and consultative capacities that equip it with special forms of knowledge.

Of course, officials face conflicting incentives toward conflicting political goods within each branch. Scholars sometimes represent the relationship between Congress and the Supreme Court as interest-ridden political will squaring off against principled legalism, but Congress is capable of beautiful feats of principle and the Court is loosely responsive to public opinion.[83] Legislative strength sometimes manifests as the delivery

82 Jane Mansbridge, "Rethinking Representation," *American Political Science Review* 97: 4 (2003): 515–28; Harvey C. Mansfield, *America's Constitutional Soul* (Baltimore, MD: The Johns Hopkins University Press, 1991), 124; T. V. Smith, *The Legislative Way of Life* (Chicago: University of Chicago Press, 1940); Bruce G. Peabody and John D. Nugent, "Toward a Unifying Theory of the Separation of Powers," *American University Law Review* 53:1 (2003): 1–64, 22. See also Benjamin Wittes, *Law and The Long War: The Future of Justice in the Age of Terror* (New York: Penguin Press, 2008), on the security value of statutory law.

83 See, for example, Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1958); Michael Perry, *The Constitution, the Courts, and Human*

of integrated public policy that responds to many different dimensions of concern, but it also sometimes manifests in the public articulation of marginal perspectives on politics. Presidential strength can manifest as quick responsiveness to emerging threat, or it can manifest as strong policy continuity in response to diplomatic needs. The branches have multiple capacities. Nonetheless not every political capacity is represented in this system. The major religious institutions (and hence the distinctive capacity to reason theologically about matters of public concern) are nowhere represented in the interbranch structure, for example.

The exercise of different functions generates a capacity for the branches to advance distinctive perspectives on political problems. Far from being simple platforms for expressing preferences, the structure of each branch can be expected to support the articulation of certain kinds of preferences and certain forms of reasoning over and above others. As each branch carries out its functions, it develops particular forms of expertise both organizationally (such as the executive branch bureaucracy, or Congress's reference service) and informally (i.e., the entrenchment of bargaining attitudes in the legislature versus hierarchical decisional qualities in the executive branch). Congress's assessment of war often focuses more on domestic costs, and presidents are often relatively more alert to war's diplomatic implications. Variation in the branches' capacities can be expected to affect their constitutional positions no less than their policy orientations.[84] We see here a second condition of interbranch relationship: these different capacities condition the perspectives of each branch, and these perspectives may in turn lead the branches to different evaluations of constitutional meaning in service of distinctive political goals.[85]

Rights (New Haven: Yale University Press, 1982); Ronald Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1986). For counterevidence, see Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009); Robert Mann, *When Freedom Would Triumph: The Civil Rights Struggle in Congress, 1954–1968* (Baton Rouge, LA: LSU Press, 2007).

84 See Jeffrey Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987), 41–45; Tulis, "Deliberation"; Morton H. Halperin, *Bureaucratic Politics and Foreign Policy* (Washington, DC: Brookings Institution, 1974); Margaret G. Hermann, ed., *Political Psychology: Contemporary Issues and Problems* (San Francisco: Jossey-Bass, 1986); Philip E. Tetlock, "Accountability: The Neglected Social Content of Judgment and Choice," *Research in Organizational Behavior* 7 (1985): 295–332.

85 Some evidence suggests that public appraisal either reflects, or helps to drive, the distinctiveness of the branches' orientations toward public policy. See H. D. Clarke and M. C. Stewart, "Prospections, Retrospections and Rationality: The Bankers of Presidential Approval Reconsidered," *American Journal of Political Science* 38:4 (1994): 1104–23; Aaron L. Friedberg, *In the Shadow of the Garrison State* (Princeton: Princeton University Press, 2000); David C. Kimball and Samuel C. Patterson, "Living Up to Expectations: Public

Officials who have served in more than one branch reveal how divergent structures can encourage officials to advance divergent judgments on constitutional meaning. Salmon Chase, Secretary of the Treasury for Lincoln, supported the president in issuing paper money during the Civil War to raise money without raising taxes. As an administration official, Chase viewed winning the war as a constitutional imperative. But once appointed to the Supreme Court, and after the war had been won, he argued that the very paper money he had advocated actually violated the constitutional rights of the individual and that security needs could not justify such violations.[86] Earl Warren was a stronger defender of individual rights on the Supreme Court than he had been as attorney general and governor of California, when he advocated Japanese internment as a security measure.[87] As a senator during the Truman administration, Richard Nixon vociferously defended congressional power, but he changed his tune as president. As attorney general for the Roosevelt administration, Robert H. Jackson participated in constructing strong doctrines of executive power, but in the *Youngstown* case, Justice Jackson wrote that a judge could not simply defer to the advocacy of one branch, "even if the advocate was himself."[88] We can interpret these switches as unprincipled efforts to maximize political power. We can also interpret them as the consequence of being exposed to new experiences in new offices, which in turn shaped these officials' judgments of constitutional meaning in context.[89]

Attitudes toward Congress," *Journal of Politics* 59:3 (1997): 701–28; Thomas J. Rudolph, "The Economic Sources of Congressional Approval," *Legislative Studies Quarterly* 27: 4 (2002): 577–99; J. Tobin Grant and Thomas J. Rudolph, "The Job of Representation in Congress: Public Expectations and Representative Approval," *Legislative Studies Quarterly* 29: 3 (2004): 431–45; Miroslav Nincic and Barbara Hinckley, "Foreign Policy and the Evaluation of Presidential Candidates," *Journal of Conflict Resolution* 35: 333–35; James Meernik and Elizabeth Oldmixon, "Internationalism in Congress," *Political Research Quarterly* 57:3 (2004): 451–65; John Mueller, "Presidential Popularity from Truman to Johnson," *American Political Science Review* 64:1 (1970): 18–52; Theodore Lowi, *The Personal President* (Ithica, NY: Cornell University Press, 1985), 16.

86 *Hepburn v. Griswold*, 75 U.S. 603 (1870).

87 Earl Warren, *The Memoirs of Earl Warren* (New York: Doubleday, 1977).

88 Jackson developed legal justification for the destroyers-for-bases deal. Robert H. Jackson, "Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases," *American Journal of International Law* 34: 728 (1940).

89 There are a variety of ways to conceptualize the mechanisms by which this institutionally rooted pluralism develops. An office may affect an officeholder's preferences and understandings of politics in deep ways. Also, even if institutional position fails to affect officials' deep preferences about public policy, it may make salient different dimensions of a problem, or induce officials to differentially prioritize different outcomes, in ways that generate institutionally induced conflict even among actors whose preferences are congruent. See e.g., William G. Howell and Saul P. Jackman, "Inter-branch Bargaining over Policies

It is important to note the fairly high level of abstraction and the aspirational filter being applied to the distinctive capacities of each of the national institutions. For example, I am reading Congress's constitutional capacities in terms of a general legislative capacity to reflect a variety of political positions in the world, to cultivate diverse responses to dilemmas of public policy, and to integrate those different positions into law. However, another theorist could note the regional basis for legislative representation, and argue that Congress's distinctive capacity amounts to a capacity to reflect and integrate *regional* differences in particular. I pitch the constitutional capacities at a fairly high level of abstraction to allow for a consistent evaluative standard to be applied to these institutions over time. The institutions of Congress, the presidency, and Supreme Court are obviously different in the late twentieth and the early nineteenth century. As only one expression of that difference, the increased mobility of the US population means that an electoral connection to a territorial constituency no longer serves as a single gold standard for assessing legislative representation (if it ever did), and forms of constituency are now expressed in the legislature that would have been inconceivable when the Constitution was written.[90] As we shall see in the case studies, it is possible to get significant analytic traction even with the constitutional capacities of the branches pitched at a fairly abstract level. This methodological choice also has the advantage of keeping the resulting model of constitutional authority more relevant as the branches evolve and develop through time. Still, the contingency of this modeling choice is worth noting. We can also note the loose normative filter I apply to identifying the branches' capacities. The presidency has the capacity to bribe, suborn perjury, and carry out torture; these governance capacities are not included in the model. It is the capacity to contribute a political functionality that is *good* for governance that is the relevant basis for developing normative standards.

The first two conditions are both conditions of separateness. They ensure independence and the basis for mutual criticism. If we consider only them, we might think of the branches as sealed off from one another, each pursuing its tasks in a hermetically sealed universe. The final condition is what brings the branches into relationship. It is their *shared powers*. To be effective, many government decisions, and certainly those of war, require the cooperation of more than one branch.

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with Multiple Outcomes," available at http://harrisschool.uchicago.edu/About/publications/working- papers/abstract.asp?paper_no=11%2E02+++ (accessed April 7, 2012). It would be surprising if the production of institutionally rooted pluralism happened through only one mechanism.

90 Jane Mansbridge, "Rethinking," 515–28.

While it is frequent for people to speak of the independent branches as systems of "separated powers," Richard Neustadt, among others, has pointed out the inaccuracy of the term, emphasizing that the Constitution constructs "a government of separated institutions *sharing* powers."[91] Clearly the government's power to make war is shared by both the executive and Congress. Government simply cannot make war—raise funds, organize troops, deploy them, communicate with foreign governments, negotiate and ratify peace treaties—without the cooperation of both branches. In fact, all of the sovereign powers of government—the power to regulate commerce, to tax, to convict and imprison criminals—require the participation of more than one branch. The executive can propose legislation, veto bills, call Congress into special session, and adjourn the houses under certain circumstances. Executive orders provide a significant locus for executive "lawmaking," especially with the rise of the administrative state, where so many of the government's activities are conducted under the umbrella of the executive. Congress creates every executive office and agency, establishes lines of authority within the executive branch, and shares in the appointments power. James Madison described this pattern as "*partial agency* in, or . . . *controul* over the acts of each other."[92]

Hence we see a third noteworthy condition: the actual exercise of their powers brings the branches into relationship with one another, a relationship that may activate the conflictual possibilities inherent in their independent sources of authority (condition one) and distinctive perspectives on public matters (condition two). These conditions mean that the possibility for interbranch conflict is both endemic and consequential. Because these conditions, taken together, activate the possibility for interbranch conflict, I name them the "conditions of conflict."[93]

91 Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: The Free Press, 1991) (rev. ed. of *Presidential Power*, c1980), 29. Neustadt speaks of "power" (the common commodity of politics) and "powers" (the formal capacities of the various branches) but nowhere of "authority." Neustadt has no distinctive category for political authority derived from convincing normative constitutional argument. I think he would have to call such authority something like "personal influence," thereby neglecting its constitutionalist dimension (see Neustadt, chapter 3, note 1).

92 James Madison, " The Federalist Papers: No. 47," *The Avalon Project*. Available at http://avalon.law.yale.edu/subject_menus/fed.asp (accessed October 19, 2011).

93 I use the term "conditions of conflict" rather than "separated powers" because, in this context, "separated powers" has distracting implications insofar as it implies that each branch is reviewable only by the electorate. This would directly contradict the third condition of conflict. It is the branches' relationship that makes their judgments about the value of one another's interpretive and policy work politically consequential.

This book treats these conditions not only as empirically observable facts about the Constitution's textual order, but also as a set of capacities. The independence of each branch (the first condition of conflict) is formally secured through the Constitution's selection and impeachment provisions, but we can also read independence as a political *capacity* that different presidents or legislatures make varying use of. So, too, the second condition—that the branches are structured to achieve different valuable ends, and may generate diverse perspectives related to those ends—designates a feature of the Constitution's formal design, as well as a capacity that can be exercised more or less successfully. And while the third condition—that the branches exist in responsive relationship—is formally guaranteed through the shared powers, different interbranch systems develop their capacities for responsiveness with more or less success. None of these conditions amount to rules about how Congress or the executive always behaves. They are rather observations about the empirical capacities the constitutional form of the legislature or presidency generates.

Viewing the conditions of conflict as a set of capacities makes it straightforward to translate them into a set of standards for assessing the branches' war powers politics. For example, we can evaluate the presidency on the basis of whether it makes good use of the distinctive intelligence capacities at its disposal (part of the second condition of conflict). In fact, each of the conditions of conflict can be translated into a standard or standards for assessing that branch's processes of constitutional elaboration. The standards that come out of that translation are distinctively constitutional to the extent that the capacities themselves are constitutional ones.

THE PROCESSUAL STANDARDS

This section translates the structural capacities of the branches—the conditions of conflict—into a set of standards for evaluating their war politics. The first condition is the independent political authority of each branch. This is a condition for the dilemma of war authority in the first place. If the branches did not have structural independence, their colliding claims could be settled through enforced deference. Pro-presidency insularists seek to expand the independent capacity of the executive branch into a norm of insularity. Independence-as-insularity means that the president uses his office as a shield against the political demands of the other branches. As for Congress's independence, little theoretic literature has interrogated the meaning of legislative independence at all.

I propose that we translate the branches' structural independence into a norm of *independent judgment*, not a norm of political insularity.

Presidents can, and must, generate independent judgments as to the security politics of the moment; only in this way can the polity fully benefit from the president's special knowledge about security, diplomacy, and threat. Yet these independent judgments can, and must, be politically defended to the other branches. This process of mutual review allows the constitutional system to harness the governance capacities of both branches, not just the presidency, in the war-making system. At the same time, the independence of the office means that a president who believes he must act quickly, without conferring with Congress, to protect security, is free to do so, for security is his special charge. As a representative, he must act to defend the security of the nation. Yet this structural capacity, given by the first condition, cannot be extended into an informal norm of decisional insularity without great cost. Chapter 4 uses the difference between independent judgment and insular judgment as one basis for assessing Presidents Kennedy's and Nixon's war politics.

Congress's structural independence also implies a norm of independent judgment. The link between independent judgment and constitutional authority is intuitively sensible: a bill passed into law because the president plausibly threatens to fire legislators who vote against his policy suffers from impaired constitutional authority, because the first condition (that Congress acts as an independent branch) is what renders legislative assent meaningful. More subtly, legislative independence can also suffer when Congress fails to insist upon the value of its governance contributions in contexts where those are relevant. The processual standard of independent judgment asks that each branch view itself as authorized and equipped to judge the constitutional and policy claims that it confronts while conducting its business. In chapter 5, I argue that the legislature's due regard for its own independence supported the Seventy-Third and Seventy-Fourth Congresses in rendering constitutionally authoritative claims in the war powers system.

The second condition of conflict is that the branches exercise distinctive capacities that predictably generate distinctive perspectives on both policy and constitutional meaning. Because the branches have many, not just one or two, distinctive capacities, this structural condition translates into not one but rather many standards for assessing the policy and constitutional work of each branch.

The first, most obvious strength of the presidency and legislature vis-à-vis the judiciary is their connectedness to policymaking. As they confront security politics every day, officials in the legislative and executive branches acquire knowledge that is useful for making good judgments about foreign policy. This shared distinctive strength partly grounds their actual dominance and normative prominence in security politics relative to the judiciary. We can translate this constitutional capacity into two

different standards for processual assessment. The first is that the branches engage in reasoning over public policy that is *sensitive to the security realities they encounter*. Because they are exposed to dilemmas of war and security in their daily governance tasks, they should be equipped to use reality-based assessments about war and security in their deliberations. To what extent are the branches' deliberations premised on reality, rather than fantasy? To what extent are they using their governance capacities to generate the kind of information about the world they need? The extent to which each branch uses, and cultivates, the knowledge available to it; the extent to which deliberative processes incorporate more rather than fewer relevant considerations; the extent to which deliberation is able to clarify relevant alternatives; and a scalar consideration, about the extent to which the branches advance high priorities over and above low priorities—these are all relatively ordinary ways that citizens, officials, and scholars already assess whether the branches engage in politics that are sensitive to policy realities.[94]

I also translate this strength in a way that some will find controversial: namely, that the branches actually *link their arguments about constitutional authority to their substantive agendas for security policy*. In other words, as the Obama administration's OLC did in its reasoning on Libya, the branches should justify their own, and challenge one another's, constitutional positions through reference to the security consequences at stake in one allocation of constitutional war authority versus another. This, after all, is one of their strengths: a capacity to think about the link between security processes and security outcomes. If such expertise is a reason for judicial deference on the war power, then it is also a resource that the president and legislature should use in developing their positions.

This standard directly opposes the common idea that arguments about constitutional meaning should not hinge on policy consequences. There is something questionable about interpreting the Constitution's guarantee of a qualified executive veto into an absolute veto to support a desired policy outcome. The settled, framework dimensions of the Constitution would not do a very good job of enabling secure decision-making if they were manipulable in this way. Policy-based constitutional reasoning for judges is also professionally suspect because and to the extent that judges are professionally insulated from the policy implications of the decisions

94 Jane Mansbridge, "Rethinking," 515–28; Jane Mansbridge and Christopher Karpowitz, "Disagreement and Consensus," *Journal of Public Deliberation* 1:1 (2004): 348–64; Richardson, *Autonomy*; Jane Mansbridge, "Self-Interest and Political Transformation," G. E. Marcus and R. L. Hanson, eds., *Reconsidering the Democratic Public* (University Park: Pennsylvania State University Press, 1993). On how publics can judge expert deliberations, see Elizabeth Anderson, "Democracy, Public Policy, and Lay Assessments of Scientific Testimony," *Episteme* 8:2 (2001): 144–64.

they make. However, the war powers controversy occurs within a zone of textual vagueness. It is difficult to read the war powers text of the Constitution only through the lens of a framework when the text seems to settle so little. Also, the national Congress and presidency have strengths not in policy neutrality but in policy development.

A second strength that Congress and the presidency share vis-à-vis the judiciary is the elected branches' relatively tight link to the public.[95] Given recurrent elections, the justifications the branches offer for their policies and constitutional positions play out within a horizon of meaning and interpretability set by the need to justify policy to larger publics. The branches make security and constitutional claims not only to persuade one another, but also to persuade public constituencies that are watching, evaluating, and voting. In fact, the branches are often aware that their success in winning over rivals may depend on their success in mobilizing public opinion. Both branches have resources to woo that opinion.

My view is that translating this strength into a standard for assessment calls for a constitutional theory of democracy. The "public" is not a simple fact but rather a constitutionally created set of offices no less than Congress or the executive. Given how the US Constitution structures its democratic politics, any theory that can speak to the capacities of that public will be extraordinarily complex. Just to begin, there is not only one democratic public. House districts, states, and national electorates are all different publics. The theoretical dilemmas engaged by this particular processual standard are vast. For the purposes of this book, I reduce this dimension to a relatively flat set of observations about a branch's *relationship to an electorate*.[96] This flat standard has only limited theoretical value, and so in turn, it is engaged in only limited ways. For a branch to behave responsively to its electorate is not always the same as for a branch to enact its duties of public representation. I nevertheless note this capacity first, in order to call attention to a feature of the relational conception that is presently underdeveloped; and second, to signal its position within the broader account of constitutional authority the book develops. I also note this capacity because in some of the case studies, the role of the electorate is important for making sense of officeholders' behavior. Assessing Franklin Roosevelt's security politics requires at least some ability to notice the constraints imposed on him by public opinion.

95 I thank Josh Chaefetz for his insistence on this point.

96 For work considering the standards of public office specifically in light of maintaining relationships of trust with the electorates, see Dennis F. Thompson, "Constitutional Character: Virtues and Vices in Presidential Leadership." *Presidential Studies Quarterly* 40: 1 (2010): 23–37.

So too, the overwhelming popular support for President Polk's and President Theodore Roosevelt's adventurism cannot be overlooked.

In addition to these are the capacities Congress and president have that are distinctive relative to each other. The distinctive strengths of the presidency are rooted in the hierarchical structure of that branch, as well as in the resources of the executive bureaucracy. For example, the president is able to *command the resources of intelligence, diplomatic, and military establishments, branch-specific research agencies, and consultative forums like the cabinet or National Security Council (NSC)*. For presidents to use these resources in their internal processes of deliberation enhances the authority of their resulting positions. In addition, the proper use of executive branch resources implies some degree of careful management of the administration. *Rewarding and elevating subordinates who demonstrate excellence, and dismissing or marginalizing those with less successful job performance*, puts the hierarchical qualities of the executive branch to use in fostering good governance. The branch's hierarchy also supports the president in *experimenting with policy* and in *responding quickly to changing circumstances*.

There is a wide variety of ways for presidents to successfully mobilize the resources of the executive branch. While presidents can gain access to the knowledge of agencies by consulting them, decision-making according to rules and bureaucratic organization is only one model of successful executive branch functioning. Classical realists like George Kennan advocate reliance "on the insight and instincts of the executive or diplomatic professional rather than rules."[97] Presidents Truman and Roosevelt made excellent judgments using informal consultations with a selected core, rather than through rigid adherence to bureaucratic procedure.[98] Allison and Zelikow note three different models of presidential decision-making:

> (1) a "formalistic" or "multiple advocacy" approach with clear structure, division of labor, and well-defined procedures managed by an "honest broker" (the Eisenhower administration is the usual example); (2) a "competitive" or "centralized management" model that encourages competitive advice by allowing overlapping responsibilities and many formal and less formal channels of communication but filters information and advice in a small inner

97 Deborah Welch Larson, "Politics, Uncertainty, and Values: Good Judgment in Context," in *Good Judgment in Foreign Policy: Theory and Application*, eds. Stanley A. Renshon and Deborah Welch Larson (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2003): 310. See also Philip E. Tetlock, "Good Judgment in International Politics: Three Psychological Perspectives," *Political Psychology* 13 (1992): 517–39.

98 See, e.g., Larson, "Politics," in *Good Judgment,* eds. Renshon and Larson. Graham Allison and Philip Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis, 2nd ed.* (New York: Addison-Wesley Longman, 1999), 314–15.

> circle of top officials (e.g., the Franklin Roosevelt administration); and (3) a "collegial" or "adhocracy" style which blurs responsibility and formal channels but emphasizes a team identified with the president (as in the Kennedy administration).[99]

There is no need to artificially reduce styles of decision-making to a single rubric.[100] There are many different ways to successfully use the intelligence, diplomatic, and consultative capacities of the executive branch. So then, there are a number of different ways presidents can achieve the full authority associated with this processual standard. In practice, many of the distinctions that arise in this book between presidents who achieve more of this processual authority and those who achieve less pertain less to matters of style and more to an intelligent use of capacities given a particular style. I argue in chapter 4, for example, that the authority of Nixon's constitutional and policy positions on the Vietnam War was undermined by his participation in war deliberations while drunk.

Also, the president does not directly control all of what is required to make good use of the executive branch's capacities. Throughout the book, I speak of the behavior of an entire administration as if it is that of the president, who is, of course, supreme in the executive branch hierarchy. For example I may describe "Obama's" behavior instead of the behavior of the Obama administration. This language obscures the extent to which a president's processual authority relies upon the capacities of a large bureaucracy. For example, Kennedy's handling of the Cuban Missile Crisis benefited from the expertise and good judgment of subordinates throughout the intelligence and military communities. While his oversight and the tone he set supported their skill, presidential hierarchy does not mean that a president can entirely control the executive branch. Constitutional officials work in relationship and are rarely able to single-handedly control the authority available to them.

What are the legislature's distinctive strengths? This question brings us immediately to Congress's major dilemma in being taken seriously as a constitutional agent: the idea that because it does not speak with one voice, it has no constitutional agency. In fact, one strength of legislative governance is precisely its ability to offer a forum for the public expression of divergent lines of reasoning on matters of public concern.

99 Allison and Zelikow, *Essence,* 266, citing Richard T. Johnson, *Managing the White House* (New York: Harper and Row, 1974); Roger B. Porter, *Presidential Decision-Making: The Economic Policy Board* (Cambridge: Cambridge University Press, 1982). See also Stephen Hess, *Organizing the Presidency* (Washington, DC: Brookings Institution, 1976), 154.

100 Dawn Johnsen has argued that we should assess presidencies on the basis of transparency, adherence to proper bureaucratic procedure, and the extent to which presidents consult all the agencies available to them. Johnsen, "Functional."

Articulating differences, clarifying grounds of disagreement, and developing multiple solutions to governance problems, which is part of the work of partisanship, enriches the broader decision-making space. A Congress that *creates and expresses divergent paths of reasoning, on both policy and constitutional matters*, is carrying out one of its important governance capacities.

It is no less a legislative strength to integrate multiple preferences into a policy that can win broad support. Hence an emphasis on legislative pluralism is not to artificially deny the authority that can be generated when Congress does manage to speak with strong majorities and to *harness the power of a consensus politics* behind its agenda. Congress does not only represent this consensus politics. The legislature's professional duties also cultivate its skill in *lawmaking*: translating areas of political agreement into statutory or treaty language that can, in turn, guide citizens or state officials. One processual interrogation of Congress pertains to the extent that it crafts law that can provide such effective guidance to others.

Finally, a strength of legislative governance is its capacity to mobilize vast quantities of information through hearings, testimony, research services, and the subpoena power. Congress's ability to *pool and weigh information from multiple sources, and to generate large understandings of public policy on the basis of complex information*, is yet a fourth strength of legislative governance.

When Congress exercises its powers—declaring or authorizing war (whether for defensive purposes or as an instrument of policy), issuing supportive resolutions, challenging presidential agendas, using public hearings to shape dynamics of war authority in practice, advancing interpretive positions on constitutional matters of war—in ways that are connected to its relative governance strengths, it generates more constitutional authority for its behavior. As with the presidency, we should recognize that the legislature has more than one route toward harnessing its distinctive capacities.[101] Given that there are several different ways for the

101 See, e.g., Josh Chafetz, "The Unconstitutionality of the Filibuster," *Connecticut Law Review* 43: 4 (2011): 1003–40; David R. Mayhew, "Supermajority Rule in the U.S. Senate," *PS: Political Science and Politics* 36: 1 (2003): 31–36; Neal Kumar Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within," *The Yale Law Journal* 115:9 (2006): 2314–49; Bruce Ackerman and Oona Hathaway, "Limited War and the Constitution: Iraq and the Crisis of Presidential Legality," *Michigan Law Review* 109:4 (2011): 447–518; Seth Barrett Tillman, "Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?" *Cornell Journal of Law and Public Policy* 16:2 (2007): 331–47; Aaron-Andrew P. Bruhl, "Burying the 'Continuing Body' Theory of the Senate," *Iowa Law Review* 95:5 (2010): 1401–65; Gary Mucciaroni and Paul J. Quirk, *Deliberative Choices: Debating Public Policy In Congress* (Chicago: University of Chicago Press, 2006).

branches to express their constitutional capacities, there should be several different ways for them to achieve the full constitutional authority associated with this second condition of conflict. At the same time, that not every political capacity is represented in the constitutional system is one feature that gives the processual standards their disciplining power. The branches have several, but not infinite, different ways to achieve their full processual authority.

The third condition of conflict is the branches' shared powers over war. We can translate this fact of interdependence into a standard about responsiveness. Branches that *accompany their uses of the shared war power with a policy and constitutional position that the other branch may judge*, and that *use their powers in ways that are more rather than less responsive to the positions of their rivals*, generate more constitutional authority for their behavior and for the larger war-making system.

The branches often are responsive to one another's positions even if only for strategic reasons. For example, the presidential veto; speeches and representations to foreign powers; directives about troop movements; and policy proposals are all governance powers that also allow the president to communicate his support, or resistance, to Congress's security visions. So too, the Congress may grant statutory authorization or pass restraining orders; interrogate the president's claims in resolutions, hearings, or floor debate; appropriate funds; retrospectively authorize or condemn presidential conduct; or impeach the president as ways of communicating its policy and constitutional agendas.

The branches also have powers to influence each other's internal politics. With its power to create bureaucracies and confirm nominees, Congress exerts power over the executive branch. The executive, with its powers of nomination, diplomacy, treaty negotiation, the veto, and execution of statutory law, creates agendas that Congress must react to. Agenda creation is a formidable power in part because of its capacity to exploit latent cleavages in the responding agent. Reagan's choice to defend his conduct in the Iran-Contra scandal according to a legalistic standard invited Congress to react in a legalistic way that was poorly suited to its governance capacities, or so I shall argue in chapter 5. On the other hand, sometimes the branches respond to one another in ways that are mutually supportive. President Roosevelt's expansion of the powers of the executive branch was one political trigger for the Legislative Reorganization Act of 1946, when Congress, for the first time, gave itself professional staff.

The concept of responsiveness allows us to capture, and theorize, the difference between a president closing military bases in response to a set of programmatic commitments, versus the president closing military bases to punish legislators. We should be able to notice the difference

between a Congress that shuts down war funding because of constitutional disagreement, versus a Congress that shuts down war funding because it believes the security issue has been resolved. Constitutional analysis should be sensitive to the meanings of exercised powers in context.

In the war powers debate, such analytic capacity is especially important because the very heart of the conflict between the relational conception and insular visions concerns the extent to which it is *proper* for the branches to use their bare powers responsively to one another's constitutional positions. *Should* the branches use their bare powers as powers of review and judgment? Or should one branch use its powers to advance its security vision, while the other branch uses its powers only in deferential support? We are hardly equipped to engage this question if we are not able to register, in the first place, the difference between a branch using its powers, and a branch using its powers responsively.

Pro-Congress insularists resist this standard when they argue that presidents should always defer to the legislature's security judgments. But the president may at times perceive a defensive security necessity that Congress has not yet brought into focus. Insofar as the president's threat assessment is a constitutionally responsible one, the president acts responsibly when he exercises his powers in ways that prompt Congress to address the threat he perceives. Pro-presidency insularists also resist this norm when they suggest that requiring the president to justify his actions to Congress would disable him from acting defensively when necessary. But inappropriate deference to misguided legislatures, or a failure to take necessary action, are also proper grounds on which to judge a president no less than his dangerous willingness to seek war. Officials must be willing and able to act in the context of being judged no matter what they do. Insularists try to contain the political costs of their favored institution's use of the war power by enshrining it with a set of insular norms. But the war power is inherently a risky power.

Insularists sometimes forget the difference between facing the burdens of justification and being utterly disabled by criticism. A president unpersuaded by Congress has resources to chart alternative paths. His structurally guaranteed independence makes action possible even in the midst of conflict. And if Congress finds a presidential justification unconvincing, it too has powers for countering his vision. Both will obviously be more effective if they manage to win the other over; but, as the next section argues, the standard of mutual responsiveness prizes, not interbranch agreement, but rather the production of appropriate reasons and well-defended judgments.

Applying these processualist standards will necessarily embed evaluators in controversial terrain. Each of these standards requires a range of assessments that can't be made without reference to at least a few

independent substantive judgments about politics. For example, I ask that the legislature "clarify relevant alternatives." No observer can assess whether Congress has "clarified relevant alternatives" without some independent idea about which alternatives are "relevant" in the context Congress faces. At the same time, the criteria of "clarifying relevant alternatives" is a more open and capacious, more proceduralist standard than, say, "delivering a good policy result." To distinguish these institutionally rooted standards from either "procedural" or "substantive" standards of evaluation common in deliberative democratic and legal literatures, I name them "processualist."

The overall standards I advance for evaluating the branches' constitutional politics are both substantive and processual. We first evaluate on the basis of the substantive terms that the Constitution offers on its face: that the president behave so as to "preserve, protect, and defend" the constitutional order; that the legislature maintains authority over "war." These terms give a set of standards for assessing the constitutional politics of the branches. The relational conception directs constitutional evaluators to begin with their own first-order assessments about the best construction of these categories in context.

At the same time, understanding that these categories are political categories, we can use the processual criteria to evaluate the branches' processes of constitutional elaboration in context. When the branches advance a particular vision of the Constitution's war powers order, does their work reflect independent judgments, the use of their distinctive governance capacities, and responsiveness to one another's positions? To the extent that the branches deliberate on the Constitution's substantive terms through a politics that can be defended on processualist grounds, they are developing more, rather than less, authoritative elaborations of constitutional meaning in context.

The rest of the book applies these standards to a series of controversies. Throughout, I will move between arguments *about* the relational conception and arguments from *within* the relational conception. From a scholarly point of view, the effort is to redescribe classical war powers controversies in terms of the relational conception and to thereby demonstrate that the relational conception provides fruitful terms for constitutional analysis. From the point of view of a constitutional participant, I demonstrate how the relational conception can be used in practice by applying its standards to the cases I treat. My description of a branch's "good" or "intelligent" constitutional politics is derived from this second position: the vantage point of a would-be faithful interpreter, applying the relational conception's substantive and processual standards to develop a judgment about constitutional war authority in context.

INTERBRANCH DELIBERATION AND THE RELATIONAL CONCEPTION

Clearly the Constitution does not create, in theory or practice, one supreme interpreter when it comes to war powers. Instead the Constitution puts the two branches in responsive relationship. The value of their responsiveness is sometimes made explicit in the text. For example, the Constitution provides for a state of the union address and legislative journals, and Article I Section 7 instructs the executive to give reasons for his veto so that the originating house may "enter the Objections at large on their Journal, and proceed to reconsider it." These indicate a constitutional valorization of at least some practices of interbranch reason-giving. The processual standards point to others. When the branches review one another's political behavior, including their interpretive claims, according to the perspectives conditioned by their various distinctive capacities, they embark on a process of *interbranch deliberation* that, I argue, creates constitutional authority for the war powers system as a whole.[102] The centrality of well-conducted interbranch responsiveness leads me to name this a *relational conception* of war authority.

If, when deliberating upon an act of war or security order, the president and Congress reach similar constitutional and policy positions even given the different political functions they are designed to serve, through processes informed by the processualist standards, then there are good reasons for endorsing these conclusions as constitutionally adequate. When the branches come to divergent conclusions, interbranch conflict can result. Does this conflict in and of itself mean one branch is being constitutionally faithless? No. In some contexts, well-structured conflict is linked to the *production* of constitutional authority when that conflict is the result of the branches' excellent use of their differing governance and interpretive capacities. Chapter 2 argues that interbranch contentiousness prior to World War II was consistent with a high level of war authority for the interbranch system that resulted in US entry into the war.

Bruce Ackerman is among those scholars who link the possibility of interbranch conflict to a more robustly defensible representative practice. Ackerman argues that when officials challenge one another's representation of "the people,"

102 The concept of interbranch deliberation was pioneered by Bessette, *Reason*, and Tulis, "Deliberation."

> the result . . . will be precisely the opposite of each partisan's hopes. Rather than allowing the House or Senate or the Presidency to beguile us with the claim that it, and it alone, speaks in the name of the People themselves, the constitutional separation of powers deconstructs all such naive synecdoches. As it works itself out in practice, the system emphasizes that no legal form can enable any small group . . . to speak unequivocally for We the People.[103]

Ackerman is arguing for the value of some interbranch conflict purely on the grounds of democratic representation. Multiple veto points filter the plausibility of all claims to public authority. But the processual standards don't filter only on the basis of democratic representation. They also filter with reference to the distinctive governing capacities of the branches.[104] The Constitution creates an order that allows officials to develop policy and interpretive judgments that are more, rather than less, sensitive to diplomatic imperatives, information about threats, the interrelationship of multiple security commitments, needs for policy flexibility, and justifiable distributions of cost and benefit. Because the processualist standards do not prize consensus for its own sake, but rather emphasize independence, skillfully conditioned judgment, and responsiveness, these standards allow for assessing the constitutional politics of the branches even when they do not agree.

The portrait of interbranch deliberation I develop here is normative because, as I argue through the chapters, it produces constitutional authority, which is a public good for a constitutional republic. This does not mean that all actors are motivated by good or faithful aims. The relational conception evaluates behavior and language, not the inner hearts of officials. I nonetheless maintain some hopefulness that the realities of power-driven politics can produce outcomes that are normatively justifiable. In the ideal case, officials would vigorously assert the most important constitutional claims at stake, and then the lengths to which

103 Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution," *Yale Law Journal* 93: 6 (1984): 1013–72, 1028–29.

104 See Tulis, "Deliberation," 16; also Pickerill, *Deliberation*, for analysis of how Supreme Court interventions support rights-responsive public policy even in the legislature. The simple checking-and-balancing story or veto point story ignores how institutions shape the particular narrations that structure the delivery of public policy. For exceptions, see Stephen Elkin, *Reconstructing the Commercial Republic: Constitutional Design after Madison* (Chicago: University of Chicago Press, 2006); Bessette, *Reason*; Mark Tushnet, "Some Notes on Congressional Capacity to Interpret the Constitution," *Boston University Law Review* 89:2 (2009): 499–509; Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge, NY: Cambridge University Press, 2007); Henry S. Richardson, "Institutionally Divided Moral Responsibility," *Social Philosophy and Policy* 16: 2 (1999): 218–49.

each branch is prepared to go in pursuit of its claims would provide a rough measure of their importance. Thus in the ideal case, the balance of power between the branches in any particular security dispute would result from political conflict that is driven by how the particularities of the case actually relate to the relational conception's standards.[105] Obviously, many cases are not ideal.[106]

The concept of interbranch deliberation is a lens that directs attention to the claims that the branches make about the merits of the policies they propose, including their positions about the allocation of war authority. (Throughout the book I refer to this combination of enacted security policy judgments, plus an enacted system of interbranch war authority to achieve those ends, as a *security order*.) To the extent that the branches' exchanges mobilize each institution's capacity for high-quality interventions about good ways of constructing a security order given a particular security context, those deliberations are productive of constitutional authority.

The exchanges between the branches encompassed by the concept of interbranch deliberation are comprised by the rhetoric and justifications they offer one another—formal communications (joint resolutions, state of the union addresses, testimony); engagement in the public sphere (speeches, interviews, editorials); and official meetings and discussions. Deliberation also includes the authoritative actions each branch takes in response to the other. Many interbranch exchanges that do not appear to be "deliberative" according to dominant scholarship in deliberative democracy will register as "deliberative" under this model. The concept of interbranch deliberation aims only to highlight the extent to which the rhetoric and authoritative actions of each branch are accompanied by reasons formulated in response to the claims of the other branch and in response to the security context at hand.[107] Of course, an authoritative act not accompanied by any substantive justification whatsoever, in

105 Tulis, "Deliberation," 43.

106 A fruitful line of research highly relevant to the relational conception is about the political conditions that support, or threaten, the branches' good use of their capacities. See, for example, Rebecca U. Thorpe, *The Warfare State: Perpetuating the U.S. Military Economy* (Chicago: University of Chicago Press, forthcoming), arguing that certain forms of defense spending in congressional districts deform legislators' judgments about constitutional war powers.

107 This way of conceiving deliberation is looser than even one of the less demanding conceptions of deliberative democracy, that advanced by Jack Knight and James Johnson, in that there is no requirement even that deliberation be conducted through fair procedures. See their "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy," *Political Theory* 22:2 (1994): 277–96. See also James D. Fearon's very stripped-down notion of deliberation as simply "discussing matters before making some collective decision," in

a context that is completely devoid of reason-giving practices, does not count as a deliberative intervention. This is a low bar. A more interesting question is about the extent to which the reasoning the branches offer achieves the processual standards. It is for the observer to say at each step whether each institution demonstrated appropriate regard for reasons that were in fact, or should have been, available; whether they were appropriately responsive to one another; and whether the institutions were applying their own distinctive strengths to the problem at hand.[108]

John Dewey is the philosopher who helps us understand that both behavior and speech can be understood as manifestations of how we apply our intelligence to the world. Elizabeth Anderson provides an elegant description of how Dewey can help us perceive deliberative processes:

> [Dewey] argued that practical intelligence is the application of experimental methods to value judgments and practical precepts. We test our value judgments by living in accordance with them and seeing whether doing so is satisfactory—whether it can provide satisfactory answers to questions like this: Does action in accordance with the value judgment solve the problem it was intended to solve? Does it bring about worse problems? Does it give rise to complaints from others that need to be addressed? Might we do better by adopting different judgments? If we find life in accordance with the value judgment satisfactory, we stick with it; if it fails these tests, we seek new judgments that can better guide our lives.[109]

Expanding the concept of deliberation to include speech, rhetoric, and reasons, but also behavior, fits with Dewey's notion that conduct is as much a matter of practical intelligence as are words.

In short, there are three significant claims here. First is the empirical claim: that, as departmentalists know, the Constitution does structure the political space between the branches so as to place them in a distinctive form of responsive relationship. Second is that we can understand, and evaluate, how well this responsive system develops meaning for the Constitution's *substantive* categories by reference to the *processualist*

"Deliberation as Discussion," *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1998), 44.

108 Elsewhere I locate processualism as a standard already implicit within literatures on deliberative democracy. Mariah Zeisberg, "Democratic Processualism," *The Journal of Social Philosophy* 41: 2 (2010): 202–209.

109 Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010), 89–90, citing John Dewey, "Valuation and Experimental Knowledge," *The Middle Works*, 1899–1924 (Carbondale: Southern Illinois University Press, 1976), 3–28.

standards. And finally, that well-conducted interbranch deliberation can produce constitutional authority for the branches.

Because partisanship, group affiliation, interest group membership, and other politicized standpoints condition whether an observer believes these standards have been achieved, these standards are not neutral benchmarks. Different evaluators will judge these questions differently. In the case studies that follow, the arguments I make about policy and institutional process are easy to fit within different partisan registers. Some of my arguments will be intuitive to many people; I try to show that, in fact, the relational conception can accommodate and explain some common intuitions that are analytically neglected in settlement accounts. In other cases, my arguments will be controversial. Interpretive controversy can be appropriate even over the question of whether a particular deliberative process has been conducted so as to produce constitutional authority. This does not pose a problem for the relational conception. In fact, a central effort of this book is to demonstrate that standards of constitutional authority need not be capable of producing consensus in all instances. The relational conception seeks to focus controversy on questions about institutional performance rather than legal compliance.

THE RELATIONAL CONCEPTION AND CONSTITUTIONAL AUTHORITY

At each step, the more the branches govern and interpret constitutional meaning in accord with the substantive and processual standards of the relational conception, the more constitutionally authoritative is the war-making system they construct. The relational conception puts the processes of knowledge production and interbranch deliberation at the center of its conception of constitutional authority. The practices of discernment, elaboration, and review at the heart of interbranch deliberation *generate* constitutional authority for acts of war and security orders.

Constitutional authority to use the war power has a stipulated definition here: it is what emerges from the branches' successful navigation of a web of justificatory processes. When the branches mobilize their institutional capacities, develop good understandings of the security needs of the moment, and place themselves in responsive relationship, they generate constitutional authority over war; authority is hence both presumed and created by their interactive processes.

This way of conceiving constitutional authority is unusual. Legal and philosophic scholarship prominently associated with Joseph Raz

commonly describes "authority" as content-independent reasons to obey.[110] In other words, for an institution to be authoritative means that others obey it even if they object to what they are told to do. And yet the relational conception asks the branches to respond to, and perhaps even challenge, one another's determinations. While this is an unfamiliar notion of constitutional authority, it is not unusual in the world more broadly. Consider a junior faculty member being advised by his chair. If asked why he treats the chair's advice as authoritative, the faculty member may well answer in a Razian fashion that the chair is empowered to instruct junior faculty. But it would also be perfectly sensible to say that the faculty treats the chair's advice as authoritative because he recognizes that the advice is coherent and informed by the chair's unique perspective on a situation, because the chair has been responsive to counterconsiderations and frames a dilemma in a way that makes good sense, and because the chair offers recommendations of recognizably high quality. We may consider a friend's advice authoritative for similar reasons. In fact, people often consider one another's perspectives authoritative on the basis of assessments that are not entirely content-neutral, but which are also not reducible to following a good idea no matter where it comes from. This way of relating to authority views it as a resource that actors develop for one another.

Authority also means having reason to obey. A second reason for viewing authority in a bimodal way rests upon a view of compliance that is itself bimodal. A soldier either will, or will not, comply with an order to deploy. It doesn't make sense for a soldier to partially deploy in response to a form of authority that is shaky but still intact. To have the option to comply or not comply with a command suggests that authority itself must be bimodal.

But this way of viewing compliance is also limited. When Congress declares war, the president does not face a choice of "obeying" or "not obeying." The president may use that declaration of war as the grounds for an all-out assault on another nation's sovereignty, or he may use it as one more tool of coercive diplomacy. These are only two among many possibilities. When the president deploys troops in a provocative manner, the legislature too faces a large array of possible policy and constitutional

110 See, e.g., H.L.A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), ch. 10; Richard Friedman, "On the Concept of Authority in Political Philosophy," in Richard Flathman, ed., *Concepts in Social and Political Philosophy* (New York: MacMillan, 1973), 129; Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 38–69; Joseph Raz, *The Authority of the Law* (Oxford University Press, 2009); Frederick Schauer, *Playing by the Rules* (New York: Oxford University Press, 1991); Thomas Christiano, "The Authority of Democracy," *The Journal of Political Philosophy* 12: 3 (2004): 266–90.

responses. Because the branches are policymaking institutions, the authoritative behavior of each triggers a range of possible responses from the others. Each branch has governance tools that may resist, narrow, closely execute, extend, or intensify the instructions the other branch has communicated.[111] The relational conception asks officials to link their responses to their judgments about each branch's relative authority. Authority here does not function as a fully exclusionary reason. In the US constitutional system, it is rare for commands to be given without reasons, and we expect pushback from agents if or when these reasons are inadequate.[112] Using the word "authority" to signify the presence of content-independent reasons for action is only one way of conceiving how authority functions in our lives.

What do we gain and lose with this way of describing constitutional authority? First, it is, on its face, more consistent with the Constitution's actual strategy of elaborating institutional structure but not defining the boundary lines between war powers. The vagueness present in how the relational conception conceives authority corresponds to a vagueness rooted in the Constitution's own text. Second, this way of describing authority provides a vocabulary for political intuitions that cannot otherwise be accommodated. Consider debate in Congress about whether its own declaration of the War of 1812 was constitutional, given insufficient British hostility.[113] Or consider that, when I discuss this book, some mention the US entry into the Iraq War as a moment of constitutional deficiency.[114] Yet the Iraq War was legally authorized by Congress acting through its regular procedures. No other war powers theory on offer can account for the common intuition that legislative processes may sometimes be so deficient as to actually impair the constitutional authority of legislative assent. Highlighting the role of the processual standards in generating constitutional authority makes these common intuitions more sensible. Through the case studies, I bring attention to common intuitions about American constitutional politics that the relational conception of war authority—but not settlement accounts—can track.

Certain dimensions of this way of conceiving authority may raise empirical skepticism. For example, the branches' exercise of their capacity to develop knowledge about difficult constitutional and security questions is central to their development of constitutional authority. But do

111 See Douglas L. Kriner, *After the Rubicon: Congress, Presidents, and the Politics of Waging War* (Chicago: University of Chicago Press, 2010).

112 Many thanks to Elizabeth Anderson for helping me think through this point.

113 Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (New York: Harper Collins Publishers, 1976), 268; Barron and Lederman, "Lowest," 977.

114 See Michael Bressler, "Congressional Dissent During Times of War: How Congress Goes Public to Influence Foreign Policy," *Extensions* (2008): 9–14.

the branches have that capacity? Many commentators seem comfortable grounding presidential war authority in the president's access to security knowledge, but even advocates of Congress may be reluctant to make parallel claims. Imagine this alternative, non-epistemic defense of Congressional authority:

> Congress doesn't know anything about security. Legislators' most developed skills are those of campaigning and bargaining, neither of which is relevant to war. While Congress may contain plural perspectives, a president can convene panels of experts with diverse perspectives to inform his deliberations.
>
> But Congress still has an important role to play. Congress' role is to check against unitary presidential action. Legislators are elected to represent particular districts, whereas the President is elected by the nation as a whole. The President is incentivized to pick policies that will appeal to the national median voter, but passing a bill through Congress requires the approval of a majority of districts. Given simple differences in opinion between districts, the requirement of Congressional action imposes a higher hurdle. At the very least, Congressional approval requires the assent of a broad cross-section of America. Congress is also more directly accountable to the electorate (the House is voted in every two years, while second term Presidents are done).
>
> Blocking the president's path to war by requiring him to go to Congress for approval can be justified in terms of the value of slowing down the decision to go to war and representing the interests of a large cross section of America, not simply the median voter.[115]

This familiar checks-and-balances story grounds legislative authority not in knowledge, but in Congress's capacity to represent the majority of districts and to slow down decision-making.

Some pieces of this account must be rejected as matters of fact. Congress can produce knowledge on security, not simply knowledge about the dynamics of campaigns and bargaining; and Congress is capable of governing, not only campaigning.[116] We also should not assume that

115 Many thanks to David Nickerson for pressing this point.

116 Nelson W. Polsby, "Legislatures," eds. Fred Greenstein et al., *Handbook of Political Science* (Reading, MA: Addison-Wesley, 1975), 257–319. For discussion of legislative process improving the content of security legislation, see Donald R. Wolfensberger, "Congress and Policymaking in an Age of Terrorism," *Congress Reconsidered*, eds. Lawrence C. Dodd and Bruce I. Oppenheimer, 8th ed., (Washington, DC, CQ Press, 2005). See also Richard Fenno, *Home Style: House Members in Their Districts* (Boston: Little, Brown, 1978); Richard Fenno, *Congressmen in Committees* (Boston: Little, Brown, 1973); David Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–2002* (New Haven: Yale University Press, 2005).

going to war is always the least desirable outcome and that Congress will be less desirous of war than the president. In fact, war may sometimes be an intelligent response to a security problem. To slow war in such cases can spell catastrophe. And Congress has sometimes been more, not less, eager to go to war than the president.[117]

Other pieces of the account must be rejected because they are incompatible with more general theories of constitutional authority. Accounts of authority in particular domains should be consistent with the best understanding of what constitutional authority, in general, consists of. Certain features of the checks-and-balances story fail this test. Locating congressional authority, as a matter of constitutional theory, in its representation of plural interests is unsatisfactory. There is no reason for a plurality of interests to be viewed as more authoritative than the median voter. Pluralism is useful for generating authority when it is used to generate appropriate justifications for public policy; or when it ensures democratic inclusion and impartiality; or when it contributes to political stability. On its own, it has no normative weight. We need a broader theory to explain what pluralism is for, especially when accommodating pluralism undermines other goals like speedy response.

A final concern about this notion of authority pertains to subjectivity and partisanship. The relational conception of war authority fails to incontrovertibly resolve questions of war authority, because its substantive and processual standards are not themselves easy to incontrovertibly apply. Consider Congress's deliberation over the 2001 Authorization for Use of Military Force, which not only authorized open-ended war against "nations," "organizations," and "persons," reaching to those who may have "harbored" those who "aided" the attacks, but also stated that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[118] For some, Congress's willingness to enact such a massively broad delegation without considering broader Middle East foreign policy or antiterrorism security policy undermines the legislature's claim to deliberative responsibility. For others, Congress's willingness to support the president so broadly demonstrates a responsible sensitivity to the unique dilemmas of fighting nonstate actors. Our own assessments of what was at stake in these decisions partially condition our judgments about whether Congress did a good job in its deliberations.

117 Consider Cleveland's threat to veto a declaration of war against Spain. See Clinton Rossiter, *The Supreme Court and the Commander in Chief* (Ithaca, NY: Cornell University Press, 1976), 66.

118 Authorization for Use of Military Force, September 18, 2001, PS 107-40.

The relational conception of war authority cannot resolve many of the political controversies at the heart of the judgments it elicits. But it provides common terms for deliberation that encompass the constitutional values implicitly at stake in these decisions. I demonstrate in the case studies that follow that the relational conception can accommodate common intuitions that cannot be accommodated in settlement accounts which neglect the political dimensions of constitutional authority. Remaining controversy is then focused onto questions of institutional performance rather than legal obedience.

These arguments will be embedded within fields of partisan controversy, but constitutional theorists probably worry more about this partisanship than we need to. Consider that when the Constitution was ratified, basic questions of constitutional authority became partisan questions. For example, the relationship between a sovereign and a preexistent legal order split the Federalists from a wide variety of Anti-Federalist positions. And yet the ratification was a highlight of constitutional deliberation, producing profound statements of constitutional meaning.[119] Even theories meant to guide impartial judicial decision-making fit within fields of juridical partisan controversy. Originalism, natural law, or the Warren-court emphasis on minority participation are all approaches that are recognizably partisan within the field of legal studies. Skepticism about partisanship in constitutional reasoning fits poorly with experience, where deep expressions of constitutional meaning are expressed through and alongside deep partisan divides.

The power to take the actions of war—to fund troops, engage in policies antagonistic to other nations, give speeches that amplify the likelihood of war, place armies in disputed territory, order them to shoot, legally declare hostilities—are dispersed between Congress and the presidency. Many of these institutions' other powers become war powers when used in a context of war. The relational conception of war authority insists that the branches use their powers according to the Constitution's substantive and processual standards. It also insists that the authority to review and judge behavior and rhetoric follows the Constitution's distribution of war powers. When the branches act and judge in ways that summon the governance capacities the Constitution makes available, using their capacities to determine good allocations of constitutional war authority in the context of their own times, then their acts of power become constitutionally authoritative.

119 Pauline Meier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2010).

CONCLUSION

The war powers literature is marked by a series of conventional controversies. Does a president who uses discretionary power to move the country toward war undermine legislative war authority? Can Congress delegate its war power to the presidency? When and how is a president justified in engaging in independent acts of war? With cases ranging from the Mexican War to the Cuban Missile Crisis, isolationist resistance to World War II and the Iran-Contra Investigation, the following chapters redescribe these basic controversies in terms of the relational conception in order to show its operation in practice. The aim is to show how the relational conception illuminates common intuitions and reframes certain controversies, rather than to advance a particular interpretation of, say, the Korean War. By elaborating the theory through a series of paired case studies, the book shows that the relational conception can accommodate common intuitions, explain those intuitions, and direct our focus toward useful new lines of investigation for assessing the ethical behavior of officials.

The chapters address these controversies not through constitutional law, but through an analysis of constitutional politics. I use the ordinary resources of political judgment to develop these cases. Histories, memoirs, journal and news articles, the Congressional Record, and major scholarly works are all useful and widely available sources for helping observers and participants understand their own political contexts.[120] Epistemic priority goes to what can now be seen as most accurate, although it is also relevant to know what was reasonable for the branches to know at the time. For example, secret letters discovered centuries later could change the best assessment of a branch's processual authority. It is congruent with the terms of the relational conception to say "at the time this behavior seemed constitutionally authoritative, but in fact, it was not." Ongoing reassessment is one basic feature of ordinary political judgment.

I use comparative case studies not to investigate empirical variation, but to address a methodological dilemma of normative work: setting a standard of assessment. The relational conception inquires into relative levels of political authority rather than the yes/no judgments of legal compliance.[121] The bar for assessing the branches is set by the branches'

120 See Anderson, "Lay Assessments."

121 The comparative case study approach may not rhetorically enact this central point vividly enough. The book demonstrates a system of constitutional evaluation that proceeds within a web of processual and substantive considerations, each of which are scalar, none of

own conduct in formally parallel cases. In addition, the comparative case study method allows for some measure of realism in applying the processual standards. The aspirations the relational conception enjoins are ones that are at least sometimes within reach. And, while the branches' absolute capacities (in terms of their ability to project power) change over time, the relational conception's standards are relative, asking only that the branches make good use of the capacities they do have at the moment.

Chapter 2 pairs President Polk's entry into the Mexican War with President Roosevelt's movement toward World War II and argues, using the relational conception, that while both Polk and Roosevelt behaved independently and made good use of the distinctive capacities of the executive branch, Roosevelt's behavior was more deeply relational in that it was more subject to legislative rebuff. Roosevelt's constitutional authority was also buttressed by a defensive security necessity. After World War II, repelling troops at the border was transparently revealed as an inadequate standard for judging whether a president was using the office's war powers "defensively." Confronted with this transparent destabilization of the category of "defensive," the United States embarked on a project of global institution building to reduce its vulnerabilities. When Truman went to war in Korea without legislative permission, he introduced the idea of an executive branch authorized to make war on the basis of this new, global conception of US defensive interests. The modern war powers debate is structured according to the institutional cleavage of the Korean War.[122]

Chapter 3 introduces the concept of a security order as a way of achieving analytic traction on this Cold War constitutional transformation. We can assess security orders, no less than acts of war, through the lens of the relational conception. The chapter compares the legislative contribution to the construction of the Cold War security order to the legislature's construction of the Roosevelt Corollary to the Monroe Doctrine. I argue that the quality of Congress's participation in the former was qualitatively higher than in the latter. Impressive levels of participation and knowledge, combined with a lengthy deliberative process where the legislature developed a variety of security alternatives, make the legislature's contribution to the Cold War order more constitutionally authoritative than legislative participation in the construction of the Roosevelt Corollary.

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which can be lexically prioritized for all contexts. But evaluating two cases in relationship to each other is consistent with both threshold and scalar views of constitutional authority. Many thanks to Colin Bird for helping me see this drawback.

122 See Griffin, *Long Wars*, for persuasive historicization of the debate.

Chapter 4 returns to analyzing presidential conduct by showing how presidents can augment their authority to engage in independent acts of war. Assessing Kennedy's behavior in the Cuban Missile Crisis and Nixon's in the Cambodian bombing and incursion, I argue that independent acts of presidential war are more constitutional to the extent that they are interpretable in light of a security order that is itself constitutionally authoritative, and to the extent that they are themselves defensible in terms of the substantive and processual values of the relational conception.

The chapters alternate between assessing presidential, legislative, and presidential authority. Chapter 5 returns to Congress to scrutinize another legislative discretionary power, that of investigations. While the investigatory power is normally conceived as a retrospective power of judgment, chapter 5 construes investigations as both a war power and as a forward-looking tool for developing legislative war authority. The chapter compares the Munitions Investigation of 1934–36 with the Iran-Contra Investigation of 1989, arguing that the former developed far more constitutional authority for the legislature and war-making system than did the latter. The reasons may be surprising: counterintuitively, I argue that Congress's insufficiently developed partisanship undermined the authority of its Iran-Contra Investigation as a challenge to presidential power.

Chapter 6 assesses the connections between the relational conception and a variety of legal approaches to war powers. By placing the relational conception explicitly in dialogue with settlement theories of constitutional analysis; in dialogue with qualities understood as "legal" in a separation of powers system; and in dialogue with the premier judicial war powers expression, that of *Youngstown Sheet & Tube v. Sawyer* (1952), the chapter articulates some of the broader methodological implications of this distinctive form of constitutional theory.