The Relational Conception of War Powers

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The U.S. Constitution’s allocation of the authority to initiate military hostilities is conspicuously vague. In contrast to its concrete placement of the power to borrow money in the hands of Congress, or of the power to grant pardons in the hands of the president, the war power is distributed between the branches in ways that defy easy categorization. Congress is given authority to “declare war,” but it is unclear whether “declaring war” is the same power as authorizing hostilities.1 And, although the hierarchical structure of the president’s office, the fact that it never adjourns, and his role as commander in chief seem to indicate some war authority, the contours of that authority are left unspecified.

All commentators agree that the president may defensively repel attacks on the United States. But the current debate over the authority to initiate aggressive hostilities is divided according to whether one supports the presidency or Congress. Congressional partisans claim that Congress, and Congress only, enjoys the power to authorize hostilities. Partisans of the presidency, on the other hand, claim that the president has the domestic constitutional authority to initiate aggressive military hostilities without any authorizing legislation. But both sides share a common assumption—that the Constitution settles, or should be interpreted so as to settle, this foundational question of institutional authority.2

It is not strange to read the Constitution in light of the idea that it should settle basic questions of institutional authority. A dominant model of constitutional authority, the settlement thesis, claims that resolving foundational political questions is precisely the function of a constitution. According to the settlement thesis, constitutions are meant to settle or resolve foundational political questions, and hence constitutional fidelity must involve little or no conflict over constitutional values, institutions, or procedures.3 A corollary is that political questions not resolved by the constitutional text are open for resolution in a completely discretionary way. Under this view, constitutions establish frameworks for handling ordinary political contestation. A political question can be either settled by the constitution, and hence become a part of the basic framework, or not settled by the constitution, and hence become a matter for discretionary decision making. From this point of view, struggle between the legislature and executive over war authority looks like a constitutional failure or even a crisis. The settlement thesis is perhaps the single most prevalent premise guiding constitutional theory today.

This essay argues that the settlement thesis is strikingly inadequate for understanding the Constitution’s allocation of war authority. I instead defend a “relational” account of war authority, one premised on the value of maintaining the branches in relationships of mutual review, even when that review leads to interbranch interpretive conflict. In fact, the relational model does not see struggle over constitutional meaning as necessarily a problem at all.4 In some cases, interpretive struggle, by clarifying what is at stake in a particular security context, can generate more constitutional authority than would be the case if one branch were highly deferential. In other cases, interpretive struggle can lead the branches to develop governance and interpretive capacities that are useful for broader constitutional aims. While this essay does not develop the full contours of the relational model, it does demonstrate the model’s value for understanding two critical war acts: Kennedy’s response to the Cuban missile crisis, and Nixon’s Cambodian incursion. In both cases, the relational model

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Just Political Order (Baltimore: Johns Hopkins University Press, 2007), chap. 14, on the relationship between interpretation and maintenance.

points us toward criteria of constitutional evaluation that are more illuminating than are those offered by the settlement account. Exploring the relational model through these cases reveals the tremendous difference between the questions raised by a settlement approach and those raised by a relational approach. Ultimately, whereas the settlement model either defends or condemns together the presidential conduct in each case, the relational account reveals subtle yet critical constitutional differences between Kennedy’s and Nixon’s acts of war.

The Relational Conception of Constitutional War Authority

Settlement understandings of the war power locate war-making authority with either Congress or the executive. Hence, John Hart Ely emphasizes the necessity of congressional authorization of war, and John Yoo emphasizes the vast scope of the executive power. By contrast, the relational account emphasizes that the war authority is shared, that the best answer to the question of who holds war authority varies according to the security context, and that the Constitution equips the branches themselves to make appropriate constitutional judgments on the allocation of the sovereign war power in ways that are intelligently related to the public good.

Three critical conditions support the branches’ capacity to make these judgments. First, both Congress and the president are structured so as to enjoy independent political authority. They are elected from different constituencies, and neither holds the power to remove the other from office except under exceptional circumstances. This independence preserves their capacity to make claims on one another without threats of personal reprisal. Second, the branches are structured so as to achieve distinctive values. While the presidency is structured to achieve a capacity for (relatively) quick response and (relatively) univocal communication, Congress is structured to achieve governance that is (relatively) deliberative and which is in (relatively) greater touch with the relationship between general policy commitments and the well-being of particular constituencies. These distinctive structures can be used to support the development of distinctive perspectives on matters of both ordinary politics and constitutional interpretation. Finally, when exercising war authority, the branches are exercising a power that is shared. These three conditions I call the “conditions of conflict.” The independence and distinctiveness of the branches create conditions for disagreement; but the exercise of shared powers makes it possible for that abstract disagreement to turn into outright conflict as the branches vie for the primacy of their own views in the execution of actual policy. These conditions indicate a constitutional vision on behalf of a broad practice of mutual evaluation from each branch’s distinctive point of view, a constitutional vision of interbranch deliberation. Under the relational conception, these three conditions are not facts about the constitutional order to be proved or disproved through empirical research. They are rather a set of capacities that are also legitimating conditions for the creation of constitutional authority. Because they are so important for generating constitutional authority, these conditions are also a set of public goods to be achieved. Congress can fail to achieve a perspective distinctively related to its special governance strengths; when it does so, its assent to a public policy fails to deliver all of the constitutional authority that Congress is capable of muster. This means that if one of these conditions is not met, even coordinate judgments of Congress and the president suffer from impaired constitutional authority. If we imagine a president getting his way on a war authorization by plausibly threatening to fire those legislators who disagreed with him, or if we imagine a Congress that cowers before a president’s representation of a threat rather than basing its decisions upon its own deliberations, we can easily see how interbranch agreement, on its own, is not enough to create real constitutional authority. Agreement must instead be reached in a context where the conditions of conflict are intact; and when those conditions are intact, interbranch agreement is not as important for war authority as many have argued.

Ultimately, the relational account grounds constitutional authority not only on interbranch agreement but also on the relationship between the branches’ epistemic and functional capacities and the nature of the security threat. In a context of immediate invasion, the executive’s capacity to move quickly and to take initiative means that that branch has more authority. In the context of wars that signify new and broad foreign policy commitments, Congress’s special capacities to integrate the perspectives of citizens from multiple regions and with multiple interests, to integrate new information into large policy visions, and to consider the distribution of benefits and burdens of large commitments give that branch more authority. Of course, it is often unclear what the meaning of a particular war act is or would be and whether that act would benefit more from congressional or presidential determination. In these cases, the branches must make

their own best judgments about the relationship between the security context and their own constitutional capacities. When the branches disagree, interbranch interpretive conflict can amount to a deliberative process for helping to achieve a constitutionally authoritative response, one that takes into account more rather than fewer relevant dimensions of political concern. Hence, the relational conception of war powers interprets constitutional vagueness as a way of enabling an appropriate form of political judgment as to the location of constitutional authority in a particular context, as opposed to licensing a zone of pure interpretive discretion.8

It is important to distinguish the relational conception from classical separated-powers accounts about foreign policy. There is a vigorous debate over the relationship between separated powers and an effective foreign policy. Some have argued that the branches' capacity to pursue divergent tasks may lead to more efficient and intelligent policy regardless of the intent of officials. For example, Aaron Friedberg argues that congressionally imposed tax ceilings (imposed in response to local political pressure, not from an alternate war vision) inadvertently supported U.S. success in the Cold War by allowing the United States to pursue both productivity and defense buildup at the same time, ultimately leading to a more successful defense posture. Others argue that separation of powers can impair U.S. foreign policy by rendering it self-defeating and vacillating.9 The settlement versus relational account does not track this division, because instead of focusing on the branches’ contributions to “governance” broadly defined, the settlement and relational accounts pertain to the branches’ specific constitutional practice—their development and articulation of distinctive constitutional visions that are wedded to their foreign policy visions. Hence, although the departmentalist claim that “just about everybody” engages in constitutional interpretation simply by assuming the constitutional validity of their own behavior is true,10 there is a conceptual difference between Congress’s affecting war policy through the unselfconscious exercise of its tax authority and its destabilizing a president’s initiative by offering a competing war policy under an interpretation of its own war powers. No scholar challenges the constitutional validity of the first exercise of power (but perhaps some

should). But the second can be very controversial. One reason it is so controversial is because that struggle creates a burden for the elected branches to defend their constitutional judgments in a context where the constitutional text is not crystal clear. In other words, the relational conception creates a burden for constitutional argumentation that is deeply political in nature. This essay shows how such arguments can be built with regards to two specific cases.

The Cuban Missile Crisis and the Cambodian Incursion

Consider two acts of war of two separate presidential administrations: the 1962 Cuban missile crisis of the Kennedy administration and Nixon’s intervention in Cambodia (the bombings in 1969). In the fall of 1962, Kennedy had assured Congress that there were no offensive missiles in Cuba, consistent with statements he was receiving from the Soviets and from personal communication from Khrushchev, and consistent with beliefs of U.S. intelligence. When it became apparent in October that missiles were being installed, Kennedy kept the situation secret, notifying even allies before he notified the public or Congress. He kept the situation secret while making preparations for the possibility of a nuclear war and actually initiating an act of war, a blockade that was not announced until it was actually being executed. It is plausible that Kennedy kept the blockade secret for reasons of political calculation; Kennedy was being attacked by Republicans for his failures in Cuba, especially the disastrous Bay of Pigs invasion.11

Nixon cited this “finest hour” of the Kennedy administration as precedent for the Cambodian invasion.12 Nixon’s intervention in neutral Cambodia was justified as a way to weaken that country’s utility as a supply line and conduit of soldiers into the Vietnam conflict. Although Nixon did not originally defend his actions under international law (emphasizing that “we live in an age of anarchy, both abroad and at home”), the administration did eventually offer a legal defense of its actions.13 It is

8. This element distinguishes my account from the interpretation-construction account (where constitutional vagueness is seen as enabling a zone of “construction” that should be guided by an appropriate, nonconstitutional political theory) that has gained so much currency. See Murphy, Constitutional Democracy, 460 n. 3.
10. See Murphy, Constitutional Democracy, 463.
11. For an argument that the choice of a blockade was a response to domestic political pressures, see Fen Osler Hampson, “The Divided Decision-Maker: American Domestic Politics and the Cuban Crises,” International Security 9, no. 3 (1984): 130–65.
plausible that Nixon, like Kennedy, kept his actions in Cambodia secret to evade domestic political pressure—in this case, against escalating the Vietnam War.

The settlement account has few questions to ask about the constitutionality of these actions. From a pro-Congress settlement position, evaluating the constitutionality of these acts is entirely a question of whether the president was appropriately authorized by Congress. From a pro-executive settlement position, we need only ask whether Congress had taken any constitutionally legitimate action—such as defunding the military—to block what was an inherent executive power. The answers to these questions are similar in the two cases. Neither act of war received explicit authorization from Congress, but in neither case did Congress block the executive’s capacity for action. Both were kept secret from the public and from Congress. Both presidents justified their acts by appealing to an inherent executive power, but neither act actually represented a response to an immediate attack or invasion.

From a pro-Congress settlement position, evaluating the Cambodian incursion is entirely a question of whether the president received congressional authorization, which in turn hinges on one’s interpretation of the Gulf of Tonkin resolution, which authorized executive action in Southeast Asia. John Hart Ely, a pro-Congress settlement theorist, reads the Gulf of Tonkin resolution as a broad mandate, but argues that the bombing of Cambodia in 1969 was still unconstitutional because the secrecy of the bombing meant that Congress was denied the opportunity to retract its authorization if it so chose when confronted with the consequences of its security decision. For Ely, the constitutionality of a war act is entirely a function of congressional authorization in a context of full knowledge. The context or meaning of the war act does not matter for Ely; authorization is authorization, no matter what bizarre consequences follow. In fact, Ely followed the logic of his position to its full conclusion by arguing that the Gulf of Tonkin resolution would even license bombing supply lines in China if the Congress knew about this action and hence had a chance to block it. The meaning of the escalation of the war outside of Vietnam and the incoherence of Nixon’s public justifications for his actions are simply insignificant, on this settlement account, because congressional authorization is congressional authorization no matter what. Ely never published commentary on the Cuban missile crisis, other than a footnote noting his astonishment that Robert Kennedy never considered Congress as a possible source of advice. But in all of his work, Ely makes it clear that it is congressional authorization in the context of full knowledge that makes acts of war constitutional. According to that criterion, the naval blockade of Cuba, like the Cambodian incursion, was unconstitutional.

What about the inherent powers of the executive office? Even pro-Congress settlement theorists agree that the president can respond defensively if another country launches an attack on U.S. territory. The Cambodian incursion was an escalation of an aggressive war, and nobody has defended it in terms of presidential defense powers. As for the Cuban missile crisis, it is worth emphasizing that Kennedy had even less statutory authority than Nixon did. Nixon had at least the Gulf of Tonkin resolution, where it is arguable what power Congress had granted; Kennedy had nothing. Hence, according to a settlement account, the only constitutional authority Kennedy could enjoy for the blockade would have been in terms of his pure executive authority to defend the nation from attack. But the existence of missiles in Cuba did not constitute an attack or even an immediate threat. As Kennedy himself appreciated, the USSR already had ample missiles to destroy the Unites States. Although the missiles somewhat enhanced the Soviet first-strike capability, such an enhancement would likely not have an effect on the strength of the retaliatory response—and it was the retaliatory response that was the primary basis for the Cold War security guarantee. Furthermore, the missiles were attractive targets for preemptive strikes given that they did not have rapid launch capabilities (the United States was already considering removing its missiles from Turkey for this very problem). More significant was the

14. See William D. Rogers, “The Constitutionality of the Cambodian Incursion,” American Journal of International Law 65, no. 1 (1971): 26–37, who argued that the incursion was unconstitutional because the Gulf of Tonkin resolution allowed the President only to repel “armed attack,” not to disrupt supply lines. The resolution also allowed the president to use armed force to aid a SEATO member or protocol state requesting assistance, but Cambodia had not requested assistance in 1969. Rogers believes that the case of the Cambodian incursion thus rests fully on whether the president has such powers under his sole authority as commander in chief.

15. Ely, “American War in Indochina, Part II.”


meaning of the introduction of the offensive missiles from the point of view of international political appearance. Kennedy had just assured the public that if Cuba were ever to “become an offensive military base of significant capacity” that the United States would do “whatever must be done to protect its own security and that of its allies.” For the Soviets to quickly and secretly insert missiles into Cuba after such remarks by the president represented a threat to U.S. honor but a crisis only from within a Cold War paradigm whereby international security was guaranteed by the willingness of the U.S. president to back up words with force. In other words, the Cuban missile crisis, like the presence of supply lines in Cambodia, was a threat according to a particular security paradigm but did not itself represent an immediate hostile invasion or even the threat of an immediate hostile invasion.

For this reason, pro-Congress settlement scholars will find little to defend in either instance. By contrast, pro-executive settlement theorists can defend both actions according to the president’s inherent power to authorize hostilities. John Yoo defended the Cambodian incursion as clearly constitutional, nor because of the Gulf of Tonkin resolution, but because the executive power of the president contains an inherent power to initiate hostilities. (Although Yoo emphasizes that “the Constitution does not establish any specific procedure for going to war,” it is appropriate to call him a settlement theorist because of his view that insofar as the Constitution does not decisively settle the question of where authority for war resides, the right answer to such a question is completely discretionary.) His analysis easily extends to Cuba. Under Yoo’s reading, because Congress never decisively blocked Nixon from the Cambodian incursion or Kennedy from the Cuban blockade through funding restrictions or other measures, these acts were constitutional.

The settlement account has little to say about an act of war other than which institution authorized the act. And according to the settlement conception of war powers, the constitutionality of Kennedy’s blockade in Cuba and Nixon’s bombing of Cambodia rises and falls together. Both Nixon’s bombing of Cambodia and the naval blockade that Kennedy established in the Cuban missile crisis were acts of war under international law. Both presidents undertook these acts of war without the consent of Congress—indeed, without notifying Congress at all. And neither of these acts was consistent with an executive power to defend the nation, unless that power is understood quite broadly, as John Yoo does, in which case both acts are justifiable together.

The relational conception, on the other hand, expands the scope of constitutional questions we can ask about these acts of war. Beyond simply asking whether the executive received explicit legislative authorization, the relational conception asks us to consider the relationship of the war act to a legislatively authorized security vision; the meaning of executive secrecy, specifically the relationship of that secrecy to the development of a distinctive institutional perspective; and the retrospective judgment of Congress. Each of these criteria is offered as politicized dimensions of constitutional judgment. The rest of this essay discusses what is valuable in each of the criteria that the relational conception proposes and applies them to the Cuba and Cambodia cases. Ultimately, examining the cases through these expanded criteria reveals that the two acts are constitutionally (although not legally) distinguishable.

Relationship of the War Act to a Legislatively Authorized Security Policy Vision

It is a familiar idea that independent executive action can be warranted when the country faces an emergency threat. The structure of the executive office (which seems well equipped for quick response) and a deeply held, widely shared national consensus undergird this constitutional warrant. Even the most ardent pro-Congress settlement theorist sees a role for independent executive action to defend the country from immediate hostile invasion. Exercising this capacity skillfully is normally seen as one of the main functions of a presidency.

But the language of war, with its accompanying rhetoric of necessity, emergency, and urgency, often conceals the considerable element of judgment that is involved in designating a threat as a threat. What counts as a national interest, and hence what counts as a security threat, far from being self-evident, is always a matter of political construction.

For example, although the interruption of trade that led to the Barbary Wars constituted a “threat” that Jefferson used to justify extensive uses of independent executive power, the far more significant and massive interruption of U.S. trade during the lead-up to World War II was not identified


20. Yoo, “War and the Constitutional Text.” See especially his assertions that, because of the paucity of judicial opinions on this question, past practice determines constitutionality (24). Although Yoo criticizes “legalistic” accounts of war powers, the posing of a sharp dichotomy between constitutional determinations resolved by judges and zones of pure political discretion is a core characteristic of the settlement view.

as a "threat" by the Congress that passed the Neutrality Acts of 1935. That Congress saw entanglement in European politics as the true threat. This strong element of political judgment is present even in designating attacks on national territory as war threats. The 1993 bombing of the World Trade Center was understood as catastrophic but not as an act of war that would justify a broad executive war power. Few emergencies come neatly labeled as such. Rather, most emergencies are cognizable within a security paradigm that designates the content of the national (or public) good and designates the sorts of events that count as an emergency or warlike disruption of that good.

What counts as an emergency threat depends upon what has been articulated as a national self-interest, and these articulations are not always self-evident. The Constitution itself implies one national self-interest in terms of the preservation of its own institutions. This was the articulation Lincoln relied upon to undergird the extraordinary security powers he assumed during the Civil War. A deeply held and broadly shared general consensus about threat may undergird another articulation. For example, although the identification of a hostile invasion as an emergency threat makes sense only from within a contestable paradigm (the Dalai Lama does not believe China's invasion of Tibet warrants a warlike response), it is a paradigm that is so deeply uncontested in the United States that it is appropriate to rest on it as a solid touchstone for grounding executive authority. But other public interests are given specific content neither through the Constitution itself nor through deep consensus but rather through the operation of the political processes that the Constitution supports. The national self-interest that counts is not only the self-interest articulated in the Constitution but also the one (or ones) that emerge (or are constructed) from the security politics of a particular time. Hence, the first criterion that the relational conception advances is the relationship of the war act to a security paradigm that Congress has participated in constructing.

Congress has a powerful role to play in articulating these political conceptions of national self-interest not only because of the considerable security-related powers that the Constitution gives Congress but also because of the relationship between its constitutional capacities and the nature of that task. Constructing a security paradigm involves integrating at a minimum both the security concerns of the nation as a whole and the varied meaning of these security commitments for different regions, economies, and interests within the nation. Legislatures are comparatively well equipped to integrate the perspectives of diverse constituencies, to consider the significance of various kinds of threats for those constituencies, and to consider how the public good regarding security should be constructed given these perspectives. Indeed, Congress has the occasion to consider these questions every time it exercises one of its security powers. As an institution that is practiced in debating priorities and experienced in the political questions that lay beneath broad security visions—questions of funding, allocations of costs and benefits, the kinds of risk that are and are not tolerable, and so forth—Congress, as well as the president, has a valuable epistemic role to play in constructing a security paradigm for its particular age. This paradigm, once constructed, can play a role in guiding acts of executive prerogative.

This criterion—the question of the relationship of a war act to a congressionally authorized national security paradigm—allows us to move beyond Locke's prohibitive as the sole theoretical framework for guiding judgments about authorized independent executive power. Right now, pro-Congress settlement theorists implicitly rely on Locke to provide the theoretical justification for executives to engage in defensive war without congressional authorization. For, although the Constitution requires the president to vow to "preserve, protect, and defend" the Constitution, we need reference to Locke's notion of executive power in order to construe that oath as an actual grant of independent war-making power.

Lockean prerogative gives the executive power to act without, or even against, the law for the sake of the public good. For Locke, the only limitation on this power is the right of revolution or resistance, powers that are inherently reactive. Locke's failure to offer any specification for the content of the public good renders this power utterly, especially when we take seriously the deep element of political judgment that is involved in designating threats as threats. To make prerogative tractable from a constitutional perspective, we can specify the content of the common good at least in part through reference to the functioning institutions that are given responsibility for defining that good. Understanding legislative authority in terms not only of Congress's power to authorize particular hostilities but also of its power to construct, through legislation, a public conception of the national security interest can be useful as a constitutional discipline to Lockean prerogative. Under this more disciplined, constitutionalist conception, the prerogative power still pertains to action without law (i.e., actual authorization). Yet insofar as it responds to a threat identified as such through Congress's construction of a security framework, it is less constitutionally problematic than is a pure prerogative power, where the content of the public good is left undefined or defined only by the president himself.

One value of this criterion beyond its capacity to discipline Lockean notions of prerogative power is that it draws attention to an element of congressional participation in the construction of war authority that has been too often ignored. Advocates of strong presidential power (even reluctant advocates) speak of the president’s advantage in acting as “first responder” to emergency. This gives him the capacity to set the terms of debate and creates a field within which Congress’s only plausible role is that of a reactive institution. This first criterion shows us that Congress, too, can act as a “first responder” by defining the field within which events will be categorized, or not, as war or emergency events. If Congress’s participation in the construction of a security paradigm is one element of its constitutional agency, there is good reason for Congress to pay deep attention to this part of its security tasks.

Congress did not authorize either Kennedy’s or Nixon’s act of war. Settlement theorists believe that a failure to offer authorization always counts in one direction, either to curtail executive authority or to supplement his zone of discretion. But when we understand the significance of congressional participation in constructing a public conception of the nation’s security interest, then it becomes clear that a failure to achieve legislative authorization is of varying constitutional significance depending in part on the relationship of the war action to a broader security vision that Congress has ratified. If the aggressive war act signals a considerable shift in the nature of threat cognizable by the U.S. government, then a failure to achieve congressional authorization is devastating. But if the aggressive war act is meaningful from within a security paradigm that Congress has participated in constructing, then failure to achieve authorization represents the president’s recourse to a form of executive prerogative that, while still potentially risky, is less constitutionally problematic.

What does this mean for Cuba and Cambodia? As mentioned, neither received explicit congressional authorization. In the Cuban case, Kennedy announced his view that his authority as commander in chief was adequate for the blockade and asserted that there was no reason for Congress to grant him that authority, although he would “be very glad to have those resolutions passed if that should be the desire of the Congress.” Congress then did pass a resolution expressing determination “to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States,” but that resolution indicated that the United States was “determined” rather than that the executive was “authorized.”

However, the Cuban missile crisis was easily recognized as a crisis from within an astonishingly broad Cold War consensus. The basic tenets of the Cold War, including the identification of the USSR as a threat, the identification of the United States as the only global power able to resist Soviet influence after the Cold War, the division of the world into geographic spheres of influence, and the positioning of the president as the first responder to Soviet threats, had been ratified repeatedly by Congress in everything from the system of weapons that were funded, to the structure of the Cold War military and bureaucratic buildup, to alliance decisions and the structure of foreign aid. According to the system for organizing danger under this repeatedly ratified Cold War ideology, the placement of missiles in Cuba represented a threat because they could be launched with little or no warning to the United States, and because the warheads placed Cuba, otherwise within the U.S. regional sphere of influence, explicitly within the Soviet deterrence system. According to Cold War ideology, tolerating this incursion would create a vulnerability by signaling that Kennedy was willing to tolerate a Soviet lie. Legislators had also been pressuring the executive to “do something” about Fidel Castro, a pressure that had conditioned their mild response after the failed 1961 Bay of Pigs invasion. Finally, although the Cuba resolution was not a legal authorization, it did indicate a political commitment to responding to threats to U.S. interests in Cuba. None of these represent congressional authorization for Kennedy’s act of war. But they create a field within which the president’s response to the Cuban situation is rendered meaningful according to a broadly shared security ideology which was the template for a Cold War legal (i.e., congressionally authorized) architecture.

Nixon, like Kennedy, lacked explicit legislative authorization for the incursion. Congressional authorization for the Cambodian bombing could only be pursuant to the Gulf of Tonkin resolution of 1964. That resolution stated that “Congress approves and supports the determination of the President . . . to take all necessary measures to repel any armed


attack against the forces of the United States ... Consonant with the
Constitution of the United States and the Charter of the United Nations
and in accordance with its obligations under the Southeast Asia Collective
Defense Treaty, the United States is, therefore, prepared, as the Presi-
dent determines, to take all necessary steps, including the use of armed
force, to assist any member or protocol state of the Southeast Asia Col-
collective Defense Treaty requesting assistance in defense of its freedom.\textsuperscript{28}
Although this resolution authorized the Vietnam War, contra Ely, the lan-
guage of the resolution should not be interpreted as a legal authorization
for the Cambodian bombings simply because Cambodia had not
requested assistance. Hence the terms of the statute simply do not cover
the assistance Nixon offered through bombing.

We also should not read the resolution as ratifying a security paradigm
to which Nixon could turn as a source of constitutional authority. By
1969 whatever political conception of security lay beneath the resolution
was deeply imperiled—and the strife was evident in Congress’ actions.
Beginning in 1966 and 1967, the Senate Foreign Relations Committee
(SFRG) had received information that Johnson had misrepresented the
Tonkin attacks. The SFRG leaked this information to the press.\textsuperscript{29} Senator
William Fulbright, the chair of the SFRC, began holding hearings on
the Tonkin resolution in 1966, and those hearings highlighted Congress’s
emerging strong opposition to that conflict. By 1968 Fulbright and a sig-
nificant number of other congressional foreign policy elites had begun
to characterize the Tonkin resolution as an “overreaction obtained by
misrepresentation.”\textsuperscript{30} By 1969 congressional debates over Vietnam had
become polarized, and in 1969, while Nixon actually began the bomb-
ings (but before they were made public), U.S. senators John Sherman
Cooper (R-KY) and Frank Church (D-ID) were passing legislation pro-
hibiting the introduction of U.S. combat troops into Thailand or Laos.
Hence, although Congress had funded the Vietnam War and had passed
the Gulf of Tonkin resolution, the foreign policy ideology according to
which Vietnam itself—to say nothing of expansion of the conflict to
Cambodia—made sense at all was subject to serious divisions within
Congress. The president was facing immense pressure to disengage and
to reframe American security interests in a more limited way.

\textsuperscript{28} Southeast Asia Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (also known as
the Tonkin Gulf Resolution).
\textsuperscript{29} Randall B. Woods, \emph{J. William Fulbright, Vietnam, and the Search for a Cold War Pol-
icy} (New York: Cambridge University Press, 1998), 165–70; David W. Levy, \emph{The Debate
over Vietnam} (Baltimore: Johns Hopkins University Press, 1991), 51; Scott Shane, “Viet-
nam War Intelligence ‘Deliberately Skewed,’ Secret Study Says,” \emph{New York Times}, Decem-
ber 2, 2005.
\textsuperscript{30} Levy, \emph{Debate over Vietnam}, 146.

It was not even clear that the president himself supported a security vision
that could render meaningful an intervention in Cambodia: Nixon’s own
public statements had offered a foreign policy vision that would preclude
expanding the scope of conflict. In 1969 Nixon had started making seri-
sous public commitments to deescalate the war, remove American combat
troops, and promote “Vietnamization.” Also that year, he had announced
the Nixon Doctrine, emphasizing that foreign nations have the direct
responsibility for their own defense but that the United States would sup-
ply assistance when requested in accordance with treaty commitments.\textsuperscript{31}
Under this doctrine, Cambodia’s neutrality should have protected it from
interference at least until Cambodia itself requested assistance. The security
vision according to which the intervention in Cambodia made sense
was not subject to the kind of broad and deep legislative support that the
basic Cold War tenets had provided to Kennedy. Nor was the executive
defense in order to articulate or defend a coherent vision of the national in-

terest that could reconcile his public statements with his actions. Kennedy’s
and Nixon’s actions are constitutionally distinguishable, then, according
to this first criterion of the relational conception.

At this point, an alert reader might wonder whether the criterion
ultimately falls back onto some of the settlement assumptions that the
relational conception is committed to challenging. Is this criterion, that
the prerogative power be disciplined by reference to a security ideology
ratified by Congress, just another way of saying that interbranch agree-
ment is what, at bottom, authorizes the initiation of hostilities? Perhaps a
relational account that truly valued the epistemic benefits of interbranch
interpretive conflict would defend Nixon for advancing, through the
Cambodian incursion, an alternative to the security consensus that was
beginning to prevail in a Democratic Congress. Nixon, not Kennedy, the
critic would argue, represented a true departure from security group-
think. His actions represented a challenge to Congress at the level of both
policy and constitutional interpretation. This criticism reveals how the
first criterion, taken on its own, ultimately locates constitutional authority
in interbranch consensus even as the relevant consensus moves to
another level of abstraction—consensus over a security paradigm rather
than consensus over a particular policy.

The relational conception is not opposed to consensus-based accounts
of authority but rather to the claim that authority is generated only
through consensus. Hence, the critic is right to notice that this criterion

\textsuperscript{31} Richard M. Nixon, “Address to the Nation on the War in Vietnam,” November 3,
1969, at \emph{Miller Center of Public Affairs Presidential Speech Archive} (University of Virginia,
October 17, 2009).
from the relational conception retains an appeal to the authority of political consensus. Yet we must also notice that broad agreement over security paradigms is consistent with intense and powerful political conflict over the application of that paradigm in particular cases. The criticism is wrong, for example, to posit Kennedy and the Democratic Congress as essentially acting in harmony, even as they both appealed to a broadly shared Cold War security ideology. In fact, Kennedy was at the time involved in a contentious relationship with Congress precisely over the question of Cuba. Congress was urging a more bellicose attitude toward Cuba than Kennedy was willing to accept. While Kennedy’s authority may be enhanced by the act’s interpretability from within a Cold War security consensus, that is different from Congress actually agreeing to the content of his policy. Political conflict nested within a security consensus can be as significant as conflict that is structured by reference to opposing major paradigms.

It is also important to resist the idea that Nixon’s actions represent a distinctive contribution to interbranch deliberation over Vietnam War authority, because he failed to develop and publicly defend an ideology according to which the incursion in Cambodia made sense in light of his previous commitments. The relational account asks the branches to wed their distinctive judgments about public policy to distinctive conceptions of security authority. Although the Cambodian incursion represented a departure from reigning security paradigms, it did not represent a departure that was publicly justified according to a new paradigm through which the public, and Congress, could make sense of a new context. Nixon argued that Cambodia had lost the capacity to stay neutral and therefore had become a part of the Vietnam War. But this reasoning pointed toward a paradigm of escalation and enlargement of the war, not deescalating and handing responsibility for its prosecution to Vietnam. Nixon was not able to reconcile these divergent ideologies into a larger, coherent structure. Departures and deviations, on their own, do not represent contributions to an interbranch system of mutual review. They must be articulated according to a broader security ideology in order to count as deliberative contributions. Hence, Nixon’s failure to publicly articulate an alternative security ideology that could compete with the one he was resisting is fatal to the effort to bolster his constitutional authority through reference to his participation in a system of interbranch deliberation.

32. Presupposing that that consensus is itself constitutionally authoritative. For the purposes of this essay, I presume that it is. But it is important to note that, insofar as the Cold War consensus can create authority for independent executive war action, it is highly appropriate to evaluate the construction of the Cold War security consensus itself through the lens of the relational conception of constitutional war authority.


Secrecy and the Possibility of Rebuff

The second constitutional criterion advanced by the relational conception is the meaning of secrecy and the possibility of rebuff. We have already seen that at least one settlement account, that of Ely, considers secrecy as undermining of executive constitutional authority. Under Ely’s account, for an executive to act in secret curtails his authority insofar as Congress is blocked from the opportunity to revoke or amend the authorizations available to the president. Hence, secret executive war action, for Ely, always represents a constitutional problem.

Like Ely’s settlement account, the relational conception emphasizes the importance of the branches being engaged in practices of mutual review. This generates a strong imperative for the branches to publicize their deliberations to one another. But the relational account also sees that the meaning of secrecy can be different depending on the relationship of that secrecy to the conditions of conflict and security context of the moment. Secrecy, in other words, is of varying constitutional significance depending on its contribution to the system of interbranch deliberation.

In the case of Cuba and Cambodia, both presidents concealed what they were doing both for strategic international reasons and, more troubling, in order to avoid political interference. But there is a critical difference in the meaning of this evasion in each case. In Kennedy’s case, avoiding public judgment was in service of his capacity to formulate a distinctive perspective at all. Kennedy’s opponents were primed and eager to set a belligerent course with Cuba. Kennedy had reasonable grounds for fearing that once the placement of Soviet missiles was made public, and his deliberations were exposed, that political winds would be so strong that he would be unable to develop a distinctive perspective at all. His secrecy was related to the imperative of developing a plan of action. To immediately publicize the missile buildup when it was not clear what the executive branch’s judgment on the situation was could have significantly limited the scope of Kennedy’s deliberations. Kennedy thus forestalled the judgment of the other branches (the third condition) in order to shore up his capacity to develop a distinctive perspective (the second condition). Importantly, once this second condition was met and Kennedy had developed a position, he exposed his conclusions to Congress (and the public). He did not avoid congressional judgment any more than
was necessary for developing his own position. It is also significant that the likely direction of congressional influence—toward more aggressive engagement with the Soviets—remained open for Kennedy, and hence the possibility of Congress enacting an alternate legislative preference was not forestalled by Kennedy’s failure to notify Congress earlier.

Nixon’s evasion of public judgment, by contrast, was not in service of developing a distinctive executive judgment on what should be done. Kissinger offered, as reasons for the administration’s “reticence,” the desire to “avoid forcing the North Vietnamese, Prince Sihanouk, and the Soviets and the Chinese into public reactions. A volunteered American statement would have obligated Hanoi to make a public response,” risking pushing Cambodia further into the arms of the North Vietnamese. 34 But the Nixon administration’s efforts to shield the news from domestic audiences went beyond “reticence.” When news of the bombing was leaked, Nixon tapped the phone of one of his security advisers and placed others within his security circle on an enemies list. 35 Nixon refused to acknowledge American combat operations in Cambodia for a year. When he announced the ground incursions in 1970, Nixon simply lied about prior U.S. involvement in Cambodia, claiming that “for five years neither the United States nor South Vietnam has moved against these enemy sanctuaries because we did not wish to violate the territory of a neutral nation.” 36 Even after the revelation of troop presence in Cambodia, Kissinger and Nixon refused to acknowledge the significance of their intervention, with Kissinger arguing that “it was not a bombing of Cambodia, but it was a bombing of North Vietnamese in Cambodia.” 37

In 1971, when Congress began to investigate Cambodia more seriously, Pentagon officials gave the Armed Services Committee classified information claiming that no B-52 bombing raids had happened in Cambodia before the incursion of ground troops in 1970, exposing a major scandal of pilots listing false coordinates of bombing runs. 38 A witness to the Senate hearings on the matter testified that when he “asked his superior officer from whom the Air Force needed to conceal the bombing raids, the response was, ‘Well, I guess the Foreign Relations Committee.’ ” 39

The secrecy and misrepresentations of the Nixon administration is most plausibly interpreted as a direct desire to avoid the possibility of rebuff by Congress. Such a strategy represents a direct attempt to remove decision making from ultimate democratic control and accountability rather than a secrecy strategy in service of goals that can be constitutionally defended. Nixon may have needed privacy to form a distinctive position on the expansion of the Vietnam War, but, unlike Kennedy, his use of secrecy went far beyond what was required for only those needs.

Because the relational conception emphasizes how constitutional authority is developed over time as a result of the quality of the branches’ responsiveness to one another, executive secrecy cannot be examined at one point in time but rather must be evaluated as part of a developing relationship with Congress. Secrecy contributes differently to the system of interbranch deliberation in different contexts. The relational conception, unlike the settlement account, can be sensitive to the way context changes the meaning of executive secrecy.

Retrospective Judgment

A final criterion for evaluating the constitutionality of aggressive war acts is explicitly retrospective: the post hoc judgment of the branches. This criterion asks us to consider, as constitutionally significant, each branch’s judgment about whether it would have or should have authorized the war act. In practice, because we can expect executives to defend their own actions almost regardless of the consequences, the question will be about Congress’s retrospective judgment of the president’s act of war. But the criterion is phrased with more generality to indicate the equal constitutional significance if a president were to repudiate the constitutionality of his own war act when faced with its consequences.

Retrospective judgment is sometimes understood as distinctively valuable for its capacity to integrate the consequences of a course of action into an account about the authority of that action. For some, it is bizarre to consider the authority of a president’s conduct without considering whether that conduct led to good results, and this type of reasoning is certainly consistent with a Lockean conception of prerogative, where the retrospective judgment of the public is the only way judgment about the legitimacy of an act of prerogative is carried forth. For this reason, the criterion of retrospective judgment has probably been the place where most efforts to develop political criteria for evaluating executive authority have been lodged.

But we must remember that nothing about a judgment being retrospective necessarily makes it better. Those who judge an action after the fact are certainly looking through a different light; but the presence of more
information may not provide an epistemic advantage if the framework they use for analyzing that information is distorted—and some theorists argue that any judgment outside of the context of threat is distorted because it will fail to take the threat as seriously as it ought. Perhaps Congress would be right to repudiate an action after the fact that it was right to approve at the time. For this reason, we should understand Congress’s retrospective judgment as one factor for evaluating constitutional authority but not as a criterion that is more important than the others. An act could be deemed appropriate retrospectively but still be constitutionally problematic according to dimensions other than retrospective judgment; an act could be condemned retrospectively and lose constitutional validity, even if at the time it appeared to be constitutionally appropriate. The way an action appears when judged retrospectively is one element to include in a full constitutional evaluation, but not the only one.

The value of including retrospective judgment as an element of constitutional evaluation is that of constructing a constitutional precedent for moving forward. A constitutionally responsible Congress will exercise its power to judge not because the reactive judge is necessarily more accurate than a contemporary judge, but because the prospect of judging can be a disciplining force for a president contemplating such scrutiny in the future, and because retrospective judgments are one way for Congress to contribute to the political construction of defensible constitutional interpretations about the war power. On this dimension, the differences between the two cases are worth investigating for what they reveal about Congress. Kennedy was never repudiated by Congress. Certain elements of Nixon’s Cambodian incursion were repudiated, but not, as we shall see, intelligently. Hence, here, too, we see a constitutional distinction between the cases, but, as this section describes, the form of the constitutional distinction that Congress drew was bizarre and arguably misplaced.

The response to the Cambodian incursion in the broader public was massive and hostile; Nixon’s announcement about Cambodia spurred the Kent State protests and killings, and a week after those shootings more than 100,000 protesters converged in Washington to protest both the shooting of students and the incursion into Cambodia. Congress itself passed a flurry of legislation indicating policy disagreement with Nixon’s Cambodian decision. Congress revoked the Gulf of Tonkin resolution shortly after the public announcement of ground troops in Cambodia; moved to cut off funds for combat operations in Cambodia through the Cooper and Church amendments (although it took until 1973 for both houses to actually cut off funds for bombing operations); imposed, by 1974, massive restrictions on funding in aid to Cambodia—a ceiling of $377 million against which every expenditure, military or food, had to be counted; and from the early 1970s onward, emphasized in almost all aid bills for Cambodia that no “commitment” was implied (Nixon had used preexisting American commitments in Indochina to prolong the war). In 1973 Congress passed the War Powers resolution, and although the text of that Resolution said nothing about Cambodia, legislative debate was filled with references to Nixon’s abuses there. In March 1974 military aid to Cambodia was cut off completely. A notable gap in Congress’s response was a simple declaration of the unconstitutionality of the incursion itself. The charge that Nixon’s bombing in Cambodia had been unconstitutional was considered as an article of impeachment, but dropped. Hence, Nixon never faced a direct retrospective condemnation in the text of any congressional bill.

With the exception of the War Powers Resolution, the relational conception does not interpret all of this action as constitutional repudiation, however. To interpret policy action as constitutional repudiation would be to destroy the sensitivity of the register with which we read congressional communication. Constitutional interpretation is a practice that depends upon the capacity to communicate subtle positions. Understanding Congress as a constitutional agent is already rendered difficult by the fact that Congress, unlike the president or court, rarely speaks with a single voice. This may be one reason Congress is so often ignored as an interpreter. To read policy judgments of Congress as constitutional evaluations, when Congress itself has not made that connection, would defeat the capacity of the relational account to register Congress as an interpreter at all. Reading policy decisions as necessarily constitutional decisions would also ignore the difference between a separation-of-powers approach, which emphasizes the relationship of separated powers to governance issues, and a relational approach, which pertains to the specifically constitutional implications of the conditions of conflict.

The War Powers Resolution, however, can be read as a condemnation of a certain kind. It is not exactly a retrospective judgment, because it never actually repudiates Nixon’s actions in Cambodia. It is thus possible to read the act as a message for going forward, not as a repudiation of the past. But more important than this narrow conceptual point is to notice how bizarre the content of the “repudiation” actually was. The resolution attempted to rectify the imbalance between the branches by requiring the president to consult with Congress before starting hostilities, and to remove armed forces from hostilities if Congress did not declare war.


within sixty days. Advocates did argue that the resolution would condemn Nixonian conceptions of executive authority. But the text of the act is not quite the condemnation one would hope for. It concedes far too much. It concedes that it is constitutional for a president to commit troops on his own authority, as long as he notifies Congress. It also concedes that an executive has independent constitutional authority to keep offensive troops in combat for sixty days. Even more strangely, the resolution makes it the executive’s filing of reports on hostilities that begins the congressional “clock.” By not filing, the president can avoid facing Congress for authorization. The resolution was essentially designed to control the president without requiring any action from Congress. The resolution exchanges Congress’s constitutional power to authorize war for a role in influencing war policy (but only to the extent that the executive is interested in what Congress has to say). If we interpret the resolution as a retrospective judgment, then the content of the judgment is only that Nixon was wrong not to tell Congress that he was bombing Cambodia sooner. It is plausible as a criticism, but this is not the same as a repudiation of Nixon’s actually authorizing the hostilities. The argument that Nixon’s bombing of Cambodia was unconstitutional because of the post hoc judgment of the Congress is weaker than it could have been because of Congress’s failure to state directly that constitutional grievance, whether in the articles of impeachment or elsewhere.

Nor was the Cuban missile crisis repudiated after the fact. In fact, according to Robert Kennedy, the possibility of impeachment for not responding to the missiles was one reason JFK felt compelled to respond in the first place. There is a robust literature about whether Kennedy took the right course of action, whether his conduct was strategically sound, the significance of the reinstatement of the missiles in Cuba (and Turkey), and more. But there is no academic work criticizing Kennedy from a constitutional perspective, nor did such criticism appear in Congress. The crisis seems not to have left much of a constitutional aftermath at all, except as a political precedent for presidential war.

Political Criteria for Constitutional Judgment

The criteria offered here provide a way of discussing many elements of war authority that constitutional participants may find intuitively significant but which receive no development in any settlement account. These criteria allow us to register sensitivity to the contexts that officials work within, but to nonetheless make critical evaluations about what officials do in those contexts. Hence, the criteria represent a form of constitutional evaluation that is deeply politicized.

They are politicized forms of constitutional judgment because evaluating the “meaning” of a war act, not to mention identifying the nation’s operative “security paradigm,” for example, is a deeply interpretive, and hence contestable, task. The answer that an interpreter arrives at is likely to be colored by her political goals and values. Furthermore, we can expect radical divergence in the answers interpreters provide rather than subtle shades of gray. As an example, consider the question of whether the incursion into Cambodia represented an extension of commitments already entered into, or a repudiation of the basic tenets of an operative security paradigm. Although this essay takes a position on that question in order to demonstrate the kind of reasoning that undergirds the relational conception, other positions are to be expected and are consistent with a relational account. Because the answer to this question is so deeply interpretive, so deeply informed by the interpreter’s own goals and values, and so deeply dependent on one’s conception of the nature, meaning, and context of the security decisions that the branches have entered into, applying these criteria to actual war contexts is a task that is well suited to those officials who are deeply immersed in making the everyday judgments of the security state—that is to say, the legislature and executive themselves. This is a profound strength of these criteria. A constitution cannot live through the courts alone. Yet constitutional interpreters other than courts have suffered from a lack of conceptual work articulating forms of defensible yet politicized constitutional judgment.

If the criteria of the relational conception are “political” in the sense of being interpretive and contestable, what distinguishes a constitutional judgment about the use of the war power from a straightforward political judgment about the desirability of a particular war? A constitutional judgment under the relational account is not the same as a political judgment because the relational account can generate constitutional defenses of behavior that is politically tragic, outrageous, or worse. This essay defends the constitutionality of Kennedy’s response to the Cuban missile crisis. But it is plausible that, although Congress had ratified a security ideology according to which the threat of the missiles in Cuba was cognizable, that security ideology itself was troubling. Given the dangers of the Cold War security ideology, the fact that a war act is meaningful within that ideology is not necessarily a source of comfort. And, although many scholars believe Kennedy’s handling of the crisis to be masterful from a strategic perspective, it is terrifying that Kennedy’s blockade brought the nation to the brink.
of nuclear war. Behavior that is justifiable within the relational approach to war powers can lead to troubling, terrifying, or even horrific outcomes.

Certain evaluations of the consequences of a war policy are not enough, in themselves, to undermine their constitutional authority from within the relational conception. For example, the effectiveness of Kennedy's blockade, that it represented a limited and defensive posture, that it allowed ships with peaceful cargo to continue through, and so on are not relevant dimensions for constitutional evaluation. Nor is it relevant to consider the extent of Nixon's violence in Cambodia, its disruptiveness for the security context in Southeast Asia more generally, the question of whether the incursion helped pave the way for the rise of the Khmer Rouge, or even the legality of the action under international law. To be sure, apprehension of these policies may motivate legislators and the public toward advocacy or opposition, and their presence as advocates or opponents may change the constitutional landscape. But the consequences of the war act (beyond its consequences for constitutional institutions and practices themselves) are not an evaluative category in the relational account.

This brings us to the relational conception's stance on the nature of constitutional interpretation. Michael Ramsey has argued that policy views about a controversy are not an appropriate basis for choosing war power views, and this view is implicit in judicial rhetoric and the rhetoric of international lawyers. But according to the relational conception, whether this is true depends on the kind of policy view that is at stake. Certainly not all actions that are defensible under a relational conception will be defensible as the best way of proceeding, and sometimes there may be better ways of proceeding (from a strictly policy point of view) that are not consistent with constitutional authority as conceived under the relational conception. But the main mechanism for the cultivation of distinctive perspectives on constitutional meaning is precisely a strong and developed concern for a particular policy. For example, it was Congress's opposition to Nixon's war policy that motivated it to mount a constitutional challenge to his use of his powers. Insofar as those policy views are distinctively related to the special charge of the branch—protecting the general welfare, for Congress—they are indeed an appropriate basis for officials to choose their war powers views. Hence, under the relational account, whether or not policy views are an appropriate basis for a war powers view depends on the relationship between the nature of the policy view and the nature of the relevant institution's position within the constitutional framework.

**Conclusion**

The relational conception of constitutional war powers insists that the war power is shared and sees war-making authority as a function of the quality of relationship that exists between the two branches. Neither branch has ultimate war-making authority. Rather, the authority of each branch fluctuates according to context and the relationship of that context to the branch's capacities. Because it is the branches themselves that bear primary responsibility for constructing a constitutional order that is faithful to the relational conception in each security situation, neither branch can ever be free from the burden to justify its actions to the other. But the standards for evaluation they should engage for constitutional evaluation are explicitly contextual and political, not legalistic. What this means is that the right constitutional answer to questions of war authority is tied to context. For example, in the two cases I have explored, one relevant dimension of the context includes the nature of the “crisis” (whether it is an immediate attack or rather a crisis from within a given security paradigm) and the relationship of the president's actions to his own, and to Congress's, previously ratified security commitments. Because the relational conception is so tied to context, political judgment will play a significant role in forming how interpreters apply its criteria. The centrality of political judgment to forming the positions interpreters take within the relational conception does not, however, collapse the relational conception into a simply political account. The strength of the relational conception of constitutional war authority is precisely that it supports officials in making claims upon each other that are both appropriately political and appropriately constitutional in nature.