ANALYZING WAR POWERS AFTER 9/11

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ABSTRACT

In this Article, I use the perspective advanced in my book Long Wars and the Constitution to analyze some of the war powers issues that have arisen since the 9/11 attacks. I first discuss the constitutionality of the Obama Administration’s military operation against ISIS. In addition, I consider to what extent the Obama Administration’s approach was different from that taken by the Bush Administration with respect to the “9/11 War.” Finally, I offer some general thoughts on the proper way to analyze checks and balances with respect to war powers in a post-9/11 world.

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I. INTRODUCTION

Although there have been times during the Obama Administration when war powers issues seemed to recede,1 they have always returned.2 About a month after the Drake University Law School symposium on War

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1. After President Obama was reelected in 2012, he sought to “begin the transition to a day when the country will no longer be on a war footing.” Peter Baker, Pivoting from a War Footing, Obama Acts to Curtail Drones, N.Y. TIMES (May 23, 2013), http://www.nytimes.com/2013/05/24/us/politics/pivoting-from-a-war-footing-obama-acts-to-curtail-drones.html.

Powers and the Constitution, the New York Times reported the filing of a soldier’s lawsuit against President Obama for pursuing an illegal war against the Islamic State (known by the acronyms ISIS or ISIL). The Islamic State controls territory in Syria and Iraq. The Obama Administration began a military operation against ISIS, initially consisting of air strikes, in August 2014. The Times stated:

Constitutional experts and some members of Congress have also challenged the Obama administration’s thin legal rationale for using military force in Iraq and Syria. The Federal District Court for the District of Columbia should allow the suit to move forward to force the White House and Congress to confront an important question both have irresponsibly skirted.

The Times thus appeared to scant the Administration’s legal justification for the operation against ISIS—namely that it rested on the September 2001 Authorization of Use of Military Force (9/11 AUMF), saying: “[The Administration] currently relies on the authorization for the use of military force passed in 2001 for the explicit purpose of targeting the perpetrators of the Sept. 11 attacks, which paved the way for the invasion of Afghanistan.”

Despite the fact that the Obama Administration submitted a new AUMF to Congress with respect to the ISIS operation in early 2015, the Times’s main objection was that both the Executive and Legislative Branches of government were avoiding their constitutional responsibilities by failing to move forward on the resolution in a timely manner:


7. A Soldier’s Challenge to the President, supra note 4.

8. Id.
Yet, the White House has enabled Congress to shirk its responsibility by arguing that a new war authorization would be ideal but not necessary. Administration officials could have forced Congress to act by declaring that it could not rely indefinitely on the Afghanistan war authorization and giving lawmakers a deadline to pass a new law. By failing to pass a new one, Congress and the administration are setting a dangerous precedent that the next president may be tempted to abuse. That is particularly worrisome given the bellicose temperament of Donald Trump, the likely Republican nominee.9

Although I do not think there is much likelihood that the federal courts will reach the merits of the soldier’s lawsuit, I will use this editorial as my point of departure in discussing some of the war powers controversies that have drawn attention since 9/11. In my book Long Wars and the Constitution, I provide a detailed review of presidential decisions for war since 1945, as well as an account of the origins of the contemporary war powers debate in the Cold War era.10 In applying the Long Wars perspective to the war powers controversies after 9/11, I want to show how to move beyond the terms in which those debates have been conducted to territory that is more productive for constitutional analysis.11

I begin in the next section, Part II, with the constitutionality of the Obama Administration’s ongoing military operation against ISIS.12 But my main concern is how we should approach the war powers questions created by the terrorist attacks by al Qaeda and associated forces since 9/11.13 A persistent theme sounded by commentators is the similarity between how the Bush and Obama Administrations fought what might be called the “9/11 War,” in spite of what was understood as Obama’s 2008 campaign promise to uphold “rule of law” values.14 As I discuss in Part III, I believe there are both important similarities and differences, but they cannot be understood properly unless we appreciate the significance of the background “Cold War” constitutional order.15 Finally, in Part IV I offer some thoughts about the current meaning of checks and balances with respect to presidential war

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9. Id.
10. See generally Stephen M. Griffin, Long Wars and the Constitution (2013) [hereinafter Griffin, Long Wars].
11. See infra Part II.
12. See infra Part II.
13. See infra Part II.
14. See infra Part II.
15. See infra Part III.
powers, closing with the example of the Libya intervention in the Obama Administration.  

II. ISIS AND THE CONSTITUTIONAL ORDER

To return to the Times editorial, I want to highlight three argumentative moves it makes, moves that are unfortunately all too common in post-9/11 debates about war powers. First, as I noted above, the Times mostly bypasses the constitutional relevance of the 9/11 AUMF. This is the “thin legal rationale” to which the editorial refers. The Times does not see the 9/11 AUMF as central to a legal and constitutional analysis of the Obama Administration’s military operation against ISIS. Second, the Times believes that the Obama Administration and Congress are somehow shirking their constitutional responsibilities by failing to move forward with a new AUMF specifically tailored to the operation against ISIS. Third, the Times believes this failure to act may set a “dangerous precedent” for the next president.

Although I do not want to postpone unduly my examination of the Times editorial, I should explain that the perspective I bring to war powers involves the concept of a constitutional order. This is not a novel concept for political scientists pursuing the study of U.S. political development or for constitutional theorists. As it is not a term normally employed by constitutional lawyers, however, I should say something about it. In brief, the concept of a constitutional order is useful to legal analysis because it orients us to where we are in historical time. It helps remind us of relevant circumstances that we might otherwise ignore. Understanding our constitutional order helps explain and “account for”—both in the sense of justifying and keeping a running tally of—informal constitutional change, that is, change outside the Article V amendment process as well as outside the Supreme Court’s use of judicial review. This perspective is especially

16. See infra Part IV.
17. See A Soldier’s Challenge to the President, supra note 4.
18. Id.
19. See id.
20. See id.
21. Id.
22. See GRIFFIN, LONG WARS, supra note 10, at 14–18.
23. See id. at 12.
24. See id. at 14–17.
25. See id.
useful to an assessment of presidential war powers, where there is wide agreement that a great deal of change has occurred off the textual books since 1789.\textsuperscript{26}

That explains the purpose of a constitutional order, but how do we specify its content? Again, in brief, we first describe the baseline constitutional order that existed with respect to war powers in the early republic.\textsuperscript{27} This order consisted of the relevant portions of the text of the Constitution, the relevant contributions of the three branches of government responsible for implementing the Constitution, and the institutions (such as the military) the branches created.\textsuperscript{28} After we specify this order, we can meaningfully investigate and determine the capacities for action of these institutions, especially the expertise they acquired over time.\textsuperscript{29} We then examine how this order changes through historical time, looking for changes in the baseline along the way and taking special note of the interaction between these institutions and the democratic process.\textsuperscript{30} In \textit{Long Wars}, I devote considerable attention to arguing that a fundamental change occurred to the baseline set down in the early republic during and after World War II.\textsuperscript{31} I therefore termed it the “post-1945” constitutional order,\textsuperscript{32} although the “Cold War” constitutional order is probably more accurate.

In many ways, we are still living in the Cold War constitutional order. But why is this concept useful for \textit{legal} analysis? From my perspective, ignoring the existence of constitutional orders means denying the reality of informal constitutional change. This would take us in the wrong direction. What happens in the case of war powers, for example, is that we wind up with unproductive analyses based on such notions as the “imperial presidency” and the depressing idea that we are ruled by a pervasive undemocratic “national security state.”\textsuperscript{33} We wind up with commentary, especially on the left, that is unhappy with President Obama’s record on issues like ISIS and drone strikes without understanding the imperatives, derived ultimately from a constitutional order deliberately created by the American people after 1945, that drove him to take an aggressive stance on

\textsuperscript{26} See \textit{id.} at 11–14.
\textsuperscript{27} See \textit{id.} at 17–26.
\textsuperscript{28} See \textit{id.} at 14.
\textsuperscript{29} See \textit{id.} at 17.
\textsuperscript{30} See \textit{id.}
\textsuperscript{31} \textit{Id.} at 31–40, 52–77.
\textsuperscript{32} \textit{Id.} at 52.
\textsuperscript{33} \textit{Id.} at 95–96.
national security. Further, because these commentators do not understand that Cold War constitutional order, they are unable to analyze it properly and so propose reasonable changes.

It is not simply the political left that ignores the reality of informal constitutional change. Constitutional analyses from the right are not much better. The leading form of legal analysis is original public meaning, which in effect denies the reality of informal constitutional change by conducting analysis solely in eighteenth-century terms. Among other points, this means ignoring the input provided by democratic elections over time. The basic substantive problem with national security conservatism is that it tends to deny the continuing relevance of checks and balances, particularly with respect to Congress. Those checks, however, do require a good bit of repair before we can enjoy the benefits of what I call the “cycle of accountability.”

Let us return to the *Times* editorial, bearing in mind that I am employing the concept of the Cold War constitutional order to assist in analyzing its war powers claims. The first flaw in the *Times*’s analysis is that it discounts the signal constitutional importance of the 9/11 AUMF. I cannot count the number of times I have encountered analyses, especially by journalists and from the political left, that ignore the legal relevance of the AUMF. On any reasonable reading, the 9/11 AUMF was written in fairly broad terms. It called on the president to:

The cycle occurs when conflict and cooperation between the branches with respect to an area of policy like war powers are repeated across time. Each branch knows it will be judged by the other and by the people. Each branch thus feels the weight of responsibility and decision. This creates the potential for learning from experience.

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34. See id. at 17.
35. See id. at 17–18.
36. Id. at 35–38 (discussing the Founding Fathers’ deliberations over allocation of war power).
37. See id. at 18.
38. See A Soldier’s Challenge to the President, *supra* note 4.
39. See, e.g., id.
[U]se 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.41

By saying the 9/11 AUMF is broad, I mean especially to point to the fact that it was not limited to nations or states that had attacked the United States; it applied as well to non-state organizations such as al Qaeda.42 In addition, it was not limited by geography.43 Although some members of Congress may have had the impression that the AUMF was solely about striking Afghanistan,44 it authorized the United States to take action anywhere in the world, provided of course there was a linkage to the 9/11 terrorist attacks.45 Finally, we should take note of what might be called the “prevention” clause, indicating that presidents were to act with the purpose of preventing future acts of terrorism.46 This served as a statement of purpose that demonstrated that the AUMF concerned the future just as much as the past.47

The leading scholarly analysis by Curtis Bradley and Jack Goldsmith argues, rightly in my view, that the 9/11 AUMF is the legal and constitutional equivalent of a declaration of war.48 In other words, leaving its specific origins to one side for a moment, there is no material difference between the AUMF and the sweeping declarations of war used by Congress to authorize World Wars I and II.49 Bradley and Goldsmith argue in effect that literal declarations of war are not simply out of style or being avoided by

42. See id. (applying to “nations, organizations, or persons”).
43. See id.
44. Note that the Times editorial refers to the 9/11 AUMF as the “Afghanistan war authorization.” This is clearly mistaken for the reasons stated. See A Soldier’s Challenge to the President, supra note 4.
45. See AUMF, § 2(a), 115 Stat. at 224.
46. See id. (authorizing force “in order to prevent any future acts of international terrorism against the United States”).
47. See id.
49. Id. at 2063.
Congress. Rather, they were made legally irrelevant worldwide by the international legal order established in the U.N. Charter. Yet this does not imply that the requirements contained in the Constitution have changed. I argued in *Long Wars* that what counts domestically for purposes of the Constitution is not whether Congress enacted a literal declaration of war but rather whether it authorized the war by any valid legislative means. So what counts constitutionally is whether Congress authorizes a war, and the 9/11 AUMF of course provides that requisite legislative authorization with respect to al Qaeda. This further means that Congress used the full extent of its constitutional power under Article I to “declare war,” thus calling into being all relevant war powers of the government to respond to the attack by al Qaeda with “all necessary and appropriate force.” Just as in World Wars I and II, the passage of the 9/11 AUMF after a brutal attack on the United States was a solemn response by Congress backed by the democratic authority of the people of the United States.

Although there are some genuine questions to be answered about the scope of the 9/11 AUMF, especially this many years on, there is an additional factor that is crucial in assessing the persistent criticisms that have been directed at the Bush and Obama Administrations in this regard. We need to bear in mind that at least by *Hamdi v. Rumsfeld*, all three branches of the national government had signed on to the proposition that the United States was engaged in a war, a “real war,” against al Qaeda. More importantly, this commitment was reaffirmed in every subsequent presidential election. The AUMF was not only backed initially by the democratic process, its legitimacy was reaffirmed repeatedly by the American people. In particular, the reality that we were in a war with al

50. *Id.* at 2059.
51. *Id.* at 2061–62.
54. *See* AUMF, § 2(a), 115 Stat. at 224.
 Qaeda was endorsed by Democratic candidates John Kerry in 2004 and Barack Obama in 2008.59

Because the 2004 election has been forgotten, it is worth taking a look at the campaign platform of one of the major candidates. He promised to follow the examples of presidential leadership with respect to national security set by Woodrow Wilson and Franklin Roosevelt in the two World Wars as well as the national security state (what I call the Cold War constitutional order) championed by Harry Truman and John Kennedy.60 This candidate’s platform called for the swift capture or killing of Osama bin Laden, but noted “that day will only mark a victory in the war on terror, not its end. Terrorists like al Qaeda and its affiliates are unlike any adversary our nation has known.”61 He went on to call for “direct immediate, effective military action to capture or destroy terrorist groups and their leaders” and “[a] massive strengthening in intelligence gathering.”62 As you may have noticed from the footnotes, I am of course discussing the platform of John Kerry. Despite horrifying revelations in 2004 about torture and the mistreatment of prisoners at Abu Ghraib prison in Iraq, the Kerry campaign strongly endorsed increased aggressive tactics against al Qaeda in the 9/11 War.63 One surmises that this was the popular thing to do.

Moving to the 2008 campaign, contrary to what may have been the assumptions of his supporters, Obama never wavered from a strong commitment to fighting al Qaeda and the terrorist threat in general, both before and after the 2008 campaign.64 As Charlie Savage explains in his highly useful and timely book Power Wars, with respect to al Qaeda, Obama was every bit as “hawkish” (to use a term from the Vietnam era) as George W. Bush.65 This certainly appears to be what the American people wanted.66


60. KERRY & EDWARDS, supra note 59, at 8.

61. Id. at 10.

62. Id. at 11.

63. See id. at 10–28.


65. See SAVAGE, POWER WARS, supra note 64, at 60–62.

66. See Conor Friedersdorf, Angry Letters to the One Member of Congress Who
To be sure, by the 2008 campaign, they were arguably frustrated that Osama bin Laden had evaded their government’s effort to kill or capture him.\textsuperscript{67} It is therefore understandable that President Obama continued the efforts begun under President Bush to pursue bin Laden and his associates.\textsuperscript{68}

As far as I can tell, in the war powers debates that closely followed the 9/11 attacks, no one disputed that the public supported the 9/11 AUMF.\textsuperscript{69} But with reference to criticisms directed at an apparently endless “long war,” few have marked the significance of the four intervening presidential elections since its original approval. Despite the criticisms advanced, particularly by the civil liberties community, in none of these elections did the public register any concern with the basic concept of a long war against “those nations, organizations, or persons.”\textsuperscript{70} From my perspective, this is strong evidence of not only the ongoing political relevance of the 9/11 AUMF, but also its continuing legal and constitutional significance.\textsuperscript{71}

These last remarks are directed in particular against the intuition that the mere passage of time has undermined the authority provided by the 9/11 AUMF. I agree with the Obama Administration that the 9/11 AUMF is still highly relevant to an assessment of the constitutionality of the military operations the United States undertakes, as long as its conditions are met.\textsuperscript{72} That may be another source of the trouble with common interpretations of the AUMF. Many assume that it applies only against the “original” al

\textsuperscript{67} For a relevant account, see generally Daniel Klaidman, \textit{Kill or Capture: The War on Terror and the Soul of the Obama Presidency} (2012).

\textsuperscript{68} See id. passim.

\textsuperscript{69} See Friedersdorf, \textit{supra} note 66.


\textsuperscript{71} For the contrary view, see Jennifer Daskal, Opinion, \textit{Obama's Last Chance to End the 'Forever War'}, N.Y. TIMES (Apr. 27, 2016), http://www.nytimes.com/2016/04/27/opinion/obamas-last-chance-to-end-the-forever-war.html. Daskal acknowledges that an expansive reading of the 9/11 AUMF has been normalized by Congress and the courts. Id.

By contrast, since 2009 the Obama Administration has taken the position that the 9/11 AUMF applies not only to al Qaeda, but also to “associated forces that are engaged in hostilities against the United States.” Although I will not explore this position in detail, I think the Obama Administration’s logic is sound. The additional point I do want to make here is that the public might well assume that the determination of whether an “organization” is covered by the 9/11 AUMF is a matter of executive discretion based on an expert intelligence judgment rather than an easily determined bare fact. So the Times’s quick assumption that ISIS cannot be covered under the AUMF simply because it is a separate organization may well be wrong.

In this connection, it is surely relevant that there are in fact significant links between al Qaeda and ISIS. There have been since 2004, when the groups joined forces under the leadership of Osama bin Laden. Although much has changed since, this means it is at least plausible that the current operation against ISIS can be justified as falling under the 9/11 AUMF as the Obama Administration maintains. But I hope it has also become


75. See SAVAGE, POWER WARS, supra note 64, at 685–86 (“The Islamic State was a rebranded descendant of al-Qaeda in Iraq, the franchise that had led a bloody insurgency during the American occupation there. Its current leader, Abu Bakr al-Baghdadi, and the new leader of core al-Qaeda, Ayman al-Zawahiri, had feuded. In February 2014, al-Zawahiri had excommunicated al-Baghdadi’s group from al-Qaeda. Al-Zawahiri kept the brand name, but al-Baghdadi saw himself as Osama bin Laden’s true heir.” (footnote omitted)).

76. Preston, supra note 72.

77. In particular, as Savage describes, there was a later split between al Qaeda and ISIS. See SAVAGE, POWER WARS, supra note 64, at 685–86. Many commentators regard this as a fatal weakness in the Obama Administration’s argument. See PRESTON, supra note 72; see also SAVAGE, POWER WARS, supra note 64, at 688–90. To my way of thinking, Preston appropriately responds to this argument in his address to the American Society of International Law.

78. Preston, supra note 72. I understand Preston’s argument to be that the eventual split between al Qaeda and ISIS should not be allowed to determine what U.S. policy toward ISIS should be under the 9/11 AUMF, especially given that ISIS continues to
apparent that, given the breadth and consistency of the public and governmental support for the AUMF, if ISIS qualifies as an associated organization, then the Obama Administration is on fairly firm ground in pursuing a military operation without asking Congress for another resolution.\textsuperscript{79} In other words, given the steady democratic support for continuing military operations against organizations related to 9/11, the passage of time has, if anything, \textit{strengthened} the leeway we should grant the Obama Administration with respect to interpreting the terms of the 9/11 AUMF.

From a lawyerly perspective, it is natural to think that we would be better off if we had another round of public debate leading to a new AUMF tailored to today’s circumstances.\textsuperscript{80} I am a constitutional scholar trained as a lawyer, and I therefore have a lawyer’s usual biases. I believe that wills, contracts, and statutes should be updated if necessary to reflect changing circumstances. I also believe in the inherent value of democratic deliberation. Thus, given that much has undoubtedly changed since 9/11, I am biased in favor of believing we would all be better off if we deliberated together on an updated AUMF that would more clearly apply to the operation against ISIS. Such considerations are perhaps part of the motivation behind the Obama Administration’s submission of a new ISIS-oriented AUMF to Congress in early 2015.\textsuperscript{81} However, in the end, what is most relevant is the viewpoint of members of Congress.\textsuperscript{82} They may not have my lawyerly biases, and in seeking to understand our constitutional order, we should at least try to understand their perspective.

Following Congress’s lead in avoiding a new AUMF may seem a bit odd, given that we are discussing a question of constitutional power. Doesn’t the constitutional issue exist independently of what members of Congress decide? It is this sort of intuition that presumably underlies the \textit{Times}’s claim

\textsuperscript{79} For a similar suggestion, see SAVAGE, POWER WARS, \textit{supra} note 64, at 688.

\textsuperscript{80} For thoughts along this line, see ROBERT CHESNEY ET AL., JEAN PERKINS TASK FORCE ON NAT’L SEC. & LAW, A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 3–6 (2013), \url{http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf}.


\textsuperscript{82} See id.
that Congress is shirking its responsibilities. My approach to informal constitutional change stresses that the question of how the Constitution is enforced is of signal importance. Especially with respect to war initiation, the Constitution has been traditionally the province of the political branches and not enforced by the judiciary. It is thus a kind of category mistake to expect the sort of legalistic considerations appropriate to the judicial sphere to be applicable to the evaluation of the propriety of the actions of Congress and the Obama Administration. I suggest many commentators are making this sort of mistake—treating the interpretation of the 9/11 AUMF as if we were in federal court rather than in the democratic arena.

Given that war powers are usually enforced by the political branches, what considerations should be relevant? First and foremost, the U.S. military operation against ISIS was public from the beginning. It was described in some detail by President Obama in a major speech in September 2014. It was not a secret kept from Congress and the public. It is also worth noting that the changing nature of al Qaeda and the changing circumstances of the 9/11 War are publicly known. This means that the exercise of war powers can be assessed by the public and political elites through elections—with presidential elections of particular importance here, given that the exercise of presidential war powers is centrally at issue.

So President Obama and members of Congress might reason—constitutionally reason—as follows. The ongoing operations against al Qaeda and its associated forces (which originally included ISIS) have been consistently approved by the public in multiple presidential elections in which candidates of both parties have steadily supported vigorous action against them. The perhaps overly refined objection that a new AUMF is

83. See A Soldier’s Challenge to the President, supra note 4.
84. See Savage, Power Wars, supra note 64, at 647.
86. Id.
87. Id.
88. Id.
89. See supra notes 59–68 and accompanying text.
90. Savage, Power Wars, supra note 64, at 685–86.
91. See Iraq, supra note 58; Stevenson, supra note 58. For example, in the presidential election matchup between Hillary Clinton and Donald Trump, the candidates generally agreed about the need to act against ISIS, and no one in either campaign pushed the need for a new AUMF. It appears to be a non-issue with the public.
required has had no resonance in these elections. Given that the Obama Administration has been open about what it is doing, the formalities of a new resolution are unnecessary. In saying that it is unnecessary, however, I am not suggesting that anyone is shirking a constitutional responsibility. Rather, they are executing it, albeit in a way that leaves the more legalistic among us (including the Times) somewhat uncomfortable.92

The final issue the Times raises is that of setting a precedent.93 I find this to be something of a knotty issue,94 so I will limit my remarks. I think what has been said so far goes some distance toward addressing the Times’s concern. The specific issue is presumably that the Obama Administration’s unilateral military actions against ISIS might set a bad precedent for future presidents.95 Here, I believe the Times’s argument is based on a misunderstanding that is directly related to the previous discussion of the legal relevance of the 9/11 AUMF.96

What the Times surely means is that President Obama may be setting a bad constitutional precedent.97 But President Obama is not acting against ISIS based on his Article II powers. Indeed, as I will discuss in the next section, President Obama is notable for rejecting reliance on “exclusivist” Article II arguments.98 His actions against ISIS therefore cannot set a constitutional precedent. As discussed, President Obama insists he has the backing of the statutory authorization provided by the 9/11 AUMF.99 Out of an abundance of caution, he would like Congress to pass a new AUMF specific to ISIS.100 But he has not abandoned his claim (well-founded, in my view) that the military operation against ISIS is based on the 9/11 AUMF.101 President Obama cannot set a constitutional “precedent” unless he is

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92. See Baker, Obama’s Dual View, supra note 81.
93. Id.
94. See the discussion of practice-based arguments in Griffin, Long Wars, supra note 10, at 77–85.
95. Id. at 84–85.
96. See supra notes 38–47 and accompanying text.
97. See Griffin, Long Wars, supra note 10, at 84–85.
98. See infra note 168 and accompanying text. For a discussion of such arguments, see Griffin, Long Wars, supra note 10, at 188–93.
99. A Soldier’s Challenge to the President, supra note 4.
100. See Baker, Obama’s Dual View, supra note 81.
101. See id.
claiming to do so, which he is not.102

One final point concerning the Times editorial: Somewhat amazingly, the editors suggest that President Obama should force Congress to act by admitting that the 9/11 AUMF is an inadequate legal basis for the operation and giving Congress a deadline.103 This presumably means that if Congress did not meet the deadline, the President would have to abandon the operation against ISIS, a complex military endeavor that involves the cooperation of multiple countries.104 This is no way to run the nation’s diplomacy or, for that matter, a military operation. It is likely that from the perspective of the Obama Administration, the Times’s proposed course of action is irresponsible.105 This is my view as well. This judgment may seem harsh, but I think it can be justified once we better understand the nature of the Cold War constitutional order. I discuss how this constitutional order is relevant to assessing the similarities and differences between the Bush and Obama Administrations in the next section.

III. FROM BUSH TO OBAMA: WHAT’S THE DIFFERENCE?

One of the most persistent observations with respect to the Constitution and national security policy—and clearly a source of disappointment for some—is that the change from President Bush to President Obama in 2008 did not make a dramatic difference.106 This judgment can be contested, but there is a measure of truth to this observation that I am not sure even President Obama would dispute.

If national security policy did not change much, is there a reason that is meaningfully connected with the Constitution? In other words, are we looking at a phenomenon that is, at least in part, caused by the Constitution itself, as opposed to an otherwise baffling agreement between Bush and Obama? I believe so, although we have to consider the perspective a

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102. See id.
103. Id.
104. See CHOLLET, supra note 64, at 149–51.
constitutional order affords us in order to understand why. A survey of the
similarities and differences between the Bush and Obama Administrations
on the Constitution and national security matters could fill at least a small
book, so here I can provide only the most summary of judgments. Yet I
should note that I prefer to address this question from a wide-angle
perspective in any case. To my mind, too many scholars concentrate on
particular trees in the national security forest (or even individual pieces of
bark) rather than the forest itself or, for that matter, the region in which the
forest grows.

This is why I find the concept of a constitutional order helpful. The
Cold War constitutional order provided the essential framework for national
security matters in both the Bush and Obama Administrations. It thus in
large measure explains why there was a noticeable continuity between these
Administrations, which were otherwise very different, as I will explain
below, in their understanding of the rule of law. Consider that as Osama bin
Laden planned the 9/11 attacks, we moved from Clinton to Bush, and later
from Bush to Obama, having not only the same constitutional text, but
mostly the same national security institutions (save for the creation of the
Department of Homeland Security and the Director of National
Intelligence). In this connection, we should take special notice of the
Department of Defense, National Security Council, Central Intelligence
Agency (CIA), and the National Security Agency (NSA)—all classic post-
World War II creations whose formative bureaucratic experiences were
grounded in the Cold War.

The critiques directed at the Bush and Obama Administrations with
respect to national security are based mostly on concerns about violations of
the rule of law and individual rights. Although I do not wish to minimize
the violations of rights that have occurred since 9/11, I think it paints a false
picture if we use the particular grove of individual rights violations as a basis
for a generalized description of a forest dominated by a runaway or
tyrannical presidency. Much of the criticism from the domestic civil
liberties community and the international human rights community seems to

107. Or a very long 769-page book. See SAVAGE, POWER WARS, supra note 64.
108. See GRIFFIN, LONG WARS, supra note 10, at 195.
109. See id.
110. See id. at 100–01.
111. See id. at 195.
112. See ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND:
assume that the democratic process is irrelevant to drawing the balance between liberty and security. This is illustrated by the fact that, overwhelmingly, the criticism has been aimed at Presidents Bush and Obama rather than at Congress.

I have read many critiques of the Bush and Obama Administrations that have the following structure: the President is solely responsible for decision X and X is unconstitutional, illegal, or at least questionable in light of U.S. traditions and values. Curiously, the issue of whether the President had the backing of Congress and public opinion for his decision rarely comes up. Yet my study of the origins of the national security state showed that Congress was involved in creating our current constitutional order from the beginning. Presidents can take action without even thinking about checking with Congress or the state of public opinion, but in my review of the presidential administrations since FDR, it is rare. Presidents are uniformly expert politicians and are always at least somewhat aware of the state of congressional opinion and acutely aware of relevant public opinion. This means there is usually a democratic domestic background to even the most unilateral presidential actions. I think this background is especially helpful in understanding the controversy over military commissions and the evolution of the detainee situation at Guantánamo as well as drone strikes and the successful operation against Osama bin Laden.

The critical constitutional distinction is the one I introduced in the preceding section—the difference between national security policies that are publicly known and democratically discussed and those that are secret, even from Congress. Many of the Snowden revelations about NSA surveillance might fall into the latter category. But in this Article, I am bracketing national security matters that were secret when they were adopted in order to concentrate on the issue of how to evaluate policies constitutionally that are publicly known.

113. See id. at 11.
114. See id.
115. See, e.g., id.
116. See, e.g., GRIFFIN, LONG WARS, supra note 10, at 70–71.
117. Id. at 65–69.
118. See id. at 85.
119. See generally id.
120. See, e.g., SAVAGE, POWER WARS, supra note 64, at 401.
121. It is worth noting that surveillance issues were covered in last year’s Drake University Law School Constitutional Law Symposium. Symposium, Eyes and Ears
There has been something of a trend among historians studying foreign policy and the national security state of seeing them as intermixed with domestic politics as opposed to being held apart. This suggests the value of a democratic or popular constitutionalist perspective, which is helpful in understanding why there was an essential continuity between the Bush and Obama Administrations. I will discuss some interesting parallels between how presidents fought the Cold War and 9/11 War. What I want to emphasize here is that the parallels were strongly determined by the fact that we fought the 9/11 War with largely the same national security state we had during the Cold War.

Part of the Cold War constitutional order is a set of expectations about the duties of the president, expectations that strongly influenced the policy stances all of the post-9/11 candidates for president, including Kerry and Obama, took in their respective runs for president. In that constitutional order, the president has the lead role in advancing the foreign policy and protecting the national security of the United States. Some scholars might say this is not so different from what presidents prior to World War II and the Cold War were expected to do. However, once we consider that presidents were expected to do this with U.S. and global security as their goals then, indeed, we were in a different constitutional order. I argue in Long Wars that this understanding and the creation of the national security state led to an actual material change in presidential powers similar to a constitutional amendment. No post-1945 president ran for office promising to make Congress an equal partner in foreign policy (nor have many members of Congress, for that matter). Try to recall when, after an attack on U.S. soil or against U.S. personnel abroad, the public responded by calling for an investigation into how Congress had failed in its responsibility to protect Americans from danger. The focus is always on the


123. See id.
124. See Griffin, Long Wars, supra note 10, at 100–01.
125. See id. at 154.
126. See the useful discussion in Goldsmith, supra note 106, at 23–29.
127. See id. at 31–32.
128. See Griffin, Long Wars, supra note 10, at 32.
129. Id. at 14–17.
130. See supra notes 59–68 and accompanying text.
president, and all post-1945 presidents have been aware of this; that is what it means to have a constitutional order structuring our expectations.\footnote{131}

Indeed, Obama endorsed the Cold War constitutional order in his widely noticed address accepting the 2009 Nobel Peace Prize.\footnote{132} He declared:

> Whatever mistakes we have made, the plain fact is this: The United States of America has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms. The service and sacrifice of our men and women in uniform has promoted peace and prosperity from Germany to Korea, and enabled democracy to take hold in places like the Balkans.\footnote{133}

The commitment to global security invoked here is of course one of the pillars of the Cold War constitutional order.\footnote{134}

This, then, is the context in which we should understand and evaluate presidential action in foreign policy and national security, specifically with respect to why we did not see more of a shift in policy from the Bush to Obama Administrations. As I argued in the preceding section, the 9/11 War always had broad public support.\footnote{135} Every candidate for president post-9/11 reflected this democratic consensus.\footnote{136} It was thus reasonable to expect with respect to the 9/11 War specifically (I will discuss the Iraq War separately) a great deal of policy continuity as we changed presidents from Bush to Obama.

In fact, I have argued that “[w]hen we situate Bush and Obama within the [Cold War] constitutional order, the parallels with the positions occupied by Truman and Eisenhower are striking.”\footnote{137} Like Truman, Bush initiated both overt and covert major military commitments in an emergency atmosphere.\footnote{138} “Like Eisenhower, Obama had to wind down a war (the Iraq

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\item \footnote{131. See \textsc{Savage}, \textit{Power Wars}, supra note 64, at 11–22, 75–97 (discussing the impact on the Obama Administration of the failed attack by the “underwear bomber”).}
\item \footnote{133. \textit{Id.}}
\item \footnote{134. See \textsc{Griffin}, \textit{Long Wars}, supra note 10, at 31–40.}
\item \footnote{135. See \textsc{Savage}, \textit{Power Wars}, supra note 64, at 688.}
\item \footnote{136. See Daskal & Vladeck, \textit{supra} note 55, at 115–16.}
\item \footnote{137. \textsc{Griffin}, \textit{Long Wars}, \textit{supra} note 10, at 248; see also \textsc{Chollet}, \textit{supra} note 64, at 204–06.}
\item \footnote{138. \textsc{Griffin}, \textit{Long Wars}, \textit{supra} note 10, at 248.}
\end{itemize}
War)’’ while maintaining ‘‘a commitment to a ‘long war’ against a foreign threat.’’ Further, Obama ‘‘had his own version of Eisenhower’s ‘Old Guard’ Republicans’’—whereas Eisenhower’s Old Guard wanted more vigorous action against communism, Obama’s liberals wanted ‘‘criminal investigations of the excesses of the Bush administration.’’ Like Eisenhower, Obama ‘‘increasingly turned to ‘covert’ means of war, such as drone strikes, after initially expanding the conventional commitment in Afghanistan,’’ in order ‘‘to cope with varied national security challenges amid the reality of a war-weary public.’’ And, ‘‘[a]s in the Eisenhower administration, this meant that the role of the CIA and the intelligence community expanded significantly.’’

Some of the disappointment of civil libertarians with the Obama Administration derives from the notion that the positions held by Republican members of Congress, such as those on the treatment of Guantánamo detainees, are put forward purely as a matter of partisan advantage. Civil libertarians do not seem to credit that some Americans oppose treating detainees as ordinary criminal defendants on principle. The Obama Administration’s running room with respect to closing Guantánamo thus has been significantly limited by Congress, not simply for reasons of partisanship, but because many Americans believe it is the right way to proceed. Similarly, the public did not perceive the operation against bin Laden to be controversial because it struck them as fulfilling one of the chief objectives of the 9/11 War. Further, drone strikes that do not require

139. Id.
140. Id.
141. Id.; see PEW RESEARCH CTR., PUBLIC CONTINUES TO BACK U.S. DRONE ATTACKS 3 (2015), http://www.people-press.org/2015/05/28/public-continues-to-back-u-s-drone-attacks/. I put covert in scare quotes because there was never much likelihood that the full scope of Obama’s drone strikes could be concealed. Similarly, the operation against bin Laden was of course secret, but once it occurred, it had to be made public.
142. GRIFIN, LONG WARS, supra note 10, at 248.
144. See id.
“boots on the ground” and thus do not put American lives at risk, yet still advance our objectives in the continuing conflict against al Qaeda and their associates, have strong public support. 147 In other words, in the democratic and judicial arenas, the objections of civil libertarians have in fact been heard but have not prevailed. 148 It is therefore unsurprising that the policies of the Obama Administration have consistently disappointed civil libertarians. 149

The story so far points to the essential continuity between the Bush and Obama Administrations, a continuity based in the Cold War constitutional order. 150 Yet there are very real differences as well. 151 Given that the constitutional order stayed the same, how could this be the case? We should keep in mind that, like the Constitution itself, a constitutional order is a framework and does not determine how presidents seek to fulfill their responsibilities. 152 Presidents themselves can make a difference. 153 Thus, we need to pay attention to the variable of what might be called the personal constitutional initiatives of each president, as filtered through the preexisting structure of the Cold War constitutional order.

In this regard, it is well documented that President Bush took office seeking to restore the power of the presidency—power that he and his vice president Dick Cheney thought had drained away since the 1970s. 154 This was an oversimplification, but Bush’s power-seeking initiative, and the new institutional structure he set up inside the White House to accomplish it, sent

147. See PEW RESEARCH CTR., supra note 141, at 1 (conducting a similar poll finding that 58 percent of the Americans polled approved of drone missile strikes to target countries such as Pakistan, Yemen, and Somalia).
148. This is argued in greater detail in GOLDSMITH, supra note 106, at 194–96.
149. For an argument that civil libertarian opposition to military commissions and drone strikes have made at least some difference to policy, see DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 212–20 (2016).
150. See id. at 209.
151. These differences are insightfully discussed in David Cole, Obama and Terror: The Hovering Questions, N.Y. REV. BOOKS, July 12, 2012, at 32 passim (reviewing GOLDSMITH, supra note 106; KLAIDMAN, supra note 67).
152. See U.S. CONST. art. II (describing the powers given to the President).
153. See id. (noting that the Constitution does not assign how the responsibilities should be fulfilled).
a strong signal to officials in the Executive Branch.\textsuperscript{155} Members of the Executive Branch began to appreciate that, during the Bush Administration, law understood as deliberative procedure was secondary to law as effective personal authority.\textsuperscript{156} This initiative was then greatly accelerated by the 9/11 attacks.\textsuperscript{157}

Bush’s initiative crystallized an understanding of the President’s Article II authority that had been percolating for some time in conservative circles.\textsuperscript{158} The idea of “exclusive” or “preclusive” authority was that Article II powers, such as the commander-in-chief power, were exclusive to the Executive Branch and thus not shared with Congress or the Judiciary.\textsuperscript{159} This meant in practical terms that Bush’s exercise of constitutional authority, especially during a war, could not be checked.\textsuperscript{160} This is a notion that Bush himself endorsed.\textsuperscript{161} At a notable December 2005 press conference, Bush disagreed with the claim that he exercised “unchecked power.”\textsuperscript{162} But Bush’s explanation showed that he did not accept that Congress and the courts could meaningfully check his decisions.\textsuperscript{163} From Bush’s perspective, the only checks on his authority were his personal adherence to the oath to preserve the Constitution and consultation with Congress.\textsuperscript{164} Yet the standard meaning of checks and balances is that the other branches can say no to the president when they act within their scope of constitutional authority.

The ultimate consequence of the exclusive authority theory was the

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\item \textsuperscript{155} See id. at 74–75 (“[Officials in the executive branch] were all instructed by Bush ‘to make sure that he left the presidency in better shape than he found it.’”).
\item \textsuperscript{156} See id. at 80–82.
\item \textsuperscript{157} For a detailed discussion, see GRIFFIN, LONG WARS, supra note 10, at 216–27.
\item \textsuperscript{158} See id. at 188–93.
\item \textsuperscript{159} Id. at 188.
\item \textsuperscript{162} President Bush, News Conference, supra note 160 (response to question by Peter Baker of The Washington Post).
\item \textsuperscript{163} See id.
\item \textsuperscript{164} See id.
\end{itemize}
creation of an operational capability for the White House—something common to past constitutional crises caused by the exercise of presidential war powers, such as Watergate and Iran-contra. In the case of the Bush Administration, the signal development was not undercover operatives like President Nixon’s “Plumbers,” but rather an executive legal clique consisting of the White House Counsel and the Office of the Vice President, working in tandem with the Office of Legal Counsel. Operating with great efficiency in the months after 9/11, this clique produced secret legal opinions not vetted through an interagency process approving torture and NSA surveillance in violation of existing law.

By contrast, the Obama Administration rejected the “exclusive” reading of Article II and made it clear that every exercise of presidential war powers was taken pursuant to authorizations from Congress, most notably the 9/11 AUMF. This “democracy-forcing” move made it clear from the beginning of the Obama Administration that its actions could be effectively checked by Congress and the Judiciary. This also meant, however, that if those branches of government did not challenge the administration, it could act as if it had their de facto approval and proceed backed by the authority of all three branches of government. In my view, this is a point that many legal commentators, especially those in the civil liberties community, never grasped. By making this crucial move, the Obama Administration thus transited the entire national security debate from the high altitude plains of exclusive presidential authority to the sea level of ordinary democratic politics.

The Bush Administration’s early decision to establish military

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166. Id. at 225–26.
167. Id. at 223–26.
168. A Soldier’s Challenge to the President, supra note 4; see Memorandum from John P. Holdren et al., Assistant to the President for Sci. & Tech., to Heads of Dep’ts & Agencies passim (Feb. 24, 2009) [hereinafter Holdren Memo], https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-12.pdf.
171. See Savage, Power Wars, supra note 64, at 288.
commissions provides another example of the significant differences between the two administrations. The Obama Administration was careful to establish an effective interagency process for reviewing legal and constitutional questions. For its part, the Bush Administration faced up to the question of how to handle detainees early after 9/11 and did create an interagency task force to come up with a policy. Yet famously, the task force was cleverly short-circuited by Vice President Cheney and lawyers in the White House. The result was endless legal trouble for the commissions, eventually leading to Congress stepping in after *Hamdan v. Rumsfeld* with the Military Commissions Act. This legislative path could have been taken from the outset. The short-circuiting of the interagency process by the Office of the Vice President is something that almost by definition could not have occurred in the Obama Administration. When we further consider that the Abu Ghraib scandal was linked to the question of how detainees in general were treated by the Bush Administration, we can understand more fully the consequences of the Executive Branch being dominated by a White House legal clique. Of course, there was nothing approaching the Abu Ghraib scandal in the Obama Administration.

It is also hard to believe that the Obama Administration would have gone to war in Iraq. Although I think this would have been true of John McCain or anyone else elected in 2008, you may have noticed that President Obama did not initiate another military conflict on the scale of the Iraq War. This is a piece of the puzzle that is often missing from critical analyses of the Obama Administration. The consequences of the Iraq War by itself dwarf any of the new conflicts initiated by President Obama. Operation Iraqi Freedom is estimated to have cost $1.6 trillion as of 2013.

177. See *Savage, Takeover*, supra note 154, at 208.
least 134,000 casualties of Iraqi civilians, and casualties among U.S. security forces were 4,411 deaths and 31,952 wounded in action.\(^{182}\)

Indeed, a further arguable consequence of the Iraq War was the creation of ISIS, something that brings us full circle.\(^{183}\) One might say that not only was the Obama Administration different from the Bush Administration, but that the Bush Administration was responsible for creating some new national security threats President Obama was forced to address.\(^{184}\)

IV. WAR POWERS AND CHECKS AND BALANCES

It is highly doubtful anyone could make money writing a book called “Why We Should Not Fear the Presidency.”\(^{185}\) A certain amount of hype seems endemic. Despite the warnings of some in the civil liberties community, Presidents Bush and Obama were not interested in being monarchs and did not wield the power of tyrants.\(^{186}\) They were democratically elected politicians who sometimes wielded power in controversial ways.\(^{187}\) With respect to the 9/11 War against al Qaeda and associated organizations, I suggest that they wielded the power presidents normally have in a war consistently approved by the American people.\(^{188}\)

This means that grand separation of powers narratives such as the “imperial presidency” are more of a distraction than an analytical help.\(^{189}\) In
Long Wars, I conclude that obsessing over the imperial presidency was chiefly a way for those left-of-center to avoid thinking seriously about the president’s responsibilities under the Cold War constitutional order—namely, advancing the foreign policy and protecting the national security of the United States.\(^\text{190}\) Although the Cold War is in the nation’s rearview mirror, those in government are still operating under its assumptions about presidential responsibility in foreign policy and using the institutional capacities developed in that era to wage war.\(^\text{191}\) We should therefore not buy into narratives that pretend this constitutional order is either an illusion or a conspiracy.

With respect to the issue of constitutional checks and balances in relation to presidential war powers, where does that leave us? What are the real issues? My argument in this Article suggests several paths of analysis. I first argued that many commentators have missed the significance of the democratic dimension of the 9/11 War.\(^\text{192}\) The constitutional basis of that war is not limited solely to the somewhat out-of-date 9/11 AUMF.\(^\text{193}\) It is also based on a series of presidential elections that have repeatedly ratified the American people’s continuing concern with the terrorist threat posed by al Qaeda and its associates.\(^\text{194}\) This consistent democratic support should make lawyers more comfortable with the interpretive leeway taken by both the Bush and Obama Administrations with respect to the 9/11 AUMF.\(^\text{195}\) After all, democratic elections are part of our system of checks and balances.

Elections and the democratic process are relevant not only to understanding the continuing relevance of the 9/11 AUMF, but also to the legitimacy and viability of the Cold War constitutional order itself. Although scholars, mostly on the left, have claimed that the Cold War order happened as a result of a kind of elite conspiracy, I argued in Long Wars that it is more plausible to suppose it had a substantial measure of democratic legitimacy.\(^\text{196}\) Indeed, in many respects, the Cold War constitutional order was something the American people established.\(^\text{197}\) It remains a signal example of informal constitutional change in contemporary times. We the people democratically

\(^{190}\) Id. at 268–69.
\(^{191}\) See id.
\(^{192}\) See supra Part II.
\(^{193}\) See supra Part II.
\(^{194}\) See supra Part II.
\(^{195}\) See supra Part II.
\(^{196}\) GRIFFIN, LONG WARS, supra note 10, at 69–71.
\(^{197}\) See id.
gave the president not only the responsibility for acting in the interests of the United States around the globe but also, crucially, the institutional means or state capacities to do so.\textsuperscript{198} Doing this changed the original constitutional order and thus the Constitution itself, despite the absence of a formal constitutional amendment.\textsuperscript{199}

So another path of analysis is whether this background reality held after 9/11. Most of the measures adopted after 9/11 likely had democratic support,\textsuperscript{200} although there are some very troublesome cases that deserve further investigation by scholars, including the run-up to the Iraq War and, of course, the secret NSA surveillance programs I bracketed for the purposes of this Article. In addition, we need more attention to the proper role of Congress. As I have noted, what tends to be left out in civil libertarian discussions of issues such as detainee policy is the viewpoint of members of Congress. With respect to closing Guantánamo, for example, the parties and the branches of government split and so Congress limited President Obama’s options.\textsuperscript{201} This may have harmed the standing of the United States with our allies, especially in the Middle East,\textsuperscript{202} but it was not the result of presidential unilateralism\textsuperscript{203}—quite the opposite.

If Congress were involved on detainee policy and other issues, this cuts against both the ideas that the Cold War order inherently requires presidential unilateralism and that the various measures taken after 9/11 were not in accordance with U.S. values. Rather, as is perhaps more common in our history than lawyers would like to admit, what the United States stood for was itself a subject of democratic debate after 9/11.\textsuperscript{204} The more

\begin{footnotesize}
\begin{enumerate}
\item[198.] See id. at 70–71.
\item[199.] See id.
\item[200.] See Jason Villemez, 9/11 to Now: Ways We Have Changed, PBS NEWSHOUR (Sept. 14, 2011), http://www.pbs.org/newshour/rundown/911-to-now-ways-we-have-changed/.
\item[203.] See Bruck, supra note 201.
\item[204.] See GRAFFIN, LONG WARS, supra note 10, at 220.
\end{enumerate}
\end{footnotesize}
thoroughgoing critiques offered by civil libertarians were generally rejected, not merely by lawyers in the Executive Branch, but by Congress and the public.205

Yet there is a difference between recognizing that Congress was a player and asking whether Congress was a meaningful contributor to the formation of national security policy. Like many constitutional scholars, I wish Congress were more involved on issues of foreign policy and national security. In Long Wars, I argue that in order to trigger the “cycle of accountability,” the institutional structure of Congress requires a substantial overhaul.206 In its absence, what has happened since 9/11 should heighten scholarly interest into the adequacy of intrabranch checks on executive action.207 The Obama Administration’s consistent use of the interagency process to vet legal policy—and the Bush Administration’s bypassing of that same process—have lessons to teach us about how checks and balances can operate meaningfully inside the Executive Branch.208

Going forward, we should be greatly concerned about whether Congress can play a meaningful role in foreign policy in the next presidential administration. In Charlie Savage’s alarming account, the Obama Administration repeatedly confronted the reality “that Congress was unable to function as a competent governing partner.”209 Savage makes this particular remark in the context of discussing the operation against ISIS, although it applies just as well to many other war powers episodes in the Obama Administration, including the 2011 intervention in Libya.210 This episode is worth a special comment by way of concluding this Article.

Especially thick clouds of irony and hypocrisy surround the Libya episode.211 It may be forgotten that intervention in Libya was strongly

206. GRIFFIN, LONG WARS, supra note 10, at 255–60.
208. SAVAGE, POWER WARS, supra note 64, at 64–65.
209. Id. at 687.
210. Id. at 687–88.
211. For a valuable account by an Obama Administration insider, see CHOLLET, supra note 64, at 96–116.
advocated by members of Congress of both parties, including influential senators such as John Kerry and John McCain. President Obama was lobbied from all sides to intervene, including by Secretary of State Hillary Clinton and our allies abroad. Ultimately, the Senate was generally in favor of intervening, while the leadership of the House of Representatives in effect reserved the right to object if things went wrong.

For legal scholars, the legality of the Libya intervention came down to the fact that it violated the 60-day limit in the War Powers Resolution (WPR). Giving credence to this concern, many of the lawyers in the Obama Administration believed that the 60-day limit was constitutionally valid. But for the Republican-controlled Congress, the calculus should have been considerably different. This is because both the presidential and congressional wings of the Republican Party were repeatedly on record claiming that the WPR was unconstitutional and should have been repealed. Only the most severe form of selective amnesia can explain why this became a point of criticism from members of Congress, as opposed to the academy. At the same time, the House of Representatives, allergic to most proposals from the Obama Administration, could not bring itself either to reject or approve the Libya operation.

In any case, the tendency to reduce the constitutionality of the Libya operation to whether the WPR was violated shows, I think, the limitations of conventional war powers analysis. Consider that official rationales are usually relevant to the determination of constitutionality. But the concentration on the WPR does not do justice to the reasons behind President Obama’s decision to intervene. These included, for example, a desire to support our allies, who let it be known that they were going to

213. Id. at 315–16.
216. Savage, Power Wars, supra note 64, at 641–49.
217. Griffin, Long Wars, supra note 10, at 172–74; Savage, Takeover, supra note 154, at 47, 60–61, 120–21. Indeed, prior to the Obama Administration, it was common among legal scholars to rate the WPR a dead letter. See Posner & Vermeule, supra note 112, at 86.
218. Savage, Power Wars, supra note 64, at 649.
intervene in Libya regardless of what the United States did.\textsuperscript{219}

In \textit{Long Wars}, I argue that presidents usually think of military operations in a broader context, as means to ends, not ends in themselves.\textsuperscript{220} The focus of the Executive Branch is typically on how the proposed operation fits into the larger constellation of U.S. interests in foreign policy and national security.\textsuperscript{221} Yet the somewhat obsessive concern among constitutional scholars on whether the president complied with the WPR distracts from the question of ends. This conventional approach is thus not an especially helpful way to either understand the constitutional basis of executive action in the present or figure out how to check it in the future. If anything, as I argue above, we need to focus more on the structure of Congress if we want to improve our constitutional order, not the Executive Branch.

The deep congressional dysfunction demonstrated by the Libya episode surely illustrates just how far we have to go in building a better constitutional order for war powers. The successor to the Cold War constitutional order should be inspired by eighteenth-century concerns, mindful of the historical lessons of the twentieth century, and attuned to the new circumstances of the twenty-first.

\textsuperscript{219} CHOLLET, \textit{supra} note 64, at 97–98.

\textsuperscript{220} GRIFFIN, \textit{LONG WARS}, \textit{supra} note 10, at 27–30.

\textsuperscript{221} \textit{See id.} This is well-illustrated by Chollet’s account of the Libya operation. \textit{See generally} CHOLLET, \textit{supra} note 64, \textit{passim}.