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# *Unconstitutional Wars from Truman Forward*

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## *Introduction*

From President Truman's initiation of war against North Korea in June 1950, presidents have exceeded constitutional and statutory authority in exercising the war power. Instead of coming to Congress for a declaration of war or statutory support, they sought "authority" from the U.N. Security Council or NATO allies. The precedent established by Truman was followed by Bill Clinton and Barack Obama. Through their initiatives, they violated the rule of law, the principle of self-government, and the system of checks and balances. The U.S. Constitution expressly rejected the British model that placed with the Executive exclusive authority over all of external affairs, including taking the country to a state of war. The Framers assigned that power solely to Congress.

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A lawsuit filed in 2016, *Smith v. Obama*, asked a federal district court to decide whether President Obama may engage in war against the Islamic State without receiving express authority from Congress. Although Captain Smith and his attorneys, followed by the Justice Department, offered a range of constitutional analysis, the district court dismissed the lawsuit on grounds of standing and the political question doctrine. That issue, analyzed later in the article, is now before the D.C. Circuit (Fisher 2017a).

### *How the Framers Broke with the British Model*

In 1690, John Locke referred to three branches of government: legislative, executive, and federative. By the latter he meant “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.” The powers of executive and federative, he said, “are always almost united” (Locke 1690, Book II, Ch. XII, §§ 146-47). He assigned the federative power to the executive because it “is not necessary” that the legislative branch “should be always in being; but absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made” (*ibid.*, § 153).

In 1765, the British jurist William Blackstone agreed with Locke’s decision to place all of external affairs with the executive. In his chapter on the king’s prerogative, Blackstone said that royal character and authority “are rooted in and spring from the king’s political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors [sic], of creating peers, and of making war or peace” (Blackstone 1765, Book the First, 232-33). Blackstone placed other exclusive powers with the king: making treaties, sending and receiving ambassadors, coining money, the “sole prerogative of making war and peace,” issuing letters of marque and reprisal (authorizing private citizens to take military action), and “the sole power of raising and regulating fleets and armies” (*ibid.*, 243-45, 249-50, 254, 267).

Article I of the U.S. Constitution places many of those powers expressly in Congress: the power to declare war, grant letters of marque and reprisal, coin money, raise and support

*In Britain, all powers over external affairs rested with the executive.*

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armies, and provide and maintain a navy. Other external powers not mentioned by Blackstone are also included in Article I: to regulate commerce with foreign nations, define and punish piracies and felonies committed on the high seas, decide rules concerning captures on land and water, and make rules for the government and regulation of the land and naval forces. The power over treaties and the appointment of ambassadors is shared between the president and the Senate. Nothing in Article II places any exclusive power in the president over external affairs. He is the Commander in Chief of the army and navy and of the militia of the several states, “when called into the actual Service of the United States.” Article I empowers Congress to call forth “the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions.”

*Article II gives the President no exclusive powers over external affairs.*

During debates at the Philadelphia Convention on August 17, 1787, the Framers offered reasons for rejecting the British model. On a motion to vest in Congress the power to “make war,” Charles Pinckney objected that the proceedings of the legislative branch “were too slow” and Congress would “meet but once a year.” He suggested it would be better to vest that power in the Senate, “being more acquainted with foreign affairs, and most capable of proper resolutions” (Farrand 1966, 2: 318). Pierce Butler wanted to vest the war power in the president “who will have all the requisite qualities, and will not make war but when the Nation will support it” (ibid.).

James Madison and Elbridge Gerry moved to change the motion’s language from “make war” to “declare war,” leaving with the president “the power to repel sudden attacks” (ibid.). Roger Sherman remarked that the president “shd. be able to repel and not to commence war.” Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war” (ibid.). George Mason was “agst giving the power of war to the Executive, because not <safely> to be trusted with it. . . . He was for clogging rather than facilitating war; but for facilitating peace” (ibid., 319). The amendment offered by Madison and Gerry passed.

At the Pennsylvania ratifying convention, James Wilson explained that the American system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of

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*Opposition to presidential wars expressed by many Framers.*

men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large” (Elliot 1836-1845, 2: 528).

Opposition to presidential wars was expressed by many Framers. In Federalist No. 4, John Jay explained his objection to executive wars: “It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” Operating under those incentives, a single executive may “engage in wars not sanctified by justice or the voice and interests of his people” (Wright 2002, 101).

James Madison, writing to Thomas Jefferson on April 2, 1798, offered his opposition to allowing single executives to go to war: “The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl” (Hunt 1906, 6: 312). Those who favor independent presidential power often turn to the writings of Alexander Hamilton, but in doing so they frequently distort his position. That pattern is underscored by the Supreme Court’s decision in *Zivotofsky v. Kerry* (2015), discussed later in this article.

### *Efforts to Promote Independent Presidential War Power*

In 1966, the State Department stated that following ratification of the Constitution “there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the ‘undeclared war’ with France (1798-1800)” (U.S. Department of State 1966: 484). However, President John Adams did not claim he possessed independent authority to use military force against France. Instead, he urged Congress to pass “effectual measures of defense” (Richardson 1897-1925, 1: 226). Congress passed several dozen bills to support military action. During

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legislative debate, Rep. Edward Livingston (D-N.Y.) considered the country “now in a state of war; and let no man flatter himself that the vote which has been given is not a declaration of war.”<sup>1</sup> There was no formal declaration of war, and yet military action was authorized by many statutes. Because Congress limited military force to naval—not land operations—the action against France is called the “Quasi-War.”

The list compiled by the State Department includes a number of minor actions. As explained by presidential scholar Edward Corwin, presidential orders for military action consist largely of “fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like” (Corwin 1951, 16).

The Quasi-War precipitated several judicial decisions that highlight the constitutional power of Congress over military actions. In 1800 and 1801, the Supreme Court accepted that Congress could authorize hostilities in two different ways: by a formal declaration of war or by statutes that authorized an undeclared war, as in the case of France. As Justice Samuel Chase remarked: “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. . . . congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land.”<sup>2</sup> In a separate case, Chief Justice John Marshall wrote for the Court: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry.”<sup>3</sup> Neither decision recognized any independent presidential power to take the country to war.

After taking office in 1801, President Thomas Jefferson inherited the U.S. practice of paying annual bribes (“tributes”) to four states of North Africa: Morocco, Algiers, Tunis, and Tripoli. Regular payments were made so they would not interfere with American merchantmen. In ordering several ships to be sent to the Mediterranean, Jefferson ordered that

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<sup>1</sup> 8 Annals of Cong. 1519 (1798).

<sup>2</sup> *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800).

<sup>3</sup> *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 28 (1801).

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they respond to any hostility directed at them. In a message to Congress on December 8, 1801, he informed lawmakers of the military actions, stating he was “unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense.” It was up to Congress to authorize “measures of offense also” (Richardson 1897-1925, 1: 315). Congress proceeded to pass ten statutes authorizing Presidents Jefferson and Madison to take military actions against the Barbary pirates (Fisher 2013, 35).

*Chief Justice Marshall held in 1804 that statutory policy prevails over contrary presidential military action.*

In authorizing war, Congress may limit presidential actions in using military force. Legislation on the Quasi-War authorized President John Adams to seize vessels sailing to French ports. He exceeded statutory policy by ordering American ships to capture vessels sailing to or from French ports. Captain George Little followed Adams’s order and seized a Danish ship sailing from a French port. Sued for damages, his case came before the Supreme Court. Chief Justice Marshall agreed with his colleagues that the instructions issued by President Adams “cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”<sup>4</sup> Thus, statutory policy necessarily prevails over contrary presidential orders and military actions. For that reason, Captain Little “must be answerable in damages to the owner of this neutral vessel.”<sup>5</sup>

In 1807, a decision issued by a federal appellate court underscored the requirement that presidential action as commander in chief must comply with statutory policy. The case involved Colonel William S. Smith, indicted for engaging in military actions against Spain. He claimed that his initiative “was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government.”<sup>6</sup> The court rejected the claim that a president or his assistants could somehow authorize military adventures that violate congressional policy, in this case the Neutrality Act of 1794. To the court, the statute was “declaratory of the law of nations; and besides, every species of private and unauthorized hostili-

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<sup>4</sup> Little v. Barreme, 6 U.S. (2 Cr.) 170, 179 (1804).

<sup>5</sup> Ibid.

<sup>6</sup> United States v. Smith, 27 Fed. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

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ties is inconsistent with the principles of the social compact, and the very nature, scope, and end of civil government.”<sup>7</sup>

The court denied that the Neutrality Act somehow allowed executive officers to waive statutory provisions. Even if Colonel Smith received some kind of implicit or explicit approval for his military initiative, the president “cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.” The court asked: “Does [the president] possess the power of making war? That power is exclusively vested in congress.”<sup>8</sup>

Military actions by President Abraham Lincoln at the start of the Civil War are often cited as evidence that emergencies may shift congressional powers to the president. He did not argue that. When war broke out, he called out the militia, suspended the writ of habeas corpus, and took other actions. But after Congress assembled in special session on July 4, 1861, Lincoln did not claim to act exclusively under his Article II powers. Instead, he admitted using the Article I powers of Congress: “It is believed that nothing has been done beyond the constitutional competency of Congress” (Basler 1953, 4: 429). To comply with the Constitution, it was necessary for lawmakers to review his actions and decide whether to authorize what he had done. A bill providing retroactive authority became law on August 6, 1861.<sup>9</sup>

*Lincoln did not claim to act exclusively under his Article II powers in the Civil War.*

In 1863, the Supreme Court upheld Lincoln’s blockade of ports in the South.<sup>10</sup> That decision is often cited to uphold broad interpretations of the president’s power over war (Garrison 2011, 61-69, 81-82, 131, 450). However, both the Lincoln administration and the Court read those powers narrowly. Lincoln’s action was purely internal and domestic, having nothing to do with exercising the war power outside the United States. Writing for the majority, Justice Grier stated that the president “has no power to initiate or declare a war either against a foreign nation or a domestic State.”<sup>11</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid., 1230.

<sup>9</sup> 12 Stat. 326 (1861).

<sup>10</sup> The Prize Cases, 67 U.S. 635 (1863).

<sup>11</sup> The Prize Cases, 67 U.S. 635, 668 (1863).

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### *How Judicial Decisions Promote Presidential Power*

In *United States v. Curtiss-Wright Export Corporation* (1936), the Supreme Court promoted for the first time a conception of presidential power in external affairs that was plenary and exclusive. The case itself had nothing to do with independent presidential power. It arose when Congress in 1934 authorized the president to prohibit the sale of arms in the Chaco region of South America whenever he found that it “may contribute to the reestablishment of peace” between belligerents.<sup>12</sup> In imposing the embargo, President Franklin D. Roosevelt relied entirely on statutory authority. His proclamation prohibiting the sale of arms and munitions to countries engaged in armed conflict in the Chaco began: “NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority in me by the said joint resolution of Congress . . . .”<sup>13</sup>

A district court, holding that the joint resolution on the arms embargo represented an unconstitutional delegation of legislative authority, said nothing about the existence of any type of independent presidential power in external affairs.<sup>14</sup> None of the briefs on either side discussed the availability of any type of exclusive presidential power. The government’s brief consistently regarded the source of authority as legislative, not executive.

The district court decision was taken directly to the Supreme Court. Writing for the majority, Justice George Sutherland reversed the district court and upheld the delegation of legislative power to the president. That should have been the end of the decision. However, in extensive dicta, he added many errors that expanded presidential power in the field of external affairs. He claimed that after America declared independence from England in 1776, sovereign authority somehow traveled directly from Great Britain to the national level. His theory has been thoroughly discredited (Goebel 1938: 571-73). After 1776, American states entered into treaties. The peace treaty with Great Britain described the United States in terms

*An error-filled  
1936 High  
Court decision  
promoted  
expansive  
conception of  
presidential  
power.*

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<sup>12</sup> 48 Stat. 811 (1934).

<sup>13</sup> *Ibid.*, 1745.

<sup>14</sup> *United States v. Curtiss-Wright Exp. Corp.*, 14 F. Supp. 230 (S.D.N.Y. 1936).



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of New Hampshire, Massachusetts Bay, Rhode Island, and others as “free, sovereign and independent States.”<sup>15</sup>

A second Sutherland error: the president “alone negotiates” treaties and into that field “of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”<sup>16</sup> In his book published in 1919, drawing on his twelve years as a U.S. Senator from Utah, Sutherland described how senators participate in treaty negotiation and presidents agree to this “practical construction” (Sutherland 1919, 122-24). Presidents also invite representatives to engage in treaty negotiation. Involvement of House members helps build political support for authorizations and appropriations needed to implement treaties (Fisher 1989).

Sutherland’s third error consists of quoting entirely out of context a speech that John Marshall gave in 1800 when he served as a member of the House of Representatives. Marshall said during debate: “The President is the sole organ of the nation in external relations, and its sole representative with foreign nations.”<sup>17</sup> The term “sole organ” is ambiguous. “Sole” means exclusive or plenary, but what is meant by “organ”? A president who announces to other nations U.S. policy decided by *both* branches, either by statute or treaty? Sutherland interpreted the remark to attribute to the president not merely “an exertion of legislative power,” as delegated by Congress, but “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”<sup>18</sup>

Anyone who reads the full speech by Marshall would understand that he did not promote independent, plenary, and exclusive power for the president in external affairs. Given the express language in Articles I and II of the Constitution, that position would be absurd. Instead, he merely explained

*Peace treaty with Britain recognized the states individually as “free, sovereign and independent.”.*

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<sup>15</sup> 8 Stat. 55 (1782).

<sup>16</sup> United States v. Curtiss-Wright, 299 U.S. 319.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., 319-20.

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that when President Adams transferred to Great Britain an individual charged with murder he did so on the basis of an extradition provision in the Jay Treaty. He simply carried out a treaty.<sup>19</sup> Although Sutherland committed plain error, the sole-organ doctrine expanded presidential power from one decade to the next.

### *The Jerusalem Passport Case*

On July 12, 2013, the D.C. Circuit held that congressional legislation in 2002 “impermissibly infringes” on the president’s power to recognize foreign governments.<sup>20</sup> To justify its decision, the court relied five times on the erroneous *Curtiss-Wright* sole-organ doctrine.<sup>21</sup> It understood that the doctrine was dicta, but concluded it was appropriate to “carefully” consider language of the Supreme Court “even if technically dictum.” Lower courts must “generally” treat the dictum as “authoritative.”<sup>22</sup>

On July 17, 2014, I filed an amicus brief with the Supreme Court, pointing out the multiple errors committed by Justice Sutherland and asking the Court to correct them because they pushed presidential power beyond constitutional boundaries and weakened the system of checks and balances.<sup>23</sup> In *Zivotofsky v. Kerry*, decided on June 8, 2015, the Supreme Court partially corrected the sole-organ doctrine but left in place the erroneous dicta about sovereignty traveling from England to the national government and the president possessing exclusive power over treaty negotiation.<sup>24</sup>

As with *Curtiss-Wright*, the 2015 decision helped promote independent presidential power in external affairs (Fisher 2016). Chief Justice Roberts remarked in his dissent: “Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs. . . . For our first 225 years, no President prevailed

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<sup>19</sup> 10 Annals of Cong. 602, 606-07, 613-14 (1800).

<sup>20</sup> *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 (D.C. Cir. 2013).

<sup>21</sup> *Ibid.*, 211 (twice), 213, 215, 219.

<sup>22</sup> *Ibid.*, 212.

<sup>23</sup> Brief *Amicus Curiae* of Louis Fisher, *Zivotofsky v. Kerry*, No. 13-628, July 17, 2014; <http://www.loufisher.org/docs/pip/Zivotofsky.pdf>.

<sup>24</sup> *Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015).

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when contradicting a statute in the field of foreign affairs.”<sup>25</sup> Roberts correctly noted that *Curtiss-Wright* “did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation.”<sup>26</sup>

In one passage, the majority in *Zivotofsky* appeared to support congressional authority in external affairs: “In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The Executive is not free from the ordinary controls and checks and balances merely because foreign affairs are at issue. . . . It is not for the President alone to determine the whole content of the Nation’s foreign policy.”<sup>27</sup> Those observations are obvious by reading the text of the Constitution and reflecting on more than two centuries of history.

The majority in *Zivotofsky* supported independent presidential power in external affairs in part by relying on Hamilton’s Federalist No. 70, which argued that “unity is conducive to energy.” To the Court, with unity comes the ability to exercise presidential powers that Hamilton identified as “[d]ecision, activity, secrecy, and dispatch.”<sup>28</sup> The majority assumed that the mentioned qualities automatically deliver positive results, but consider examples where presidential unity, energy, decisiveness, activity, secrecy, and dispatch resulted in great harm to the nation and its constitutional system: Harry Truman’s decision to go North in Korea, resulting in intervention by the Chinese and a costly stalemate; Lyndon Johnson’s escalation of the Vietnam War; Richard Nixon’s Watergate; Ronald Reagan’s Iran-Contra; George W. Bush going to war against Iraq on the basis of six false claims that Saddam Hussein possessed weapons of mass destruction; and Barack Obama using military force to remove Muammar Qaddafi from office, turning Libya into a failed state and a breeding ground for terrorists.

*Executive  
unity,  
unchecked  
by Congress,  
has brought  
great harm.*

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<sup>25</sup> *Ibid.*, 2113.

<sup>26</sup> *Ibid.*, 2115.

<sup>27</sup> *Ibid.*, 2090.

<sup>28</sup> *Ibid.*

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### *Relying on International and Regional Bodies for “Authority”*

From 1789 to 1950, presidents who decided it was necessary to use military force against other nations regularly reached out to Congress to request either statutory authority or a declaration of war. The record from 1950 forward has been strikingly different. Presidents Truman, Clinton, and Obama did not turn to Congress for authority. Instead, they claimed support from the U.N. Security Council or NATO allies. Such claims have no constitutional support. The Senate through the treaty process may not transfer Article I powers of Congress to international and regional organizations.

In 1945, senators were engaged in debating the United Nations Charter. President Truman, aware of questions about how the United States would authorize the use of American forces in a U.N. military action, decided from Potsdam to wire a note to Senator Kenneth McKellar (D-Tenn.). In his note of July 27, 1945, Truman pledged: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.”<sup>29</sup> In requiring legislation from “Congress,” senators understood that Congress “consists not alone of the Senate but of the two Houses.”<sup>30</sup> After reaching that understanding, the Senate approved the U.N. Charter by a vote of 89 to 1.<sup>31</sup>

Congress now had to pass legislation to implement the Charter and decide how to authorize military force. Under the Charter, all U.N. members would make available to the Security Council, “on its call and in accordance with a special agreement or agreements,” armed forces and other assistance for the purpose of maintaining international peace and security. Those agreements “shall be subject to ratification by the signatory states in accordance with their respective constitutional processes” (Fisher 2013, 88). Congress had to decide how to articulate and honor those constitutional processes.

That congressional effort is expressed in the U.N. Participation Act, enacted in December 1945. The statute provides that agreements for the use of military force “shall be subject to the approval of the Congress by appropriate Act or joint

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<sup>29</sup> 91 Cong. Rec. 8185 (1945).

<sup>30</sup> *Ibid.* (Senator Forrest Donnell [R-Mo.]).

<sup>31</sup> *Ibid.*, 8190.

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resolution.”<sup>32</sup> Statutory language could not be more clear. The legislative history of this statute underscores the need for advance congressional approval (Fisher 2013, 91-94). In signing the U.N. Participation Act, President Truman did not express any constitutional or policy objections.

Presidential power to use armed forces in U.N. actions is further defined by amendments to the U.N. Participation Act adopted in 1949, allowing the president on his own initiative to provide military forces to the U.N. for “cooperative action.” However, presidential authority is subject to stringent conditions: military forces can serve only as observers and guards, can perform only in a noncombatant capacity, and cannot exceed 1,000 in number.<sup>33</sup>

On June 26, 1950, President Truman announced to the American public that the Security Council had ordered North Korea to withdraw its forces from South Korea.<sup>34</sup> At that time, he made no commitment of U.S. military forces. A day later, however, stating that North Korea had failed to cease hostilities, he ordered U.S. air and sea forces to give South Korea cover and support. The United States, he said, “will continue to uphold the rule of law.”<sup>35</sup> Instead, he was violating the explicit and unambiguous language of the U.N. Participation Act. With the Soviet Union absent, the Security Council voted nine to zero to call upon North Korea to withdraw their forces from South Korea. Secretary of State Dean Acheson claimed that Truman acted in “conformity with the resolutions of the Security Council of June 25 and 27, giving air and sea support to the troops of the Korean government” (U.S. Department of State 1950: 43, 46). Truman never requested nor did he receive authority from Congress as stipulated in the U.N. Participation Act.

At a news conference on June 29, a reporter asked Truman if the country was at war. His answer: “We are not at war.” Asked whether it would be more correct to call the conflict “a police action under the United Nations,” he replied: “That

*Truman’s entry to Korean war without authority from Congress was direct violation of the U.N. Participation Act.*

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<sup>32</sup> 59 Stat. 621, sec. 6 (1945).

<sup>33</sup> 63 Stat. 735-36, sec. 5 (1949).

<sup>34</sup> Public Papers of the Presidents, 1950, 491.

<sup>35</sup> *Ibid.*, 492.

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is exactly what it amounts to.”<sup>36</sup> During Senate hearings in June 1951, Acheson conceded the obvious by admitting “in the usual sense of the word there is a war.”<sup>37</sup> Federal and state courts, facing disputes over insurance policies and other matters, regularly agreed that hostilities in Korea amounted to war. A federal district court in 1953 remarked: “We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war.”<sup>38</sup>

*Rather than Congress, Clinton looked to NATO and Obama looked to the U.N. to authorize force in Kosovo and Libya.*

President Truman’s decision to circumvent Congress by seeking “authority” from the Security Council was later followed by President Clinton in Haiti and Bosnia. When Clinton was unable to obtain U.N. authority to take military action in Kosovo, he reached out to NATO allies for support. At no time did he seek authority from Congress for those actions. In 2011, in preparing to use military force in Libya, President Obama sought authority not from Congress but from the Security Council. Whether relying on the U.N. or NATO, treaties may not shift constitutional authority from Congress to outside bodies (Fisher 1997).

The North Atlantic Treaty, signed by the United States and other nations on April 4, 1949, was agreed to by the Senate on July 21, 1949, and signed by President Truman on July 25, 1949.<sup>39</sup> Under Article 5, the parties agreed that “an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.” If an armed attack occurs, each nation, “in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations,” shall assist the party or parties so attacked.<sup>40</sup> As with the U.N. Charter, Article 11 of the NATO treaty provides that the treaty “shall be ratified and its provisions carried out by Parties in accordance with their respective

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<sup>36</sup> *Ibid.*, 504.

<sup>37</sup> “Military Situations in the Far East” (Part 3), hearings before the Senate Committees on Armed Forces and Foreign Relations, 82d Cong., 1st Sess. (1951), 2014.

<sup>38</sup> *Weissman v. Metropolitan Life Ins.*, 112 F. Supp. 420, 425 (S.D. Cal. 1953).

<sup>39</sup> 63 Stat. 2241 (1949).

<sup>40</sup> *Ibid.*, 2244.

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constitutional processes.”<sup>41</sup> Congress defined the constitutional processes of the United States when it passed the U.N. Participation Act.

When President Obama reported to Congress on March 21, 2011, he stated that U.S. forces operating under the U.N. resolution had begun a series of strikes against Libyan air defense systems and military airfields “for the purposes of preparing a no-fly zone.” Those strikes, he said, “will be limited in their nature, duration, and scope.”<sup>42</sup> The term “no-fly zone” might sound like something so constrained it should not be considered as war. However, it requires destroying the capacity of a country to act against the United States and its allies. Regardless of how U.S. officials seek to downplay a no-fly zone, using military force against another country that has not threatened the United States is, as former Secretary of Defense Robert Gates has said, an “act of war” (Gates 2015, 513). The no-fly zone in Libya began with an attack on its system of air defenses.

Initially, the purpose was to protect innocent civilians, particularly those living in Benghazi. Obama stated that military initiatives were taken “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”<sup>43</sup> A memo released by the Office of Legal Counsel on April 1 concluded that the military actions against Libya did not constitute “war” because of the limited “nature, scope, and duration” of the planned military operations.<sup>44</sup>

On March 21, 2011, Obama explained that the United States was taking military action in Libya to enforce the Security Council Resolution, anticipating that operations would conclude “in a matter of days and not a matter of weeks.”<sup>45</sup> Military force continued for seven months, exceeding the 60-90 day limit of the War Powers Resolution, discussed in the next section. Having received OLC’s memo that “war” did not exist, Obama now wanted a legal judgment that “hostilities” did

*Neither the U.N. nor NATO treaty shifts constitutional authority for war from Congress to outside bodies.*

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<sup>41</sup> Ibid., 2246.

<sup>42</sup> Public Papers of the Presidents, 2011, I, 280.

<sup>43</sup> Ibid., 281.

<sup>44</sup> Office of Legal Counsel, “Authority to Use Military Force in Libya,” April 1, 2011; <http://www.whitehouse.gov/olc/2011/authority-military-use-in-libya.pdf>.

<sup>45</sup> Public Papers of the Presidents, 2011, I, 266, 271.

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not exist. OLC declined to produce that memo. It would have been difficult to do so. Its April 1 memo repeatedly mentioned the use of military “force” and the “destruction of Libyan military assets.” Jeh Johnson, General Counsel in the Defense Department, also refused Obama’s request. He could not deny the existence of hostilities in the form of Tomahawk missiles, armed drones, and NATO aircraft bombings. Eventually, White House Counsel Robert Bauer and State Department Legal Advisor Harold Koh agreed to state that no hostilities existed in Libya (Savage 2011). The Obama administration made many efforts to deny the existence of hostilities in Libya (Fisher 2012).

### *War Powers Resolution*

After decades of debate, Congress passed legislation in 1973 in an effort to limit presidential war power. The House and the Senate pursued very different strategies. As explained by Senator Tom Eagleton (D-Mo.), the two chambers “marched down separate and distinct roads, almost irreconcilable roads.”<sup>46</sup> The House chose procedural safeguards, requiring the president (“whenever feasible”) to consult with lawmakers before sending troops into combat, reporting the circumstances that necessitated the action, citing authorities that justified military force, and explaining why congressional authorization was not requested in advance.<sup>47</sup>

In contrast, the Senate chose to identify the circumstances under which presidents could act unilaterally: (1) repelling an armed attack upon the United States and its territories and possessions, including forestalling the threat of such an attack; (2) repelling an armed attack against U.S. armed forces located outside the United States and its territories and possessions; and (3) rescuing endangered American citizens and nationals in foreign countries or at sea. Except for the final clause, the first situation conforms with debates at the Philadelphia Convention. The other situations reflect changes in presidential power that developed later.

Congressional efforts to codify presidential war powers carried various risks. As a result of ambiguous language, statutory policy could broaden presidential power instead of limiting it.

<sup>46</sup> 119 Cong. Rec. 33555 (1973).

<sup>47</sup> 116 Cong. Rec. 37398-408 (1970); 117 Cong. Rec. 28870-78 (1971).



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In vetoing the bill, President Nixon objected that it encroached upon the president's constitutional responsibilities as Commander in Chief. The only way the constitutional powers of the two elected branches could be altered was "by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force."<sup>48</sup> However, President Truman had altered the Constitution by taking the country to war against North Korea on the basis of U.N. Security Council resolutions rather than congressional authority. Both Houses overrode Nixon's veto, the House narrowly (284 to 135) and the Senate by a more comfortable margin (75 to 18).

*Ambiguous language in War Powers Act serves to broaden presidential power, rather than limit it.*

The War Powers Resolution requires the president to notify Congress within 48 hours of committing armed forces to military action and prohibits armed forces from remaining for more than 60 days, with a further 30-day withdrawal period, without a Congressional authorization for use of military force (AUMF) or a declaration of war by the United States. The purpose of the Resolution, under Section 2(a), is "to fulfill the intent of the framers of the Constitution of the United States and insure . . . the collective judgment" of both branches when U.S. forces are introduced into hostilities. For the period of 60 to 90 days, it does neither. Under Section 3, the president is directed to consult with Congress "in every possible instance," leaving full discretion to the president. Once U.S. forces have been introduced into hostilities, the president is required to report to Congress within 48 hours.

There is some uncertainty about how the 60-90 day clock begins. When President Reagan reported to Congress on his air strikes against Libya in 1986, he reported "consistent with the War Powers Resolution."<sup>49</sup> The clock never started. Yet executive officials have often acted as though the clock is running. Military initiatives in Grenada by President Reagan and in Panama by President Bush I were completed within the 60-day limit. President Clinton's military operations in Kosovo lasted 78 days, the first time the 60-day clock was exceeded (Hendrickson 2002, 117). Obama's military actions in Libya went beyond 90 days.

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<sup>48</sup> Public Papers of the Presidents, 1973, 893.

<sup>49</sup> Public Papers of the Presidents, 1986, I, 478.

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### *Captain Smith's Lawsuit*

On July 11, 2016, the Justice Department submitted four reasons to a district court why Captain Smith's challenge of the war against the Islamic State absent congressional authorization should be dismissed: (1) his claims raised non-justiciable political questions; (2) he lacked standing to assert his claims; (3) there was no waiver of sovereign immunity that permitted his claims to proceed; and (4) he could not obtain equitable relief against President Obama.<sup>50</sup> Regarding the first point, the Justice Department noted that, following enactment of the War Powers Resolution, "nearly every President has committed U.S. armed forces into combat operations overseas."<sup>51</sup> That is correct, but those operations generally ceased within 60 days. Air strikes against the Islamic State began in August 2014. Executive officials predicted that military operations would continue well beyond the Obama administration, possibly lasting up to ten years or more.

To the Justice Department, no executive-legislative conflict existed because Congress had appropriated "billions of dollars in support of the military operation" against the Islamic State.<sup>52</sup> As for standing, the government claimed that courts "repeatedly have rejected the proposition that swearing an oath to support and defend the Constitution can transform such a generalized interest into a concrete form."<sup>53</sup> The government relied on the 2015 case of *Crane v. Johnson*. However, that case involved an immigration agent who objected that the administration's policy of protecting undocumented aliens from deportation prevented enforcement officers from carrying out statutory policy.<sup>54</sup> Actions by immigration agents have little to do with the lengthy history of military officers being required to refuse to carry out orders that violate the Constitution.

The Justice Department referred to "an unbroken stream of appropriations" that support military actions against the Islamic State.<sup>55</sup> The availability of appropriations "is not dis-

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<sup>50</sup> <https://assets.documentcloud.org/documents/2991414/Smith-v-Obama-Govt-Motion-to-Dismiss.pdf>.

<sup>51</sup> *Ibid.*, 1.

<sup>52</sup> *Ibid.*, 2.

<sup>53</sup> *Ibid.*, 3.

<sup>54</sup> *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

<sup>55</sup> Government's motion to dismiss, *Smith v. Obama*, July 11, 2016, 25.

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turbed by section 8(a) of the War Powers Resolution, which purports to bar Congress from authorizing military operations through an appropriations measure unless that measure ‘states that it is intended to constitute specific statutory authorization within the meaning of this chapter.’”<sup>56</sup> Section 8(a) does not *purport* to do that. Plain language requires it.

The Justice Department did not explain why Congress adopted Section 8(a). During the early 1970s, the Nixon administration and congressional leaders differed on whether appropriation bills are instruments for setting congressional policy. Officials in the Johnson administration argued that Congress authorized the escalation of the Vietnam War by appropriating funds. Some federal courts treated appropriations as sufficient legislative authority. Said one judge: “That some members of Congress talked like doves before voting with the hawks is an inadequate basis for a charge that the President was violating the Constitution in doing what Congress by its words had told him he might do.”<sup>57</sup>

*Justice Department obfuscated Congress’s purpose in adopting Section 8(a).*

However, experts in the legislative process explained to federal judges that appropriation bills do not encompass major declarations of legislative policy. They pointed to House and Senate rules intended to prohibit substantive legislation from being included in appropriations bills.<sup>58</sup> After learning how congressional procedures distinguish between authorization and appropriations bills, judges began to change their minds.<sup>59</sup> Federal appellate Judge Arlin Adams said it would be impossible to decide whether Congress, through its appropriations, meant to authorize the military activities in Vietnam: “to explore these issues would require the interrogation of members of Congress regarding what they intended by their votes, and then synthesization of the various answers. To do otherwise would call for a gross speculation in a delicate matter pertaining to foreign relations.”<sup>60</sup>

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<sup>56</sup> *Ibid.*, 29, n.47.

<sup>57</sup> *Berk v. Laird*, 317 F. Supp. 715, 724 (E.D. N.Y. 1970), *aff’d sub nom. Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971).

<sup>58</sup> *Berk v. Laird*, 317 F. Supp. 718, 721 (testimony of Professors Richard F. Fenno, Jr. and Don Wallace, Jr.).

<sup>59</sup> E.g., *Mitchell v. Laird*, 476 F.2d 533, 538 (D.C. Cir. 1973). This decision was later withdrawn by court order.

<sup>60</sup> *Atlee v. Laird*, 347 F. Supp. 689, 706 (E.D. Pa. 1972) (three-judge court),

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Section 8(a) of the War Powers Resolution was adopted to prohibit presidents from claiming that appropriations or treaties offered indirect legislative support for military initiatives. Language in appropriations must specifically authorize the introduction of U.S. forces into hostilities. Similarly, treaties must provide specific authority.<sup>61</sup>

On August 18, 2016, attorneys for Captain Smith responded to the government's motion to dismiss. They argued that the district court had jurisdiction to hear the case, Smith had standing, and it was his duty as a military officer to disobey orders that exceeded the president's constitutional authority. As to likely personal harm, if Smith disobeyed an order he regarded as illegal, he faced the prospect of a court martial and lengthy imprisonment, as well as a dishonorable discharge. Regarding the government's claim that the case represented a political question unfit for the courts, Smith's attorneys responded: "This is a garden-variety statutory construction case," pointing to language in Section 8(a)(1) of the War Powers Resolution.<sup>62</sup>

Smith's attorneys asked the court to examine President Obama's reliance on two statutes: Authorization for Use of Military Force enacted after 9/11 (2001 AUMF) and Authorization for Use of Military Force enacted on October 16, 2002, to support military action against Iraq (2002 AUMF). As for 2002 AUMF, it authorized the president to use armed forces to "(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."<sup>63</sup> In a speech in April 2015, Stephen Preston, General Counsel of the Defense Department, argued that the 2002 AUMF provided support for military action against the Islamic State. While admitting that Saddam Hussein's regime in Iraq posed the major threat in 2002, he said the purpose of the 2002 AUMF was to establish "a stable, democratic Iraq" and address "terrorist threats emanating from Iraq."<sup>64</sup>

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aff'd, *Atlee v. Richardson*, 411 U.S. 911 (1973).

<sup>61</sup> 87 Stat. 558 (1973).

<sup>62</sup> Plaintiff's Memorandum in Opposition to Motion to Dismiss," *Smith v. Obama*, Civ. No. 16-843 (CKK), U.S. District Court for the District of Columbia, Aug. 18, 2016 (hereafter Plaintiff's Memo, Aug. 18, 2016).

<sup>63</sup> 116 Stat. 1501, sec. 3(a) (2002).

<sup>64</sup> Plaintiff's Memo, Aug. 18, 2016, 35.

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Under that interpretation, U.S. Presidents would be authorized to take military action for decades to come whenever necessary to protect Iraq. When lawmakers passed the authorization in 2002, they offered no such broad intention. The Obama administration presented inconsistent executive arguments about 2002 AUMF. On July 25, 2014, National Security Advisor Susan Rice notified Congress that the administration no longer relied on the 2002 AUMF as authority for “any U.S. government activities” in Iraq and “fully supports its repeal.”<sup>65</sup>

As for 2001 AUMF, the brief for Captain Smith points out that after the 9/11 terrorist attacks, President George W. Bush submitted legislation to Congress that would have, had it been adopted in full, “authorized President Obama’s current assertion of power” against the Islamic State.<sup>66</sup> Bush recommended language that does appear in 2001 AUMF: “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>67</sup> However, Congress deleted language proposed by Bush, authorizing the president “to deter and pre-empt any future acts of terrorism or aggression against the United States.”<sup>68</sup> Senator Robert C. Byrd (D-W.Va.) remarked during debate that it was not the intent of Congress to give the president “unbridled authority” to wage war against terrorism “writ large without the advice and consent of Congress.”<sup>69</sup>

*Post 9/11 enactment not intended to give president “unbridled authority” to wage war against terrorism “writ large.”*

Moreover, Congress added to 2001 AUMF language that relates directly to the War Powers Resolution, declaring that the 2001 AUMF is “intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”<sup>70</sup> Language proposed by President Bush after 9/11 made no mention of the War Powers Resolution. Congress made that change to protect legislative preroga-

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<sup>65</sup> *Ibid.*, 21.

<sup>66</sup> *Ibid.*, 36.

<sup>67</sup> 115 Stat. 224, sec. 2(a) (2001).

<sup>68</sup> Plaintiff’s memo, Aug. 18, 2016, 37; 147 Cong. Rec. 18136 (2001).

<sup>69</sup> 147 Cong. Rec. 18136 (2001).

<sup>70</sup> Plaintiff’s memo, Aug. 18, 2016, 37.

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tives and to block future efforts by presidents to wield the war power single-handedly.

On November 21, 2016, U.S. District Judge Colleen Kollar-Kotelly granted the government's motion to dismiss Smith's complaint, concluding that he had not alleged an injury sufficiently concrete or particularized to establish Article III standing. She held that his claims presented non-justiciable political questions unsuitable for a court. Page 11 of her opinion states that Smith "has no qualms about participating in a fight against ISIL." Smith supports military action against the Islamic State but offered specific legal and constitutional objections in his lawsuit.

*Disputes involving foreign relations are regularly decided by federal courts.*

On page 24 of her decision, Judge Kollar-Kotelly cites a federal court opinion from 2010 that describes disputes involving foreign relations as "quintessential sources of political questions."<sup>71</sup> However, disputes involving foreign relations are regularly decided by federal courts. In 2009, in the Jerusalem passport case, the D.C. Circuit held that the issue of whether the State Department could lawfully refuse to record a U.S. citizen's place of birth as "Israel" on a passport for a child born in Jerusalem was nonjusticiable under the political question doctrine.<sup>72</sup> Three years later the Supreme Court reversed, holding that the dispute was not a political question but rather a constitutional issue to be decided by the courts.<sup>73</sup> Further litigation resulted in the Supreme Court on June 8, 2015, deciding the case on the merits to hold that the president has exclusive power to recognize foreign nations and governments.<sup>74</sup>

On page 25 of her decision, Judge Kollar-Kotelly acknowledged that questions of "statutory construction and interpretation . . . are committed to the Judiciary," but concluded on the next page that Smith's efforts to analogize his case to the Jerusalem passport case "are strained." She therefore declined to analyze the statutes involved in Smith's case, including the War Powers Resolution, the 2001 AUMF, and the 2002 AUMF. On page 29, she noted that President Obama's proposed budget for 2016 requested funds to conduct military operations

<sup>71</sup> Smith v. Obama, Civil Action No. 16-843 (D.D.C. (Nov. 21, 2016), citing El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 841 (D.C. Cir. 2010).

<sup>72</sup> Zivotofsky v. Secretary of State, 571 F.3d 1227 (D.C. Cir. 2009).

<sup>73</sup> Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S.Ct. 1421 (2012).

<sup>74</sup> Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. 2076 (2015).

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against the Islamic State “and Congress again appropriated the vast majority of the requested funds.” That overlooked language in Section 8(a)(1) of the War Powers Resolution that requires that funds be specifically authorized by Congress for a particular military operation.

In response to the district court decision, Smith’s attorneys filed a brief on April 3, 2017, stating that Smith had standing to bring the suit. As to the political question doctrine, Smith’s brief points out that the district court “ignored” the Steel Seizure Case in *Youngstown v. Sawyer* and “is flatly inconsistent” with the Supreme Court’s decision in that case.<sup>75</sup> The brief notes: “No controversial fact finding is needed to establish that the AUMFs enacted by Congress in 2001 and 2002 cannot serve as the ‘specific authorizations’ required by the War Powers Resolution for the President’s decision to initiate ‘hostilities’ against ISIL in 2014.”<sup>76</sup> It underscores that “Congress’s rules prohibit the use of appropriations as vehicles for substantive legislation.”<sup>77</sup>

### *Conclusion*

The Framers opposed giving a single executive authority to take the country from a state of peace to a state of war. That power existed in the British model sanctioned by John Locke and William Blackstone, a model the Framers explicitly rejected. In 1793, James Madison offered this judgment: “Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded*” (Hunt 1906, 6: 148). That constitutional principle was respected from 1789 to 1950. With the Korean War, Truman became the first president to take the country to war without receiving congressional authority. That violation was repeated by Presidents Clinton and Obama. Presidential power has expanded as a result of Supreme Court rulings from *Curtiss-Wright* in 1936 to *Zivotofsky v. Kerry* in 2015, endorsing exclusive and independent powers of the president with regard to external affairs (Fisher 2017b).

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<sup>75</sup> Brief of Appellant, *Smith v. Trump*, No. 16-5377, April 3, 2017, at 7; <https://www.lawfareblog.com/brief-captain-nathan-smiths-challenge-presidential-war-making>.

<sup>76</sup> *Ibid.*, 7-8.

<sup>77</sup> *Idid.*, 46.

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