

## Rational War and Constitutional Design

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War powers, more specifically the question of whether the President or Congress holds the power to initiate military hostilities, remains one of the most controversial and unsettled areas of constitutional law. American Presidents have long claimed the authority to initiate military hostilities unilaterally, and since at least the 1950 Korean War, if not before, they have taken the nation into war without congressional authorization beyond legislative funding. In 1973, Congress enacted a War Powers Resolution that sought to place a 60-day limit on military intervention but has never enforced it by automatically cutting off funds or ordering the withdrawal of troops. The Supreme Court has yet to definitively choose between the two branches. It has never taken a war powers case that has decided whether a war waged without congressional authorization violates the Constitution.

And in yet another re-run of Vietnam, the question of war powers has returned as a focus in the argument over the Iraq war. Both public supporters and critics of the intervention have argued that Congress should have declared war against Iraq.<sup>1</sup> Leslie Gelb, the past president of the Council of Foreign Relations, and Anne-Marie Slaughter, the Dean of the Woodrow Wilson School at Princeton University, for example, believe that requiring congressional declarations of war for “any commitment of troops that promises sustained combat” would force the President and Congress to fulfill their “responsibilities” and to engage in better deliberation and decisionmaking.<sup>2</sup> Nonetheless, such arguments (which did not appear in any significant way before the March, 2003 invasion) did not appear to hold any sway with Congress, which authorized the attack by statute but not by declaring war,<sup>3</sup> nor with the federal courts, which turned away a challenge to the constitutionality of the Iraq war.<sup>4</sup>

Division over the extent of the President and Congress’s war powers is mirrored, if not sharpened, in the legal academy. Prominent academics, such as John Hart Ely,

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<sup>1</sup> See, e.g., Leslie H. Gelb and Anne-Marie Slaughter, *No More Blank-Check Wars*, WASH. POST. at A19 (Nov. 8, 2005); Andrew J. Bacevich, *War Powers in the Age of Terror*, N.Y. TIMES (Oct. 31, 2005); Susan J. Tolchin, *Chicken Congress AWOL from Battle*, L.A. TIMES (Oct. 9, 2005).

<sup>2</sup> Gelb & Slaughter, *supra* note , at A19.

<sup>3</sup> Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

<sup>4</sup> *Doe v. Bush*, 323 F.3d 133 (1<sup>st</sup> Cir. 2003) (dismissing as non-justiciable a suit seeking injunction to prevent president and secretary of defense from initiating war with Iraq).

Harold Koh, Louis Fisher, Louis Henkin, and Michael Glennon, believe that Congress must authorize all uses of force abroad, except in self-defense.<sup>5</sup> A minority, including Judge Robert Bork, Eugene Rostow, and John Yoo has countered that the Constitution allows the chief executive to order the initiation of military hostilities unilaterally.<sup>6</sup> Presidents since World War II have launched major wars without congressional authorization in places like Korea, Panama, and the Balkans, but have also sought and received legislative approval for combat in Vietnam, the two wars in Iraq, and the war on terrorism. Courts consistently have refused to review whether wars begun by unilateral presidential action violate the Constitution.<sup>7</sup>

This Essay moves beyond the debate over formal textual and historical sources of constitutional law. Instead of defending the legitimacy or justification for a constitutional reading, we pursue a functional or comparative institutional analysis of the relationship between the President and Congress. Sole focus on the question whether the Constitution, as originally understood when ratified, grants the President or Congress the authority to decide on war pursues a purely normative goal. Both sides in the debate wish to measure current practice against the constitutional text or original understanding (although we should note that scholars have not been terribly consistent on the value of the Framing evidence). Ely argues that because the Framers intended the Constitution to require Congress to pre-approve all wars (except in cases of an attack on the United States), current practice is unconstitutional. Others argue that the constitutional text gives the President the ability to make war to support a normative conclusion that current practice is legal. In this respect, analysis of the war power is no different than standard approaches to other aspects of constitutional law, where the purpose of interpretation is to establish a baseline against which current practice can be measured.

This Essay accepts that the legitimacy of either the pro-Congress or pro-presidential interpretation will remain disputed. Instead of rehashing that debate, it asks a different question: what war powers system would enhance the effectiveness of the United States in making decisions on war and peace?

First, we ask what functional purposes a warmaking system out to have. More specifically, we explore some of the normative claims that underpin the various war powers theories and ask whether those normative commitments can be better met by the

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<sup>5</sup> See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 81 (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 109 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158-61 (1990); LOUIS FISHER, *PRESIDENTIAL WAR* (1996).

<sup>6</sup> Robert H. Bork, Forward, in L. GORDON CROVITZ AND JEREMY A. RABKIN, EDS, *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH X* (1989); Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH U L Q 693, 698 (1990); Eugene v. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972); John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002).

<sup>7</sup> See John Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003).

current system or by a Pro-Congress approach. Part II then examines the various ways in which we might structure the war decisionmaking process to improve both its domestic and international aspects. Here, we portray the domestic elements of the warmaking system as a principal-agent issue. The central problem is to ensure that the President acts within the delegation of power granted by the people. It asks whether a pro-Congress or the current system more effectively protects against agency slack, when the national government does not act in accordance with the desires of the electorate. We then introduce the international dimension and frame it as a bargaining breakdown due to asymmetric information and commitment problems. We argue that under certain situations the bargaining position of the United States is improved if the President goes to Congress receive *ex ante* authorization for warmaking because it provides more information about the U.S.'s willingness to go to war. We do not contend, however, that the Constitution should fix such a system in stone, but instead should be read flexibly to allow the President, in some circumstances, to go to Congress, but not to require it.

Part III turns from the organization of the American constitutional system to focus on the relevance of the regime type to the potential opponent in war. It draws on what is thought to be the one empirical truth about international conflict: democracies do not go to war with each other.<sup>8</sup> Until very recently, little attention has been devoted to understanding how the nature of the regimes of foreign adversaries might affect the optimal allocation of war powers authority. The last section uses the political science literature on the democratic peace to develop a functional argument for the current allocation of war powers. It argues that a system for warmaking involves a trade-off between the ability to make costly commitments that can send a signal of willingness to go to war, and the need to add swiftly and secretly. The regime type of a potential opponent might determine whether adopting a Congress-first or President-first approach to war powers is appropriate. We argue that the Constitution ought to be read to permit the President and Congress to adopt variable processes for deciding on war, depending on the nature of the opponent. Finally, given the political judgments inherent in deciding when a Congress-first or President-first approach might best serve the United States' military objectives in any particular conflict, we conclude that courts should play little or no role in resolving war powers controversies.

## I.

This part briefly reviews some of the normative claims that underpin the competing war-powers theories, and asks whether they align with the purpose that war

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<sup>8</sup> The political science literature on the democratic peace is vast. For leading examples, see BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1995); Bruce Bueno de Mesquita, et al, *An Institutional Explanation of the Democratic Peace*, 93 AM POL SCI REV 791 (1999); Zeev Maoz & Abdolali Nazrin, *Regime Types and International Conflict, 1816-1976*, 33 J CONF. RES. 3 (1989); Dan Reiter & Allan Stam, *Democracies at War* (2002); David Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SC. REV. 24 (1992); but see Sebastian Rosato, *The Flawed Logic of the Democratic Peace Theory*, 97 AM. POL. SC. REV. 585 (2003); Michael Desch, *Democracy and Victory: Why Regime Type Hardly Matters*, 27 INT'L SEC. 5 (2002).

has served in American history. In particular, it asks whether different structures for deciding on war have in fact produced the tangible benefits or costs predicted by the different sides in the debate.

A brief survey of much of the contemporary textual and historical arguments on war powers suggests that both sides of the debate have reached a stalemate. At some level, scholars of different interpretive stripes might agree that the standard sources of constitutional interpretation do not yield a certain answer on the process for making war. Textualists and originalists could recognize that the Framing generation shared no clear understanding that the Constitution created a Congress-first process for going to war. Those who are skeptical of textualism or originalism, among whom we would count most who work on constitutional law today, would not be convinced by such arguments, one way or the other, anyway. While pro-Congress scholars believe that the intent of the Framers is clear, the constitutional text and structure do not seem to bear out that understanding. Supporters of the pro-Congress position are left to argue that the original understanding ought to trump the practice of the political branches which has formed around the Constitution's text and structure. Elsewhere, one of us has also raised doubts about the historical account upon which congressional theories rely, in particular its failure to come to grips with the understanding of war powers in the British and early national American experience, and the discussion of presidential powers during the state ratifying conventions.<sup>9</sup> But concluding that the history does not dictate any clear result only forces us back onto the constitutional text and structure, which seems to allow for a flexible system for war.

If we agree that the Constitution does not demand a specific war-making process, or at least we admit that there ambiguity in the sources of interpretation prevents any definitive conclusions, functional considerations may have exceptional relevance for judging the superior system for deciding on war. Inherent in the Congress-first approach to war powers – Congress first authorizes, and then the President wages – is the notion that the Constitution should be biased against war because of its cost and destruction. The United States is less likely to launch its missiles, the logic goes, if there are more keys that need to be turned. As Ely put it, “the point was not to exclude the executive from the decision—if the president's not on board we're not going to have much of a war—but rather to ‘clog’ the road to combat by requiring the concurrence of a number of people of various points of view.”<sup>10</sup> A set of younger scholars, including Michael Ramsey, Jane Stromseth, and William Treanor, have provided more elaborate defenses of this functional approach by delving further into the framing history.<sup>11</sup> This approach is appealing because it bears close similarity to the process that governs the enactment of

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<sup>9</sup> John Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 198-99(1996) .

<sup>10</sup> ELY, *supra* note, at 4.

<sup>11</sup> See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993).

ordinary legislation. As such, it promises to promote the values of deliberation, consensus, and clarity prized by the new legal process approaches that have dominated thinking about legislation and administrative law.<sup>12</sup> An effort to reduce the amount of war also draws upon deeply ingrained American notions that, as an exceptional nation, the United States can either withdraw from the conflict-torn affairs of the Old World or change the world as to render war itself obsolete.<sup>13</sup>

But before accepting this attractive vision, we should ask whether the Congress-first system produces these results. In other words, has requiring congressional *ex ante* approval for foreign wars produced less war, better decisionmaking, or greater consensus? Students of American foreign policy generally acknowledge that comprehensive empirical studies of American wars are impractical, due to the small number of armed conflicts. Instead, they tend to focus on case studies. A cursory review of previous American wars does not suggest that congressional participation in war necessarily produces better decisionmaking. We can certainly identify wars, such as the Mexican-American War or the Spanish-American War, in which a declaration of war did not result from extensive deliberation nor necessarily result in good policy.<sup>14</sup> Both wars benefited the United States by expanding the nation's territory and enhanced its presence on the world stage,<sup>15</sup> but it seems that these are not the wars that supporters of Congress's Declare War power would want the nation to enter – i.e., offensive wars of conquest. Nor is it clear that congressional participation has resulted in greater consensus and better decisionmaking. Congress approved the Vietnam War, in the Tonkin Gulf resolution, and the Iraq war, both of which have produced sharp division in American domestic politics and proven to be mistakes.

The other side of the coin here usually goes little noticed, but is just as important for evaluating the substantive performance of the Congress-first system. To a significant extent, much of the war powers literature focuses on situations in which the United States might erroneously enter a war where the costs outweigh the expected benefits.

<sup>12</sup> See WILLIAM ESKRIDGE, JR. & PHILIP P. FRICKEY, INTRODUCTION TO HENRY M. HART JR. & ALBERT M. SACKS, MATERIALS ON LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Foundation Press 1998).

<sup>13</sup> See, e.g., WALTER A. MCDUGALL, PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776, at 15-38 (discussing the tradition of exceptionalism in American foreign policy); FELIX GILBERT, TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY 72 (1961) (discussing relationship between isolationism and idealism in early American foreign policy).

<sup>14</sup> On the Mexican-American War, see 1 THOMAS G. PATERSON, MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY 258-62 (1989); DAVID M. PLETCHER, THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR (1973). On the Spanish-American War and the events leading up to it see ERNEST R. MAY, IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER 196-254 (1961); H. WAYNE MORGAN, AMERICA'S ROAD TO EMPIRE: THE WAR WITH SPAIN AND OVERSEAS EXPANSION (1965).

<sup>15</sup> McDougall, *supra*, at 117-21 (evaluating significance of Spanish-American War); see also WALTER LAFEVER, THE AMERICAN SEARCH FOR OPPORTUNITY, 1865-1913 180 (1993); AKIRA IRIYE, THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS, VOL. III: THE GLOBALIZING OF AMERICA, 1913-1945 34-35 (1993)

Statisticians usually label such errors of commission as Type I errors. Scholars rarely, if ever, ask whether requiring congressional *ex ante* approval for foreign wars could increase Type II errors. Type II errors occur when the United States does not enter a conflict where the expected benefits to the nation outweigh the costs, and this could occur today when the President refuses to launch a preemptive strike against a nation harboring a hostile terrorist group, for example, out of concerns over congressional opposition. It may be the case that legislative participation in warmaking could prevent the United States from entering, or delaying entry, into wars that would benefit its foreign policy or national security. The clearest example is World War II. During the inter-war period, Congress enacted several statutes designed to prevent the United States from entering into the wars in Europe and Asia. In 1940 and 1941, President Franklin D. Roosevelt recognized that America's security would be threatened by German control of Europe, and he and his advisers gradually attempted to bring the United States to the assistance of Great Britain and the Soviet Union.<sup>16</sup> Nonetheless, congressional resistance prevented Roosevelt from doing anything more than supplying arms and loans to the Allies, although he arguably stretched his authority to cooperate closely with Great Britain in protecting convoys in the North Atlantic, among other things. It is likely that if American pressure on Japan to withdraw from China had not helped triggered the Pacific War, American entry into World War II might have been delayed by at least another year, if not longer.<sup>17</sup> Knowing what we now know, most would agree that America's earlier entry into World War II would have been much to the benefit of the United States and to the world. A more recent example might be American policy in the Balkans during the middle and late 1990s.

Of course, to understand whether one system is superior to another, we must compare the results of a Congress-first system with the significance of Type I and Type II errors under a President-first approach. Presidents may in fact cause the United States to enter into wars that prove unnecessary or unwise, but, on the other hand, some of these conflicts may look better with the benefit of historical distance. It is not clear, for example, whether the experience of the Cold War period, which provides the best examples of major military hostilities conducted without congressional authorization, so clearly comes down on the side of a link between more institutional deliberation and better conflict selection. Most of the wars in this period, including Kosovo, Panama, and Grenada, ended successfully for the United States. To be sure, the Korean War, which many would consider a draw, did not. But it is worth asking whether the Korean War succeeded in its broader objectives of containing the expansion of communism in East Asia. During the struggle between the United States and the Soviet Union from 1946 through 1992, Presidents from Truman through Reagan conducted a consistent policy

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<sup>16</sup> For a standard historical source on the period see ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932-1945* (1979). See also ROBERT DIVINE, *ROOSEVELT AND WORLD WAR II* (1969); GADDIS SMITH, *AMERICAN DIPLOMACY DURING THE SECOND WORLD WAR* (1965); FREDERICK W. MARKS III, *WIND OVER SAND: THE DIPLOMACY OF FRANKLIN ROOSEVELT* (1988); WARREN F. KIMBALL, *THE JUGGLER: FRANKLIN ROOSEVELT AS WARTIME STATESMAN* (1991).

<sup>17</sup> See MARC TRACHTENBERG, *PRE-EMPTIVE WAR* (manuscript on file with authors)

designed to contain the power of the Soviet Union and its allies.<sup>18</sup> War was fought throughout the world through proxies, in places like Korea, Vietnam and Afghanistan, and the superpowers almost came into direct conflict during the Cuban Missile Crisis. While Congress provided funding and support for the creation of a massive peacetime military unknown in the American experience, one designed for offensive warfare, it authorized hostilities only once during this entire period in Vietnam, and even this is a debated point. Most observers today would agree that, despite its costs and mistakes, the strategy of containment was a success.

Statements defending congressional approval of military hostilities, in effect, argue that the independent variable of congressional authorization produces the dependent variable of deliberation, consensus, and good selection of wars. These authors, however, have never produced any data or cited to any empirical studies to support these conclusions, and the historical record seems to leave room for doubt. Perhaps we should just admit that empirical data concerning American war is too difficult to analyze rigorously. If that is the case, then we should make judgments about the warmaking system by constructing better models. This is the job of Parts II and III.

## II.

We can begin by proposing three central criteria against which to evaluate the Constitution's process for making war. Two of them – political accountability, and expertise or accuracy in making decisions – should not come as any surprise to public law scholars; they are a regular feature of the study of the administrative state and domestic policymaking. Here, we want to ask whether a Congress-first process or a President-first approach would have any significant advantages along these dimensions. In other words, the question is cast as a principal-agent issue in which we explore whether the pro-President or pro-Congress view better protects against agency slack. A third factor, which has gone mostly unstudied by legal scholars, is whether decisionmaking processes benefit the United States at the international level. Certain institutional arrangements might better allow the United States to prevail in international crises than others. This Part concludes by analyzing international conflicts as a non-cooperative bargaining problem characterized by incomplete information to better understand the ways in which institutional design can impact international performance.

### A. Political Accountability.

Numerous scholars have written in recent years about the relative political accountability of the political branches, although with varying perspectives. On the one

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<sup>18</sup> The strategy of containment and its demand for greater military resources is discussed in JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY 89-126 (1982); MCDUGALL, *supra* note , at 147-71; DANIEL YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE (1977); MELVYN P. LEFFLER, A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR (1992).

hand, a significant number of scholars have argued that the President remains more politically accountable than other institutions. Indeed, much of the current work on the separation of powers commonly assumes that the President answers to a “national constituency,” while Congress usually “parochial interests.”<sup>19</sup> This view is often held by both supporters and critics of greater presidential supervision of administrative agencies.<sup>20</sup> Critics of the nationalist or majoritarian president, on the other hand, emphasize the fact that under the winner-take-all system of our Electoral College, the President might have an incentive to cater to a narrower political constituency than the median legislator.<sup>21</sup> Indeed, under such a system, a presidential candidate’s optimal election strategy will often be to promise benefits to only 25 percent of the electorate to the exclusion of the rest.<sup>22</sup>

Despite these varying views on the accountability of the political branches, one can reasonably conclude that presidential claims to a national mandate, and greater accountability, will have greater traction in matters of foreign policy and national security. In foreign affairs, the Constitution’s framers indisputably attempted to suppress the parochial interests that had beset the Articles of Confederation. They centralized authority over national security, foreign policy, and international trade in the national government, and they would have recoiled at the idea that foreign policy would be subject to local concerns.<sup>23</sup> Over time, functional command over those issues has migrated to the executive branch – a fact that even critics of the “imperial presidency” recognize.<sup>24</sup> Presidents are often identified with the nation’s successes or failures in foreign policy, and they will bear the electoral consequences of victory or defeat in war.<sup>25</sup> Unlike the economy, foreign affairs may offer Presidents greater constitutional and institutional powers to manage outcomes.

<sup>19</sup> See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58-70 (1995); JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE 157 (1997); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L. J. 1180, 1193-95 (1994).

<sup>20</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 1-10 (1994).

<sup>21</sup> See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, UCLA LAW REV. (forthcoming 2006) (manuscript on file with authors); Cythia Farina, *Faith, Hope, and Rationality of Public Choice*, 28 FLA. ST. U. L. REV. 109, 128-29 (2000).

<sup>22</sup> See Nzelibe, *The Fable of the Nationalist President*, *supra* note \_\_.

<sup>23</sup> FREDERICK MARKS, FOREIGN AFFAIRS AND THE CONSTITUTION

<sup>24</sup> ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY? (2005); HAROLD KOH, NATIONAL SECURITY CONSTITUTION 118-23 (1990); ARTHUR M SCHLESINGER, JR, THE IMPERIAL PRESIDENCY (1973).

<sup>25</sup> The President’s electoral accountability for failed military engagements deserves special attention. A common theme that runs throughout the Pro-Congress literature is that presidents might be particularly disposed to seek positive electoral rewards or glory from initiating international conflicts. But the electorate is equally as likely to hold the President accountable for failed military engagements or stalemates. One need only look to Lyndon Johnson’s political fate in 1968 to realize that the Vietnam stalemate was not a rewarding political gamble. Indeed, because of the unpredictable electoral risks associated with initiating conflicts, some political scientists have argued that presidents are unlikely to initiate conflicts immediately prior to a national election. See DAVID P. AUERSWALD, DOMESTIC INSTITUTIONS AND THE USE OF FORCE 20 (2000).

The benefits of delegating war power to the executive, which arise from the institutional competence of the Presidency, might be outweighed by a variety of agency costs. The President, for example, may wish to only satisfy the majority necessary to elect him, which could constitute as little as 25 percent of the population (the 50 percent of the states with 50 percent of the electoral votes).<sup>26</sup> Or the President may be a lame duck in his second term, or may have a short time horizon that extends only to the next election. A President might use war as a pretext to expand his powers, which he might misuse for domestic purposes – this was a particular fear of the framers, who believed that the Crown had used war to expand its influence over Parliament.<sup>27</sup> A President might have access to poor information, which could lead to mistakes – witness the mistaken belief that Iraq possessed programs that could produce weapons of mass destruction. Finally, a President might seek personal glory in war rather than pursuing the national interest, another concern of the framers. As William Treanor argues, the Framers worried that executives were more prone to military adventurism because of the pursuit of fame and glory.<sup>28</sup>

Arguments in favor of a requirement that Congress first authorize war, however, do not explain how congressional participation would reduce these agency costs. If Congress seeks to represent the median voter, as some theories of legislation would have it, then it is unclear if Congress's constituency is any broader than the President's. The median member of the House of Representatives could represent a constituency that is as little as 25 percent of the electorate.<sup>29</sup> But the constitutional allocation of Senate seats, Congress may be biased toward the interests of rural areas, and it may suffer from greater collective action problems in acting on foreign affairs. Congress might be as equally susceptible as the President to the temptation of using war as a pretext to expand its domestic powers. The McCarthy episode provides an example where Members of Congress, rather than the executive branch, pressed to reduce civil liberties because of national security concerns. In any event, it seems that the threat of dictatorship is a not a serious one (at least it appears so from the historical record). Congress might have objects in mind that have more to do with national glory than with what the electorate would want. The War of 1812, for example, had more to do with the dreams of War Hawks in Congress to add Canada to the American republic than with national self-defense or presidential ambitions.

Further, the choice between the pro-Congress view and the current system of war powers is not one of total congressional participation versus no congressional participation. The question really is one of *ex ante* versus *ex post* participation. Even under the strongest pro-presidential theories, Congress still retains the ability to check

<sup>26</sup> See Nzelibe, *The Fable of the Nationalist President*, *supra* note \_\_\_\_

<sup>27</sup> John Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 198-99(1996) .

<sup>28</sup> Treanor, *supra* note at 695

<sup>29</sup> See Nzelibe, *The Fable of the Nationalist President*, *supra* note \_\_\_\_

presidential foreign policy and national security decisions through the funding power. Often Congress can exercise that authority *ex ante*. It had the opportunity, for example, to prevent presidents from waging the Persian Gulf War, the Kosovo conflict, and the Afghanistan and Iraq wars, by refusing to appropriate money before the fighting began. Some Pro-Congress scholars bemoan the efficacy of Congress's appropriation power in constraining presidential military ventures, but Congress has frequently used the threat to cut off funding to force the withdrawal of forces and terminate conflicts.<sup>30</sup> With the high costs of modern conflict, any significant military undertaking will require Presidents to seek congressional cooperation via funding. In such situations, it is difficult to see why political accountability would be enhanced by requiring that Congress not just provide funding for military hostilities *ex ante*, but also go to the additional step of enacting legislation authorizing the conflict. Actors in the government could consider the funding decision as politically significant as an authorizing decision.

Suppose, however, that a military conflict is sufficiently low in intensity that it does not require significant additional funding from Congress. Such operations might include, for example, cruise missile strikes against a nation's leadership, as in Libya, or surprise attacks against terrorist bases, as in Sudan. Congress would only have the opportunity, *ex post*, to register its disagreement with the President's actions through the power of the purse. The question, however, is whether political accountability suffers a setback because of Congress's after-the-fact participation. Supporters of the pro-Congress approach must explain how requiring *ex ante* congressional authorization would reduce agency "slack" and improve the national government's representation of the wishes of the electorate. If Presidents remain responsive to a national electorate, and voters associate foreign policy successes and failures more closely to Presidents than to individual members of Congress, then additional congressional participation must arise because of concerns that Presidents, due to structural or systematic reasons, misread the national mood. *Ex ante* congressional authorization might raise the political profile of an impending war, which might cause the electorate to send clearer signals to their representatives. On the other hand, Presidents presumably would remain just as, if not more, responsive as members of Congress to changes in voters' preferences.

One last advantage that legislative participation might provide lies in the area of political support for war. The previous point focused on whether the President or Congress more accurately gauged the foreign policy preferences of the electorate. This point here is somewhat different. It asks whether legislative participation, *ex ante*, on decisions for war would allow the government to more effectively mobilize popular support for war and to make a long-term commitment to seeing the conflict through that would resist calls for withdrawal in the wake of short-term setbacks. It is certainly

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<sup>30</sup> See Jide Nzelibe, *A Positive Theory of the War Powers Constitution*, IOWA L. REV. (forthcoming 2006) (manuscript on file with authors) (describing modern case studies where Congress coerced the President to withdraw troops through threats to cut off funding, including Lebanon and Somalia); David Auerswald & Peter Cowhey, *Ballotbox Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505, 520-23 (1997) (showing that Congress routinely restrains the President through threats to cut off funding and budgetary requirements).

reasonable to assume that if members of Congress vote to support a war at its outset, they will continue to provide political support for the war, for a limited period of time, to remain consistent. The question, however, is why the Constitution should be read to demand that members of Congress demonstrate this level of commitment, for every conflict, through a declaration of war or other type of authorization. Members of Congress must already make *ex ante* decisions on the depth of their support for a conflict when they respond to requests for expansions in the military budget.

It is worth making a point here derived from theories that seek to explain war as a type of bargaining failure in international disputes, about which more later in this essay. Some political scientists have approached actions taken by governments in an international crisis as signals in a non-cooperative bargaining game.<sup>31</sup> They have also distinguished between different types of signals. Presidents or Congresses, for example, can make threats on behalf of the United States to take action against another nation in order to resolve an international dispute, and the other nation can send similar signals back. A government's statements or political actions once a crisis has begun have little in the way of *ex ante* costs to the nation as a whole. A President's announcement that the United States will take military action if certain conditions go unmet does not create much *ex ante* cost in terms of personnel or resources, because there is less need or time to invest in significantly higher defense expenditures.

It may not be the case, however, that seeking *ex ante* congressional approval through a declaration of war or authorization will prove as helpful to the United States in international crises as would legislative participation through appropriations. While they are cheap threats or declarations can bear very high *ex post* costs. Seeking declarations of war or *ex ante* legislative authorization can prove destabilizing because it reduces a nation's flexibility to pull back from war in the event that the opposing nation does not meet its demands. A nation's leaders will incur domestic political costs by issuing a threat to use force and then failing to make good on the threat. If the democracy's leaders have committed in this way, they will be more likely to use force to maintain their domestic standing, which will create more instability in the international situation.

A different form of signal is more costly *ex ante*, but leads to greater *ex post* stability. Increasing military spending and investment, such as long-term deployments to prepare for a conflict, will prove more expensive than simply issuing a threat. Such costs are also sunk, because they will not change regardless of the outcome of the conflict. States that engage in sunk cost signaling, however, will have lower *ex post* costs because there will be less costs if they choose not to go to war. They can more easily avoid the use of force because they have made no commitments to domestic political audiences. These two types of signals are known as "tying hands" versus sunk cost signals. This analysis suggests that seeking legislative cooperation through funding, especially over the long-

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<sup>31</sup> See James Fearon, *Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs*, 41 J. CON. RESOL. 68, 69-70 (1997)

term, will lead to more stability and less chance of war than a constitutional system that places its emphasis on declarations of war or statutory authorizations for force.

*B. Accuracy.*

A second dimension that ought to guide our evaluation of the decision-making process for war is whether the pro-Congress model or the presidential model yields more accurate decisions. Congress does not seem to have access to better forms of information than the executive branch, and it seems that the President has more incentive to invest in methods for obtaining better information. It also seems that Presidents have not historically suffered from glory-seeking. Our early history contains examples of Presidents, most notably John Adams, seeking to restrain the nation from war. If anything, modern Presidents seem to have entered war reluctantly (Truman in the Korean War, Johnson in Vietnam) and have been acutely aware of the immediate political ramifications of war.

Let us again view the President's role in a unilateral warmaking system through a principal-agent lens. In this conception, the President is the agent and the American people are the principals. A successful system encourages the national government to wage war when the American people would believe the war is in its interests; in other words, when the war would satisfy their preferences. Americans might want war for wholly selfish reasons of national interest, such as gaining territory in the Mexican-American War, seizing overseas colonies as in the Spanish-American War, or preventing the rise of hegemonic power in Europe as in World Wars I and II. Here we do not normatively review the objectives of war, but only ask what principal-agent relationship best allows the American people to achieve their goals. In terms of constitutional design of war powers, our goal should be to maximize the ability of the United States to successfully prevail in international disputes that involve the threat or the use of force.

From the standpoint of institutional design, it seems that the executive branch has critical advantages over a multi-member legislature in reaching more accurate foreign policy and national security decisions. As Alexander Hamilton argued in *Federalist No. 70*, the executive is structured for speed and decisiveness in its actions, and is better able to maintain secrecy in its information gathering and its deliberations. "Decision, activity, secrecy, dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."<sup>32</sup> National security demands since World War II have led to even more concentration of authority in the executive branch. The history of American foreign relations has been the story of the expansion of

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<sup>32</sup> *Federalist 70* (Hamilton), in MERRILL JENSEN, JOHN P KAMINSKI & GASPARE J SALADINO, EDS, 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 397 (State Historical Society of Wisconsin 1986).

the Presidency thanks to its structural abilities to wield power quickly, effectively, and in a unitary manner – a fact bemoaned by critics of the “imperial presidency.”<sup>33</sup>

The executive branch has access to broader forms of information about foreign affairs than those available to Congress. In regard to classes of information, the executive branch has access to foreign policy and national security information produced not just by diplomatic channels, but also by clandestine agents or electronic eavesdropping. In terms of receiving and processing that information, the executive branch is not restricted by the structures that limit the information that a court or legislative body may consider. Indeed, it seems evident that the executive branch not only acquires more intelligence than Congress, but it also devotes more resources toward analyzing that information. While Congress may have its own independent staff that engage analysis of intelligence and foreign information, this staff is dwarfed by the size of the executive branch’s intelligence and foreign policy apparatus.

The events leading up to the recent Iraq war illustrate the difference in resources and capability in intelligence gathering and processing between the executive and legislative branches. As the commission headed by Judge Laurence Silberman and former Senator Charles Robb made clear, the intelligence community was “dead wrong” about the existence of WMD in pre-war Iraq.<sup>34</sup> This failure resulted from difficulties in collecting good information on Iraq’s WMD programs and shortcomings in analysis by the intelligence agencies. Yet, even though the Bush administration chose the elimination of Iraq’s WMD programs as the central justification for the invasion of Iraq, Congress brought no independent collection or analysis of information to bear. Instead, Congress based its decision to authorize the use of force against Iraq on the intelligence and analysis that the Bush administration chose to present to Congress. Congress simply did not have the institutional resources to seek alternate sources of information. As a result, the inclusion of Congress, *ex ante*, in the decision to use force did not lead to any greater accuracy in decisionmaking.

A critic might argue that having two institutions involved in the decision for war, even if both are reading the same facts, would lead to better decisionmaking. This point has an intuitive appeal, although recent efforts at intelligence reform have rejected it in favor of greater centralization.<sup>35</sup> Further, it ignores the problems with legislative organization and the political incentives of legislators, both of which make it unlikely that Congress will be willing to make difficult decisions in the foreign affairs and national security area. Epstein and O’Halloran, for example, have developed a promising analysis to explain when Congress will delegate significant discretion to the other branches (their

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<sup>33</sup> *Id.* at 118-23; see generally ARTHUR M SCHLESINGER, JR, THE IMPERIAL PRESIDENCY (1973).

<sup>34</sup> The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Report to the President of the United States (Mar. 31, 2005).

<sup>35</sup> See Anne Joseph, unpublished manuscript (manuscript on file with authors); RICHARD POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005).

primary interest is in delegations to the executive branch).<sup>36</sup> According to their model, legislators interested in re-election will delegate authority in order to overcome transaction cost problems. Drawing on theories of transactions costs as applied to firms and markets,<sup>37</sup> Epstein and O'Halloran argue that Congress will delegate when the internal inefficiencies to making policy are high, as when committees are outliers to the views of the median member of Congress, when the internal organization of Congress prevents effective bargaining, and coordination problems prevent the building of coalitions. Congress will also delegate when the President's views are closer to that of the median member of Congress and when uncertainty associated with a certain policy area is high.<sup>38</sup>

Most important here, a transaction cost approach suggests that Congress will delegate authority over issues that either are informationally complex or where the consequences of government action are difficult to predict, while it will choose to keep for itself control over policy where it can target benefits to narrow groups of constituents, as with taxation.<sup>39</sup> In an empirical analysis, Epstein and O'Halloran find that Congress will delegate the most authority to the executive branch in foreign relations and space and technology legislation.<sup>40</sup> Howell has incorporated this approach into a broader theory of unilateral executive action. He seeks to understand when Presidents will act unilaterally, and when Congress and the Judiciary will overturn his decision, by looking to the status quo of policy, where the Presidents ability to block a veto override effort will rest, and where the median policy preference of Congress and the courts lie.<sup>41</sup> His approach predicts that when Congress is fragmented and suffers from high transaction costs, Presidents are more likely to act unilaterally, whether through constitutional power or delegating rulemaking authority.<sup>42</sup> It also finds that significant presidential orders will issue during periods of unified government, when the President's own party governs Congress and is unlikely to disagree with him. Under this view, Congress would gain little by struggling to interfere in whether to initiate war, where it is difficult to predict the costs and benefits of decisions.

These problems with the structure of Congress lend support for presidential initiative in war. Bork and Rostow reach the same conclusion as these political scientists on delegation – that Congress's organization and the nature of foreign affairs (high potential costs and benefits, extreme uncertainty and unpredictability) make the

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<sup>36</sup> DAVID EPSTEIN AND SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999).

<sup>37</sup> The most relevant work being OLIVER WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (1996).

<sup>38</sup> EPSTEIN AND O'HALLORAN, *DELEGATING POWERS*, *supra* note at 75.

<sup>39</sup> *Id.* at 201-03.

<sup>40</sup> *Id.* at 198. For discussion of congressional incentives to avoid taking a position at the initiation of an international conflict, see Jide Nzelibe, *A Positive Theory of the War Powers Constitution*, *supra* note--.

<sup>41</sup> WILLIAM G HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 24-54 (2003).

<sup>42</sup> *Id.* at 64.

legislature ill-suited to taking a leading role in foreign affairs, while the Presidency seems best structured for the exercise of power in this arena. Practice, at least since the end of World War II, seems to demonstrate that the political branches have read the constitutional text to establish a stable, working system of war powers. The President has taken the primary role in deciding when and how to initiate hostilities. Congress has allowed the executive branch to assume the leadership and initiative in war, and instead has assumed the role of approving military actions after the fact by declarations of support and by appropriations.<sup>43</sup> Even Dean Koh, a leading critic of war powers in practice, acknowledges that the “presidency . . . is ideally structured for the receipt and exercise of power,” especially in the foreign affairs context, where its “decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match.”<sup>44</sup> As a matter of theory, then, the collective action problems with Congress undermines the idea that *ex ante* congressional authorization will improve decisionmaking on war.

A second way to test the assertion that greater institutional participation will produce more accurate decisions would require us to determine whether congressional participation, *ex ante*, correlates with positive outcomes in war for the United States. While a systematic review is outside the scope of this paper, a quick review of the record does not suggest any connection between success in war – which itself could be the product of good selection of war or better performance in war – and congressional *ex ante* approval. Declarations of war generally have marked victories for the United States: World Wars I and II, and the Mexican and Spanish-American Wars ended with the United States prevailing (in the short term, at least), and the War of 1812 could be considered a draw. But other wars, such as Vietnam and perhaps Iraq, do not show a relationship between *ex ante* statutory authorization and American success. Furthermore the United States has prevailed in wars, such as Panama and Grenada, in which Congress did not participate *ex ante* in the decision to initiate hostilities. This is not to claim that *ex ante* congressional participation produces no benefits for war decisionmaking, and, in fact, the next section argues that legislative approval can prove advantageous in certain crisis bargaining situations. But it is difficult, from the record, to determine the magnitude of any benefits to the United States of creating a system that cements into place a requirement of legislative approval before hostilities begin, against which the costs of such a system (explored in more detail in Part III) can be balanced.

### C. Informational Advantages and the Democratic Peace.

All of this goes to show that while there may be agency costs in delegating the initiative in war to the President, it is not obvious that requiring congressional authorization would solve them. To say that the President should have the constitutional authority to initiate war, however, is not to say that Congress should always be excluded from the decision. On the contrary, the third factor in our analysis—the informational

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<sup>43</sup> See KOH, NATIONAL SECURITY CONSTITUTION, *supra* note at 123-33.

<sup>44</sup> *Id.* at 118-19.

advantages of signaling resolve towards foreign adversaries—suggests otherwise. We propose to apply this factor to a simplified model of why disputes may turn into war. Applying this model to the separation of war powers, we find that Congress can play a beneficial role in first authorizing the use of force, under certain conditions.

The model we employ is drawn from two strands in the international relations literature, work on crisis bargaining and investigations into the “democratic peace” – the empirical finding that democracies do not fight wars against each other. War is costly and risky, so if we assume complete information, nations should reach settlements of disputes rather than use military hostilities to resolve them.<sup>45</sup> To see why this would be so, assume nation A seeks to challenge nation B over a good, whether it be territory, a trading pattern, or other asset. After A issues the challenge, accompanied by some type of threat, B decides whether to respond by either resisting or relinquishing the asset. If the latter, the game ends. If the former, A then either backs down, at which point the game ends, or A makes good on its threat and war ensues.

While war may allow either A or B to acquire the asset, the outcome of war is not certain.  $W(A)$  represents the expected value of war to A, which is the probability that A will prevail times the value of the asset (which we can designate to be 1 for these purposes), minus the expected cost of war.  $W(B)$  represents the expected value of war to B. If  $W(A)$  and  $W(B)$  are known to A and B, then no war should result. If A makes a threat to use force if it does not receive the asset, but B knows that the cost of war to A is greater than the expected value of the asset (in other words, the expected value of war to A is  $< 0$ ), then B knows A will not go to war. B will resist and A will stand down. If B knows that A’s expected value of war  $> 0$ , then B will back down by transferring the asset or seeking a negotiated compromise. Whether B resists or transfers the asset, a peaceful result obtains.

Complete information also means that bluffing will not succeed, because both parties know each side’s probability of prevailing, and hence their expected utility of war. A’s threat, for example, that it would use force when its expected value for war is less than zero would not be credible; B would still refuse to budge, and A – if it is acting rationally – would still back down. *Ex ante* knowledge of the expected benefits and costs of war and the probabilities of success, which are determined by military and political factors, allows both A and B to reach a negotiated settlement that avoids war. War generates a deadweight loss that both sides seek to avoid. There is a strong resemblance here to the Coase Theorem: possession of the asset is similar to the original allocation of the entitlement made by the legal system; the threats made, based as they are on the expected utility of war, mirror the willingness to pay to transfer the entitlement. In a

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<sup>45</sup> James Fearon, *Rationalist Explanations for War*, 49 INT’L ORG. 379 (1995); Kenneth Schultz, *Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War*, 53 INT’L ORG. 233 (1999); Robert Powell, *Bargaining Theory and International Conflict*, 5 ANN REV OF POL SCI (2002). Jide Nzelibe has also sought to apply this literature on noncooperative bargaining in international crises to the study of war powers. See Jide Nzelibe, *A Positive Theory of the War Powers Constitution*, Iowa L Rev (forthcoming 2006).

world of perfect information, the asset will end up in the most efficient hands, and the only thing that changes is the distribution of wealth.

There are three assumptions that underlay this result. First, there is a real probability that either A or B will win. If the states are rational and they know this probability exists, then they should reach a negotiated settlement. Second, A or B are not risk-seeking; they would rather accept a negotiated settlement than gamble to achieve a low probability outcome. Third, the asset is amenable to bargaining; its value is continuous and can be divided, rather than a single unit whose whole value must be transferred. Even this last assumption might not be such a problem, if states can make side payments or link deals together to reach the desired level of compensation in a bargain.

Incorporating “audience costs” changes the analysis somewhat. Following Fearon and Schultz, we can define audience costs as the costs incurred by a regime when it makes a threat to use force but fails to carry it out.<sup>46</sup> In this case, A will make a threat, and it will still carry it out, if  $W(A) > -AC$ , where AC refers to A’s audience costs. B will concede only if this is true, but will resist if  $W(A) < -AC$ . If B resists under this condition, then A will withdraw its threat and no concession is made. Again, either course of action produces a peaceful result; the only difference is whether A comes into possession of the asset or B retains it. Audience costs make it a little more likely that B will retain the asset.

Incomplete information, however, produces the possibility for war, even if both A and B act rationally. In a world of incomplete information A does not know  $W(B)$ , and B does not know  $W(A)$ . While both may agree on the valuation of the asset, they do not know each other’s estimate as to its probability of prevailing in a conflict. Both sides have private information concerning their ability to win; they may have innovative military technology, better force moral and organization, strategies that take advantage of differences in terrain, or information about the population’s resources or willingness to suffer losses in war. An advantage could even arise from a nation’s ability to more accurately estimate the impact of military and political factors on war outcomes. This is not the same as saying that A and B disagree about the probability of victory based on all known information – that could arise from emotional beliefs in a nation’s military proficiency, for example, or irrational hopes of victory not based on objective probabilities. It is also not the same as assuming bounded rationality; that different nations will produce different estimates of victory because of different reactions to overwhelming complexity. Rather, incomplete information means that A and B have private information unknown to the other side about their political and military capabilities such that, if known to the other side, would change its estimate of the probability of winning.

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<sup>46</sup> Fearon, Rationalist Explanation, *supra* note at 379; Kenneth Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829 (1998); James Fearon, *Signaling Foreign Policy Interests*, *supra* note \_\_\_ at 68.

War will result from a failure to disclose private information. First, states will not have full information on factors that will affect the military outcome. State B may not know, for example, that State A has the ability to engage in large scale re-positioning of mobile armor forces that would allow it to conduct a war of maneuver, and State A in fact may take great pains to prevent State B from learning that information – this apparently happened in the first Persian Gulf War. Second, states without complete information may misestimate each other's willingness to go to war. State A, for example, may not know State B's costs for war or the value that it places on an asset, leading to different estimates of State B's expected value for war. Third, incomplete information creates the possibility that states may bluff. State A may challenge state B, and in the complete information model State B would either stand firm or concede based on its knowledge whether  $W(A)$  was positive or negative, or was greater than  $-AC$ . But if state B does not know the relative values of  $W(A)$  or  $AC$ , then it cannot be sure whether to stand firm or concede. State B may even respond with a bluff itself. Even if both states could avoid war by not bluffing, bluffing also presents the possibility that state A or B could do better than their relative power positions would allow. While the high cost of modern war may encourage states to avoid war, it may also have the perverse effect of encouraging them to bluff about their willingness to fight in order to get a better deal.<sup>47</sup>

The democratic peace thesis enters this analysis by turning the focus to questions of domestic institutional structure. One empirical finding that appears to be accepted by most scholars of international relations is that democracies do not go to war with each other.<sup>48</sup> The statistical evidence appears to be quite robust, and extensive testing indicates that the relationship between democracies and peace is sound.<sup>49</sup> Related corollaries of this basic finding include that democracies go to war regularly with autocracies,<sup>50</sup> that democracies win a high percentage of their wars with nondemocracies,<sup>51</sup> that democracies are more likely to initiate wars against autocracies than vice-versa,<sup>52</sup> and democracies suffer less casualties and fight shorter wars than autocracies.<sup>53</sup> Democracies are not inherently peaceful; they have waged aggressive wars, attacked weaker neighbors, and have sought to build empires. They simply do not wage war against each other.

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<sup>47</sup> James Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 578 (1994).

<sup>48</sup> BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1995).

<sup>49</sup> Bruce Bueno de Mesquita, et al, *An Institutional Explanation of the Democratic Peace*, 93 AM. POL. SCI. REV. 791 (1999).

<sup>50</sup> Zeev Maoz & Abdolali Nazrin, *Regime Types and International Conflict, 1816-1976*, 33 J. CONF. RES.3 (1989).

<sup>51</sup> DAN REITER & ALLAN STAM, *DEMOCRACIES AT WAR* (2002); David Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24 (1992); but see Michael Desch, *Democracy and Victory: Why Regime Type Hardly Matters*, 27 Int'l Sec. 5 (2002).

<sup>52</sup> Scott Bennett & Allan Stam, *The Declining Advantages of Democracy: A Combined Model of War Outcomes and Duration*, 42 J. CONF. RES.344 (1998).

<sup>53</sup> Scott Bennett & Allan Stam, *The Duration of Interstate Wars: 1812-1985*, 90 AM. POL. SCI. REV. 239 (1996).

Scholars have proposed two different theories, within the context of the rational choice explanations for war, to explain the peace between democracies and their relative success in war. One approach argues that democratic regimes increase the risk and costs of war. Democracies have opposition parties; if the majority party undertakes a war that goes badly, they will be turned out of office. Democracies, therefore, will be more selective about the wars they choose, because of their fear of losing, and they will pour more resources into winning, again so as to avoid defeat.<sup>54</sup> Democracies generally will have lower expected values for war, because they will hold lower estimates of their probabilities of winning, and they will estimate higher expected costs for going to war. We can think of this as the “institutional constraints” model, because it hypothesizes that democracies, by their institutional design, place constraints on the ability of their nations to choose war.

A second theory holds that democracies enjoy informational advantages in war. Democracies can overcome the failure to reach bargains that avoid war created by imperfect information. One way a state can credibly reveal private information is to send costly signals. A state can send a signal of resolve, in other words its willingness to fight and thus its expected value of going to war, by incurring a cost that it would otherwise avoid if it were not willing to go to war.<sup>55</sup> A state, for example, can incur high audience costs by making a public threat that, if the leaders fail to follow through, will lead to the downfall of the government. The more that elected leaders make such threats – such as “this will not stand” – the more they have incurred an audience cost that indicates that they will use force if their demands are not met. Conversely, if a nation only incurs small audience costs, it is more likely to be bluffing. Democracies with an opposition party and an electorate to which the ruling party is accountable provide the government with mechanisms to signal resolve. Moreover, military decisions that represent the unified actions of the legislature and the executive branch will signal greater resolve than the decision of the executive or legislature acting alone. Electoral competition makes bluffing difficult because opposition parties will be able to mobilize the electorate against wars with weak domestic support.<sup>56</sup>

The next part will explore the implications for constitutional design of these different approaches to institutional constraints on warmaking. At this point, it is worth asking which theory has greater explanatory weight. It may be difficult to test which theory better accounts for the data, since they will have overlapping predictions. One empirical study, however, claims that the informational model is more promising. Using the Correlates of War database, Schultz examined all militarized international disputes from 1816 to 1980, and asked whether the presence of a democratic challenger (our state A) made a difference in the response of the defender (our state B).<sup>57</sup> If the institutional

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<sup>54</sup> Bueno de Mesquita, et al., *supra* note , at 791.

<sup>55</sup> Fearon, *Domestic Political Audiences*, *supra* note at 578

<sup>56</sup> Schultz, *Do Democratic Institutions Constrain or Inform?*, *supra* note at 237.

<sup>57</sup> *Id.* at 249-56.

constraints theory about democracies held true, we would expect state Bs to refuse to concede at a higher rate, because democracies under this theory would generally have a lower expected value from war. If the informational theory were superior, we would expect state Bs to concede more often when state A was a democracy, because democracy allows state A to more effectively communicate its willingness to use force. The results of Schultz's study show that state Bs are less likely to reciprocate the use of force (and hence more likely to concede) when the state initiating the use of force is a democracy.

### III

The political accountability and accuracy criteria developed in Part II both suggest that a Congress-first approach to war powers is unlikely to more effective than the current system in resolving agency slack issues at the domestic level. But the signaling model reveals that Congress still has an important role to play at the international level. We should want a system that allows the United States to avoid wars where the expected value of war is negative, but we should also want a system that allows the United States to gain in challenges where its expected value of war is greater than that of an opponent. A more effective warmaking process should allow the United States to send costly signals to opponents about its willingness to wage war.

#### A. *Legislative Authorization as Costly Signaling.*

One way to understand the Congress-first approach to war powers is to note its similarities to the institutional constraints approach. Scholars such as Ely want to involve Congress in warmaking so as reduce the number and type of conflicts waged by the United States. Ely's thesis is just as concerned with using constitutional process to stop "bad" wars as it is to promote political consensus for "good" ones. A more nuanced way of putting forward the pro-Congress claim is that it argues that the nation should not enter war when the expected value of victory (future benefits of victory minus the future costs, correcting for the probability of victory) is outweighed by the expected costs of defeat. One can understand Ely and others as arguing that unilateral presidential war power leads the nation into military hostilities where the expected value of defeat exceeds the expected value of victory. Some presidents may have higher discount rates than either Congress or the nation as a whole because of the desire for some type of historical legacy, which distorts the government's ability to accurately judge the benefits and probabilities of victory versus defeat. If this is true, then presidents may well be willing to engage the nation in unwise conflicts in which the expected costs might outweigh the expected benefits when evaluated using the discount rate held by Congress or, more broadly, by the American people.

While not exactly the same argument, this bears a great deal of similarity to the institutional constraints approach. Institutional constraint explanations for the democratic peace argue that democracies enter into less number of wars because of the competitive nature of their electoral systems, which will punish leaders who engage the

nation in losing wars. The pro-Congress view in constitutional law agrees that congressional involvement will produce the same result, although not because of electoral competition. Rather, it argues that Presidents acting alone will incorrectly over-count the expected benefits of war and under-count the costs. Ely and others seek to correct this cognitive error by including more decisionmakers.

There are several problems with this view. First, it depends on the empirical claim that wars waged without congressional authorization systematically suffer from cognitive errors. There does not appear to be evidence for this conclusion, which would have to show that American losses in wars were the result of errors in valuing the costs and benefits of war and not from the role of chance. Even if the United States properly evaluates expected costs and benefits, they are based on probabilities and once conflict has begun the vagaries of war may produce the lower probability outcome. Second, it sees the solution by imposing a process that produces delay, regardless of whether the expected value of war is positive. At the very least this will mean that the United States will forgo the opportunity to threaten the use of force, either to seek change in the status quo or to resist a challenger, when doing so would benefit the United States.

Our rational choice perspective on international crisis bargaining, however, reveals that Congress can play a beneficial role in authorizing the use of force, under certain conditions. Going to Congress for authorization allows the President to generate a costly signal to another nation.<sup>58</sup> If the President undertakes the task of going to Congress to get approval for military hostilities before or in the middle of an international crisis, he must consume political capital to convince Congress to enact legislation. He must reveal some private information to Congress about the factual circumstances of the crisis and military plans and strategies. Finally, the President generates substantial audience costs by making a political commitment to use force if certain circumstances are not met.

Of course, the nature of the legislation contributes to the amount and nature of the audience costs. Compare, for example, congressional authorizations to use force after the September 11 attacks and in the lead up to the Iraq war. Within a week after the September 11, 2001, Congress passed a resolution giving the President wide latitude to use force against any nation, organization or person involved in the September 11, 2001 attacks.<sup>59</sup> When Congress enacted the statute, however, on September 18, the United States was not yet engaged in crisis bargaining with another nation. To be sure, the

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<sup>58</sup> See Jide Nzelibe, *A Positive Theory of the War Powers Constitution*, Iowa L. Rev (forthcoming 2006) (suggesting that the President might have an incentive to seek legislative authorization when the outcome of the war is uncertain in order to send a costly signal to the foreign adversary about the United States' resolve to prosecute the conflict). John Setear has also applied the signaling model developed here to the ratification of treaties. See John Setear, *The President's Rational Choice of a Treaty's Prer ratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement*, 31 J. LEG. STUD. 5 (2002) ("[A] President who wishes to send a credible, durable signal of personal and U.S. commitment to a treaty should seek its approval by Congress.")

<sup>59</sup> SJ Res 23, Pub L No 107-40, 115 Stat 224 (Sept. 18, 2001).

statute did signal that the United States might use force to hold the supporters of the September 11 attacks to account, but at the same time the value of that signal may have been reduced because it did not occur in the context of dispute bargaining. The statute could not signal the United States' expected value of going to war to resolve a dispute, because there was as yet no dispute with another nation. A few weeks later, for example, the United States traced the September 11 attacks to the al Qaeda terrorist organization, and at that point demanded that Afghanistan hand over the organization's leaders. Congressional authorization to use force would likely have had more effect at that point in signaling to Afghanistan's leaders about the expected value of war.

Congressional participation during the lead up to the war in Iraq likely had more effectiveness in signaling American resolve. President Bush went to Congress for authorization for the use of force against Iraq in the midst of an escalating public and diplomatic campaign to force Iraq to relinquish its weapons of mass destruction and to obey United Nations Security Council resolutions seeking to end Iraq's aggressive actions against its neighbors. In his 2002 State of the Union address, President Bush declared Iraq to be part of an axis of evil whose desire to acquire weapons of mass destruction and links to terrorist organizations presented a grave threat to American national security. In September 2002, President Bush spoke before the United Nations and argued that the use of force against Iraq might be necessary in order to force it to obey existing United Nations Security Council resolutions.<sup>60</sup> On October 16, 2002, Congress passed a statute authorizing the President to use force to "defend the national security of the United States against the continuing threat posed by Iraq," and to "enforce all relevant United Nations Security Council resolutions regarding Iraq."<sup>61</sup> American diplomats followed congressional action on November 8, 2002 by convincing the Security Council to adopt Resolution 1441, which declared Iraq to be in material breach of its international commitments and threatened serious consequence for further intransigence. Iraq responded by allowing United Nations weapons inspectors to search its territory for WMD stockpiles, but after the United States and its coalition concluded that Iraq continued to disobey the resolutions, it invaded on March 19, 2003.

Congress's participation was part of a series of signals sent by the United States to Iraq to convince it to give up its WMD capabilities. It was a costly signal, at least more costly than the speeches that preceded it, because it required President Bush to go to Capitol Hill for support, to reveal information to members of Congress about the Iraq situation, and it placed the prestige and credibility of his administration on the line. At the time of its passage, the Bush administration made the argument that Congress had to enact the statute in order to place more pressure on the United Nations and on Iraq, and to show the seriousness of purpose of the United States toward Iraq. While the United States did not incur much *ex ante* costs to make the threat contained in the October, 2002 authorization to use force, it spurred high *ex post* costs in using the military force

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<sup>60</sup> These events are recounted in John Yoo, *International Law and the War in Iraq*, 97 AMJ INT'L L 563 (2003).

<sup>61</sup> HJ Res 114, Pub L No 107-243, 116 Stat 1498 (Oct. 16, 2002).

necessary to make good on the threat once it had concluded that Iraq would not concede. If the United States had decided against using force in the face of refusal by Iraq to concede to American demands, President Bush would have suffered a significant political loss. Putting aside whether one agrees with American policy toward Iraq, it seems clear that President Bush's decision to seek congressional authorization provided the United States with an additional mechanism to signal its willingness to use force, and hence reveal some private information about its expected value from war.

Two other points emerge from this analysis.

First, congressional participation can prove even more vital in the other form of signals, those that depend on sunk costs. Certain sunk cost signaling can involve unilateral presidential action as Commander-in-Chief, such as the movement of military forces. President Bush the elder's immediate deployment of airborne troops to the Saudi Arabian-Kuwaiti border, even though it could not have stopped Iraq's armored forces had they wished to continue toward the Saudi oil fields, represents a signal of this type. Congressional participation was not called upon for such deployments, but longer term, perhaps even heavier sunk costs, would require congressional participation, especially when the signals rise to the level of grand strategy. Take United States' Cold War involvement in the Europe and Asia. In Europe, the United States joined the North American Treaty Organization, stationed large numbers of troops there, and devoted billions of dollars of annual military expenditures to signal to the Soviet Union that it would defend an invasion, or even oppose coercive threats of force, at great cost. In Asia, the United States has entered into a series of mutual defense treaties, maintained a large military establishment in Japan, and stationed a force of 30,000 troops along the border between North and South Korea, again to signal that it would not permit military expansion by Communist China or North Korea to upset the status quo. Presidents alone cannot generate these sunk costs. Rather, they require Congress to approve the weapons systems and size of the armed forces, to fund the ongoing expenses of troops and operations stationed permanently abroad, and to enter into international agreements formalizing long-term security commitments. In fact, if we wanted a constitutional system that included more congressional participation, we would want to bias American signaling in international confrontations in favor of sunk costs rather than tying hands.

Second, congressional participation might play an equal, if not greater, role in ending a crisis in favor of peace. As noted earlier, failures in bargaining that lead to war can arise from private information that is not revealed publicly. Another failure could arise from a commitment failure. Two nations in an international dispute may come to an agreement on an outcome that both sides prefer to war. They cannot, however, credibly commit that they will implement the agreement since one or both nations will have an incentive to cheat if there is no supranational enforcement agency. In other words, the nations suffer from a prisoner's dilemma. Congressional participation at the end of an international confrontation can provide a means for presidents to engage in meaningful commitments to observe a bargain. A President, for example, could seek legislation that would eliminate funding for a weapon system to comply with an arms

control agreement – for example, Congress could eliminate money for Pershing missiles after the United States and the Soviet Union signed the INF treaty. While Presidents could not make absolute guarantees about the conduct of future Presidents and Congress, breaking these commitments would generate significant political costs or would at least be openly public, which could help convince another nation that the United States intends to keep its bargain.

B. *Regime Types and the Varying Value of Costly Signals.*

This section examines a factor that often goes unexamined in arguments supporting congressional participation in war: the costs. We can understand the costs by asking whether the signaling value of congressional authorization varies with the regime type of an opposing nation. If it does, then a rule that Presidents must seek congressional permission ought to vary as well.

The non-cooperative bargaining model of international conflict upon which this paper's signaling model is built depends on rational nation-states pursuing their self-interest. Recent developments in the international system may require that we relax this assumption. Taking rogue states or international terrorist organizations such as al Qaeda into account may distinguish cases in which the benefits of signaling do not outweigh the benefits of executive speed, secrecy, and flexibility. Threats to American national security now come not only from the hostile intentions of other nation-states, but from three other sources: the easy availability of the knowledge and technology to create weapons of mass destruction; the emergence of rogue nations; and the rise of international terrorism of the kind practiced by the al Qaeda terrorist organization.<sup>62</sup> The al Qaeda terrorist network and similar organizations may pose a threat that does not lend itself to resolution through bargaining. To be sure, terrorism has existed in places such as the Middle East and Europe for many decades. What makes the terrorism of September 11 different, however, is that it demonstrates that those using this tactic can cause a level of destruction that once rested only in the hands of nation-states.<sup>63</sup> As a result, the United States may seek to change the conduct of, or take possession of assets in the hands of, terrorist organizations.

At the same time, terrorist attacks are more difficult to detect and prevent due to the unconventional nature of their operations. Al Qaeda terrorists, for example, blend into civilian populations, use the channels of open societies to transport personnel, material, and money, and then target civilians with the object of causing massive casualties.<sup>64</sup> Terrorist groups like al Qaeda seek to acquire WMDs, are less likely to be reluctant to use them, and—since they have no population or territory to defend—may

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<sup>62</sup> See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

<sup>63</sup> See Robert J. Delahunty & John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J. L. & PUB. POLICY 487 (2002).

<sup>64</sup> See The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (2004).

be immune to traditional concepts of deterrence that permeate the crisis bargaining model.<sup>65</sup> Normal methods of diplomacy and detection of an enemy's preparations for attack, which help address the threats posed by hostile nations, may prove of little use against terrorists who seek to attack civilian targets by surprise and who are not interested in territorial concessions from western countries.

In particular, signaling of the kind discussed in this paper may prove ineffective in regard to these groups or nations. International terrorist organizations may not be particularly attuned to the meaning of congressional action. They may place no value on such a signal because they may not have a sufficient understanding of the American political system. Similarly, the leaders of rogue nations may not place an accurate value on a tying hands signal because they may underestimate the meaning of congressional participation or they might assume that Congress does not exercise independent authority in the American political system.

More importantly, the informational value of the signaling mechanism among democracies depends heavily on the existence of transparency and domestic political accountability, both of which are usually lacking in terrorist organizations and rogue states. In a sense, the very logic of the signaling mechanism assumes that because democracies are aware that other democracies are less likely to back down in an escalating international crisis, democracies will be less reluctant to get involved in wars against each other in the first place.<sup>66</sup> Because rogue states and terrorist organizations face little or no political accountability for their foreign policy failures, however, they can afford to ignore their domestic audiences and take more aggressive stances in initiating international conflicts. Conversely, once they enter into an escalating international crisis, rogue states can easily afford to back out of the crisis without paying a political price for seeming inconsistent or weak. In sum, the crisis bargaining model suggests that rogue states are neither likely to signal credible commitments of their resolve in an international crisis, nor are they likely to appreciate costly signals made by other states.

Even if terrorist organizations or rogue states did understand the meaning of such signals, common ground that could produce a bargain could still be absent. Al Qaeda demands, for example, that the United States withdraw from the Middle East, cease its support of moderate Arab regimes and of Israel, and that a fundamentalist Islamic caliphate replace those regimes.<sup>67</sup> Assuming that the United States will not alter its foreign policy in such a dramatic fashion, there is no possibility of a bargain. Or take a rogue state that seeks to develop WMD technology. A nation such as North Korea may be unwilling to truly give up its efforts to develop a nuclear weapon, regardless of the benefits that the United States or its allies might be willing to offer. Again, there is no

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<sup>65</sup> The National Security Strategy of the United States of America 15 (Sept. 2002).

<sup>66</sup> See Fearon, *Domestic Political Audiences*, *supra* note \_\_ at 580; see also Bueno de Mesquite et al., *Nasty or Nice? Political Regimes, Endogenous Norms, and the Treatment of Adversaries*, 41 J. CONF. RES. 175, 180 (1997).

<sup>67</sup> 9/11 Commission Report, *supra* note , at .

outcome that will make both nations better off while avoiding the losses produced to both sides by war.

Balanced against the declining value of costly signals is the benefit of using preemptive force against terrorists or rogue states. As September 11 showed, terrorist attacks can occur without warning because their unconventional nature allows their preparation to be concealed within the normal activities of civilian life. Terrorists have no territory or regular armed forces from which to detect signs of an impending attack. Yet, they can inflict a magnitude of destruction that would have once only been achievable by a nation-state using conventional arms. To defend itself from such an enemy, the United States might need to use force earlier and more often than was the norm during a time when nation-states generated the primary threats to American national security.<sup>68</sup> It might also need to use force in many different geographic locations in response to the stateless terrorist organization's dispersal of its own assets. Thus, for example, the United States is currently fighting terrorists in places such as Afghanistan, Yemen, Iraq, and the Philippines not because of hostility toward their governments, but because al Qaeda has hidden part of its operations there.

In addition to the dispersed, camouflaged nature of such terrorist groups, a second characteristic may render the use of force more immediately necessary than in previous conflicts. Because al Qaeda is not a nation, and has no territory or population, it may well be more difficult to defeat than a nation-state. Al Qaeda is similar to a traditional nation-state enemy in the resources it can command and the damage it can inflict, and it also uses military force to achieve political, rather than personal or financial, ends. But, al Qaeda is different from the nation-state enemy in the sense that the traditional means of engaging in, let alone ending, a conflict do not seem to apply.<sup>69</sup> Capture of a city or control over a population will not end the conflict with al Qaeda. It is not clear whether al Qaeda could sign a peace treaty, and even if captured leaders such as Osama bin Laden did seek to enter into an agreement ending hostilities, it is unclear whether they could enforce it on their dispersed cells and operatives. Al Qaeda's decentralized network structure likely could require a longer conflict than against a nation-state, because there is no clear way to prevail aside from defeating the organization in detail.<sup>70</sup>

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<sup>68</sup> See Yoo, *Using Force*, *supra* note , at ; Marc Trachtenberg, Pre-emptive War and the United States (manuscript 2005) (on file with author).

<sup>69</sup> See, e.g., Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT'L L. REV. 1, 31 (2005); Major Jeremy A. Ball, *Imperial Hubris: Why The West Is Losing The War On Terror*, 183 MIL. L. REV. 187, 192 (2005); Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War*, 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 309, 310 (2005); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L. J. 1801, 1870 n.16 (2004); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 816 (2004).

<sup>70</sup> 9/11 Commission Report, at .

As with terrorism, the threat posed by rogue nations may again require the United States to use force earlier and more often than it would like.<sup>71</sup> Rogue nations may very well be immune to pressure short of force designed to stop their quest for WMD or their threat to the United States. Rogue nations, for example, have isolated themselves from the international system, are less integrated into the international political economy, and repress their own populations. This makes them less susceptible to diplomatic or other means of resolving disputes short of force, such as economic sanctions. Lack of concern for their own civilian populations renders the dictatorships that often govern rogue nations more resistant to deterrence. North Korea, for example, appears to have continued its development of nuclear weapons despite years of diplomatic measures to change its course.<sup>72</sup> Meanwhile international inspectors today are having trouble dealing with what appears to be Iran's clandestine nuclear weapons program. The United States has employed economic sanctions against both countries for decades. Suppose the United States were confronted with a North Korea armed with nuclear weapons and intercontinental ballistic missiles, and could only deploy a missile defense shield whose effectiveness was questionable. Given North Korea's bellicose threats against the United States and its refusal of diplomatic efforts, the United States might resort to force to prevent deployment of the nuclear missiles.

Third, the nature of warfare against such unconventional enemies may well be different from the set-piece battlefield matches between nation-states. Gathering intelligence, from both electronic and human sources, about the future plans of terrorist groups may be the only way to prevent September 11-style attacks from occurring again.<sup>73</sup> Covert action by the Central Intelligence Agency or unconventional measures by special forces may prove to be the most effective tool for acting on that intelligence. Similarly, the least dangerous means for preventing rogue nations from acquiring WMD may depend on secret intelligence gathering and covert action, rather than open military intervention. A public revelation of the means of gathering intelligence, or the discussion of the nature of covert actions taken to forestall the threat by terrorist organizations or rogue nations, could render the use of force ineffectual or sources of information useless. Suppose, for example, that American intelligence agencies detected through intercepted phone calls that a terrorist group had built headquarters and training facilities in Yemen. A public discussion in Congress about a resolution to use force against Yemeni territory and how Yemen was identified could tip-off the group, allowing terrorists to disperse and to prevent further interception of their communications.

These new threats to American national security change the way we think about the relationship between the process and substance of the war-making system. The international system as it existed at the time of the Cold War allowed the United States

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<sup>71</sup> Yoo, *Using Force*, supra note , at .

<sup>72</sup> See generally Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Report to the President (2005) (discussing North Korean development of nuclear weapons).

<sup>73</sup> Id.; see also 9/11 Commission Report, supra note , at .

to choose a war-making system that could have placed a premium deliberation and the approval of multiple institutions, whether for purposes of political consensus (and hence institutional constraints that lower the expected value of war) or the purposes of signaling private information in the interests of reaching a peaceful bargain. If, however, the nature and the level of threats are increasing, the magnitude of expected harm has risen dramatically, and military force unfortunately remains the most effective means for responding to those threats, then it may make more sense for the United States to use force preemptively. Given the threats posed by WMD proliferation, rogue nations, and international terrorism, at the very least it seems clear that we should not adopt a war-making process that contains a built-in presumption *against* using force abroad or that requires long and deliberate procedures.

These developments in the international system may demand that the United States have the ability to use force earlier and more quickly than in the past. Use of force under international law, to be consistent with the United Nations Charter, must be justified by self-defense against an imminent attack (in those cases when not authorized by the Security Council).<sup>74</sup> Elsewhere, we argue that the rise of WMD proliferation, rogue states, and terrorism ought to lead to a reformulation of self-defense away from temporal imminence and toward a calculation of expected harm of an attack.<sup>75</sup> If we understand the use of force as a function of the magnitude of possible harm from an attack adjusted by the probability of such an attack, the United States might need to use force in situations when an attack is not temporally imminent, but nonetheless threatens massive casualties and remains probable.<sup>76</sup> In order to forestall a WMD attack, or to take advantage of a window of opportunity to strike at a terrorist cell, the executive branch needs the flexibility to act quickly, possibly in situations where congressional consent cannot be obtained in time to act on the intelligence. By acting earlier, perhaps before WMD components have been fully assembled or before an al Qaeda operative has left for the United States, the executive branch might also be able to engage in a more limited, more precisely targeted, use of force.

These cases suggest that a permanent constitutional rule requiring congressional permission to use force would be over-inclusive. In certain situations, particularly when the United States is facing a nation-state with a similar political system or one which can apply sophisticated understanding of foreign nations, signaling through congressional participation may prove valuable. But costly signals may prove to be ineffective in other situations, particularly in which rogue states or international terrorist organizations are the opponent. There may be little value in revealing private information through legislative commitments if the opponent does not understand the meaning of congressional participation or does not share a common value system that would allow a

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<sup>74</sup> U.N. CHARTER art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .”)

<sup>75</sup> See Yoo, *Using Force*, supra note , at .

<sup>76</sup> Id.

bargain to be struck. In such cases, we might conclude that the benefits of swift, even preemptive military action by the executive branch might outweigh the potential effectiveness of signaling. This suggests that a two-tier approach to war powers might be desirable, in which conflicts with similar nation-states should involve congressional authorization, which can only assist the executive branch in reaching a bargain with a foreign nation. But if the opponent is a terrorist organization or a rogue nation, the United States might be better off retaining a system of executive initiative in war.

### C. *The Dangers of Judicial Intervention.*

Faced with the prospect that congressional participation can sometimes play a salutary role in avoiding unnecessary wars, an antecedent question naturally arises: should the courts play a role in deciding when such a congressional role would be appropriate? Indeed, a recurring theme running through much of the Congress-first literature is that judicial intervention is necessary to vindicate the congressional role in initiating conflicts.<sup>77</sup> But if one accepts the signaling model developed here, then there are three significant reasons why one ought to be wary of a judicial role in resolving war powers controversies.

First, under a dynamic model of international crisis bargaining, judicial review would likely undermine the value of signals sent by the President when he seeks legislative authorization to go to war. In other words, it is the fact that the signal is both costly and discretionary that often makes it valuable in the context of an international crisis. As discussed earlier, regime characteristics broadly influence the informational environment in which various states make decisions about when to use force.<sup>78</sup> Because democratic states are transparent and politically accountable in ways that other regimes are not, democratic leaders are better able to appreciate the value of the signals created by legislative deliberation. But those same costly signals, while enhancing transparency and deliberation among democracies, can be useless or counterproductive when dealing with threats by rogue states or international terrorist organizations that lack political accountability. This is because unlike their democratic counterparts, autocratic leaders can easily ignore or override domestic audiences that oppose their war initiatives. Once one understands that regime characteristics can influence the informational value of signaling, it makes sense that the President should have the maximum flexibility to choose less costly signals when dealing with rogue states or terrorist organizations. The alternative--a judicial rule that mandates costly signals in all circumstances, even when such signals have little or no informational value to the foreign adversary--would dilute the overall value of such signals.

Second, judicial review would preclude the possibility of beneficial bargaining between the President and Congress by forcing warmaking into a procedural straightjacket. In this picture, judicial review would constrain the political branches to

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<sup>77</sup> See ELY, WAR & RESPONSIBILITY, *supra* note \_\_\_ at 54-68.

<sup>78</sup> See discussion in text at *supra* notes

adopt only the tying hands type of signal regardless of the nature or stage of an international crisis. The assumption, indulged by various Congress-first scholars, is that such a judicially-mandated requirement would reduce the overall level of international conflict engaged in by the United States.<sup>79</sup> But as discussed earlier, the political logic underlying the tying hands signal can be a double-edged sword.<sup>80</sup> In other words, although seeking legislative authorization is likely to hamper a democracy's ability to initiate military conflicts in the first place, it also makes it less likely that the democracy will be willing to back out of a conflict once it starts.<sup>81</sup> Therefore, the supposed restraining effect attributed to the tying hands signal can vary considerably depending on whether the democracy is deciding to initiate an international crisis or is already in the midst of an escalating crisis. In other words, tying hand signals are likely to lead to greater international instability once a conflict has already started. Thus, judicial insistence that the President seek legislative authorization for all conflicts could exacerbate the level of instability in an international crisis.

Thus far, our argument presupposes that there are only two institutional models of judicial review from which to choose: a judicial approach that mandates costly legislative authorization for all conflicts or a hands-off judicial approach that gives the President wide latitude to decide when such costly signaling would be beneficial. But there is a third possibility: the courts could make the initial determination as to whether a foreign adversary is the type that would benefit from costly signaling.<sup>82</sup>

At first blush, such a judicial choice of an interpretive approach might appear to resolve the problem of over-inclusive signaling identified above. But here the objection to judicial review would be on institutional competence grounds. Simply put, it would take an institutional leap of faith to believe that courts would be able to discern correctly the regime type of a foreign adversary and decide whether legislative participation would prove to be valuable in any specific war. Of course, courts sometimes make case by case judgments about factual constitutional predicates in other contexts, but decisions about the signaling value of legislative authorization would not only require access to possibly classified information about foreign threats but also the resources to analyze such threats—information and resources that courts clearly lack. Nor can one assume that all democratic regimes will behave alike in their proclivity to initiate or reciprocate hostility. For instance, the President might conclude that although a foreign adversary is nominally a democratic regime, it might not be responsive to costly tying hands signals because it is facing domestic political turmoil.<sup>83</sup> In any event, the judiciary's insulation from the

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<sup>79</sup> See ELY, WAR & RESPONSIBILITY, *supra* note \_\_ at 54-68.

<sup>80</sup> See discussion in text at *supra* notes

<sup>81</sup> See *id.*

<sup>82</sup> Indeed, Dean Slaughter has advocated such a judicial role in discriminating between democratic and autocratic regimes in the context of the application of the political question doctrine. See Anne-Marie Slaughter Burley, *Are Foreign Affairs Different*, 106 HARV. L. REV. 1980, 2003-06 (1993).

<sup>83</sup> For instance, Edward Mansfield and Jack Snyder have argued although mature democracies do not fight one another, democracies in transition are even more prone to war than authoritarian regimes. See

political process makes it particularly ill-suited to decide whether the President's decision about the value of signaling in a particular conflict is wrong or not.<sup>84</sup> Also, judicial decisions involving the appropriate allocation of war powers will not have the political cover of a coordinated political branch decision: if one judge gets it wrong, the implications of the mistake for the country can be fatal, and it is unlikely that subsequent cases will be able to correct the error.

### CONCLUSION

This paper has sought to introduce a more sophisticated functional perspective to the war powers debate. Previous arguments had raised a conflict between formalism – what rules represent the best reading of the constitutional text, structure, and history – and functionalism – what arrangements work best to achieve national goals. Formalist claims in favor of a requirement that Congress pre-authorize hostilities are no longer as compelling as they once seemed. We believe that the better reading of formalist sources is that the Constitution creates a flexible system for making war. If the formalist debate over war has reached a stalemate, then functionalist arguments only gain in importance.

Functional analysis of war powers, however, has been fairly rudimentary. It assumed that a Congress-first approach would slow down decisionmaking toward war, which would benefit the nation by reducing entry into imprudent wars. This assumption, however, ignores that Congress might not only reduce Type I errors, but might also increase Type II errors. A casual review of American history does not support the conclusion that congressional participation reduces either Type I or II errors when compared with a system of unilateral presidential initiative in war.

A better functional approach views the war powers question as a principal-agent problem. The executive branch bears certain advantages in terms of speed, unity of purpose, and secrecy in launching wars; while agency costs may certainly arise, it is not clear that congressional participation *ex ante* would significantly reduce them. Congressional participation, however, while unwise to establish as a constitutional rule, may nonetheless benefit the nation in helping it to avoid costly wars. This occurs, however, not because it slows down the process toward war, but because it allows the President to engage in costly signaling that could promote a negotiated settlement with a potential enemy. Such a dynamic would not make a significant difference in regard to rogue nations or international terrorist organizations which could not properly interpret the signals or which are uninterested in reaching a settlement. In these cases, the benefits

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generally EDWARD D. MANSFIELD & JACK SNYDER, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* (2005).

<sup>84</sup> Various other commentators have also elaborated on the courts' lack of institutional competence to resolve a wide range of foreign affairs controversies. See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 196-98 (engaging in comparative institutional analysis and concluding that delegation to courts to resolve foreign affairs cases would be inappropriate); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 992-95 (2004) (same); J. Gregory Sidak, *To Declare War*, 41 DUKE L. J. 27, 116-18 (1991) (same).

of relying upon executive speed and unity outweigh any benefits that might arise from congressional participation.

One point to clarify at the end is that this paper does not address the normative question of what types of war the United States should fight. It simply assumes that the United States should not enter wars in which its expected costs from fighting outweigh its expected benefits. It does not ask the preceding question of what national aims the United States should seek to pursue. One might certainly argue that a warmaking system should be designed to make war very difficult to wage, simply because all war is harmful. Or one might want to design a warmaking system that would only allow wars that would enhance overall global welfare, instead of simply the national interests of the United States. While that is not an argument advanced by supporters of Congress's powers in war, it is certainly possible. Addressing a cosmopolitan argument of this nature is outside the scope of the current paper, although it seems unrealistic in light of the history of American foreign policy.