Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective

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4 The US Constitution and shifting constitutional war powers

> '[I]t is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.'
>
> Justice Robert H. Jackson[1]

4.1 INTRODUCTION

During his election campaign, United States President Donald Trump was notoriously vague about his exact foreign policy plans[2] – especially with regard to his 'secret plan' to destroy ISIS – but it still became quite clear that he is a proponent of a harsher American security policy. Amongst other things, he said that if he became president, he would 'destroy' ISIS, possibly by deploying ground troops in the Middle-East.[3] He said that he would kill the families of terrorists in order to win the fight against ISIS.[4] He argued that the American military should reinstate the use of 'enhanced interrogation techniques' such as waterboarding, not only because 'it works', but also because 'if it doesn't work, they [the terrorists] deserve it anyway for what they do to us.'[5] Trump has suggested that he wants to continue detaining suspects of terrorism at

1 Concurring in *Youngstown & Tube CO v Sawyer* (1952), 343 US 579, 1952, 653.
2 Cf. Max Fisher, 'What is Donald Trump's Foreign Policy?', *The New York Times*, 11 November 2016.
3 Sopan Deb, 'Donald Trump: Massive ground force may be needed to fight ISIS', *CBSNEWS*, 11 March 2016.
4 Tom Lobianco, 'Donald Trump on terrorists: "Take out their families"', *CNN*, 3 December 2015.
5 Ben Jacobs, 'Donald Trump on waterboarding: "Even if it doesn't work they deserve it"', *The Guardian*, 24 November 2015.

Guantánamo Bay.[6] In an interview with MSNBC, he rhetorically asked: 'Somebody hits us within ISIS; you wouldn't fight back with a nuke?'[7]

Some commentators have attempted to set minds at rest by pointing out that an American president cannot make such decisions unilaterally.[8] The American presidency, they explain, is embedded in an advanced system of checks and balances, entrenched by one of the most difficult-to-change constitutions in the world. These commentators argue that, under the US Constitution, an American president can do little without the approval of Congress and his decisions can be reviewed against the constitution by the Supreme Court.

With respect to the president's authority in internal affairs, there might be an element of truth in such claims.[9] Indeed, in order to introduce a new health care system, President Obama required the consent of Congress. Moreover, the statute[10] that provides the legal foundation for 'Obama Care' was reviewed by the Supreme Court.[11]

However, when it comes to the powers of the president as commander-in-chief, the situation is substantially different. It is true that, up and until the Second World War, the president required the approval of Congress, both *de facto* and *de jure*, to deploy American troops and agents abroad.[12] In the common pre-1945 understanding, the Declare War Clause of the US Constitution (Article II) vested a prerogative in Congress to authorize and regulate the use of military force by the executive; the Commander-in-Chief Clause merely reserved the superintendence over the military to the president. However, during the Cold War and the War on Terror, a development occurred whereby the president, as commander-in-chief, acquired an ever more independent and powerful position in the field of national security.[13] Although this development has a strained relationship with the original – or least, traditional – constitutional plan, the judiciary has hardly interfered because it has consistently refused to hear the merits in war power cases.[14] The result is that a contemporary American president, as commander-in-chief, is hardly

6 The Associated Press, 'Never Mind Closing Guantanamo, Trump Might Make It Bigger', *New York Times*, 15 November 2016.

7 MSNBC Info, 'FULL TRANSCRIPT: MSNBC Town Hall with Donald Trump Moderated by Chris Matthews', MSNBC, 30 March 2016.

8 E.g., Daniel W. Drezner, 'Now, we test America's constitutional democracy', *The Washington Post*, 9 November 2016. Charles Groenhuijsen, 'Donald Trump als president is geen ramp', *NRC*, 7 Mei 2016. Stacy Hilliard, 'Don't panic about President Trump – the real power in U.S. politics lies elsewhere: how Congress, the cabinet and the vice-president will keep Trump in line', *Newsweek*, 10 November 2016.

9 For a different view, see Posner and Vermeule (2010).

10 The Patient Protection and Affordable Care Act of 2010, Public Law 111-148, 124 Stat. 119.

11 *National Federation of Independent Business v. Sebelius*, 567 U.S.. ___ (2012), 183 L. Ed. 2d 450, 132 S.Ct. 2566.

12 Griffin (2015), 353.

13 Barron and Lederman (2008). Griffin (2013).

14 See for an overview: Fisher (2013), 302.

bound by checks and balances. As an empirical matter at least, he has a broad preclusive and unilateral authority to deploy conventional weapons, intelligence units, and use nuclear arms.

The increased scope of presidential capacity to use military force has often been reviewed from a legal-doctrinal perspective.[15] Commentators who take this perspective recognize a limited set of authoritative sources of changing the constitution; these are commonly only formal constitutional amendments and judicial decisions. Since such sources are not available in the area of national security, they retain (their version of) the original meaning of the US Constitution's War Clauses. These commentators argue that any practice that deviates from this meaning is 'unconstitutional'. Moreover, the war powers issue has been studied from socio-political perspectives, which focus on real-world behavior and power relations.[16] These perspectives are taken to describe and explain the evolution of practice in the field of national security, without paying too much attention to the import of the legal or constitutional framework.

Both perspectives can be helpful. The legal-doctrinal perspective may reveal the original intent of the US Constitution's War Clauses. The political scientists, in turn, have very helpfully described and explained the much greater independence that modern presidents (compared to their pre-1945 predecessors) have acquired in shaping and implementing national security policy.[17] However, neither perspective really enables us to reveal the US Constitution's War Clauses' significance in the real world or, conversely, appreciate the implications that ordinary legal and socio-political developments may have had for how we should explain and describe the import of these clauses.

Therefore, this chapter takes an alternative approach. I will explore the American war powers issue by taking a historical institutionalism perspective. This cross-disciplinary approach, which focuses on the interplay between formal constitutional rules and real-world practices (see chapter 2), should enable us to explore the meaning that the US Constitution's War Clauses originally (or traditionally) had, reveal how the evolution of constitutional practices in the field of national security has changed during the Cold War and the War on Terror, and then see how both this evolution and the War Clauses of the US Constitution have related to one another. The historical institutional perspective will enable us to appreciate the consequences the War Clauses of the US Constitution have had for the way in which constitutional practice in the field of national security evolved, but also to recognize that this evolution has implications for how we must describe or explain the meaning of these War Clauses.

15 E.g. Fisher (2013). Ackerman (2010). Paulsen (2010).
16 E.g. Jones (2007), 118-120.
17 E.g. Perret (2007) and Skowronek (1993).

The two remaining sections of this chapter have two aims. The first is to suggest some possible factors that might explain why, despite significant change in the area the US Constitution's War Clauses seek to regulate, these clauses have never been subject of formal constitutional amendment. The second is to explore whether and to what extent alternative mechanisms that have effected structural change in the field of national security have functionally substituted the Article V amendment procedure of the US Constitution.

The US war powers issue is extremely relevant and interesting, especially at a time when an unpredictable president commands the American Armed Forces. Furthermore, the American war powers issue can teach us a great deal about the more general theme of informal constitutional development, including the ways in which law and politics intersect, the significance of rigid constitutional norms, and the implications of informal constitutional change for a constitutional democracy that (supposedly) lives under a written constitution.

4.2 War powers: from shared powers to presidential powers

This section[18] will start by explaining how the constitutional war powers of the US were allocated traditionally prior to 1945. I will then explore how, during the Cold War and the War on Terror, presidents acquired an ever broader, preclusive, and more independent authority to command the military. In conclusion, I will look at the consequences this development has had for the meaning of the US Constitution's War Clauses.

4.2.1 The constitutional plan for war in the early republic

A good starting point for exploring constitutional development in a particular field is to determine the original meaning of the constitutional provisions that supposedly establish and regulate this field. However, establishing the original meaning of the US Constitution's War Clauses is problematic, to say the least. Consider first of all the constitutional text. The US Constitution's War Clauses vest in Congress the power to 'Declare War', 'To raise and support Armies', and 'To provide and maintain a Navy'.[19] They also make the president the 'Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United

18 I published an earlier version (in Dutch) of this section in *Nederlands Juristenblad* (Netherlands Law Journal) under the title 'Als Commander in Chief kan President Trump straks bijna alles' (As Commander in Chief President Trump can do almost anything). See: Passchier (2017b).

19 Article 1(8) US Constitution.

States'.[20] These phrases are notorious for their 'vagueness and generality', as Justice Jackson put it.[21] Indeed, while these clauses clearly divide the war powers between the president and Congress, they are ambiguous in terms of how this division is exactly supposed to fall.[22]

Does the Declare War Clause imply that the US cannot wage war or use military force without a declaration of war by Congress? Does such a declaration need to be formal and explicit? Is a formal declaration of war the only way in which Congress can authorize a war? Can presidents wage smaller wars without a declaration of war or explicit congressional authorization? Or does the declare War Clause imply that all use of force by the US military needs prior congressional authorization of some kind? Also, the Commander-in-Chief Clause leaves a lot of room for interpretation. Can a president, as commander-in-chief, unilaterally initiate war? Does the commander-in-chief have a prerogative to direct how troops are to be deployed once Congress has authorized war? Or does Congress have the right to also intervene in tactical matters? Does the president, as commander-in-chief, have a prerogative of superintendence? Is the president, as commander-in-chief, obliged to wage wars that Congress has declared? Who can end a war? And what about emergencies? These are just a few examples of important legal questions that the text of US Constitution does not (directly) answer.

Moreover, while the War Clauses of the US Constitution hardly give clues with regard to their original meaning, the debates at the Philadelphia Convention, at which these Clauses were drafted, do not provide any univocal answers either.[23] On the one hand, it seems that the US Founding Fathers intended to establish a strict separation of war powers between the president and Congress, and therefore created a reduced role for the executive (relative to the British Monarch).[24] Indeed, during the debates at the Philadelphia Convention, some delegates explicitly rejected the British model in which the executive – the monarch – had the exclusive control over foreign affairs and decisions of war and peace. James Wilson

> 'did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace'.[25]

20 Article 2(2) US Constitution.
21 Justice Robert H. Jackson concurring in *Youngstown & Tube CO v Sawyer*, 343 US 579, 1952, p. 653.
22 Zeisberg (2013), 5 and Hasabe (2012), 469.
23 Which probably explains why scholars continue to debate until today whether the framers made their intentions fully evident in the US Constitution's War Clauses. Griffin (2015), 353.
24 E.g. Ginsburg (2008), 497. Paulsen (2010).
25 Fisher (2013), 5.

Edmund Randolph called the executive 'the foetus of monarchy', claiming that the delegates to the Philadelphia convention had 'no motive to be governed by the British Governmt. as our prototype'.[26] Charles Pinckney said he would prefer a 'vigorous executive', but was afraid that giving the executive the power of war and peace would 'render the Executive a Monarchy'.[27] John Rutledge was in favor of giving executive power to a single person, 'tho' he was not for giving him the power of war and peace'.[28] Roger Sherman argued that the executive was to be an institution that should merely carry 'the will of the legislature into effect'.[29] Finally, Alexander Hamilton proposed that the Senate would have 'the sole power of declaring war', and the president would have the competence to have 'the direction of war when authorized or begun'.[30]

On the other hand, the debates of the Philadelphia Convention indicate that the founders considered the president, as commander-in-chief, to have the power to 'repeal sudden attacks'.[31] Indeed, an early draft of the US Constitution provided Congress with the power to 'make war'. However, Charles Pinckney cautioned that legislative proceedings would be 'too slow' in the case of an emergency (the framers expected Congress to meet only once a year). Therefore, James Madison and Elbridge Gerry proposed the word 'declare' instead of 'make', intending to leave the president with 'the power to repel sudden attacks'.[32]

However, even without exactly knowing the original meaning of the US Constitution's War Clauses, we may acknowledge that in the period between the founding and the end of the Second World War, the ability of presidents to use military force depended to a great extent on congressional approval.[33] It is true that the 19th century had seen a few quite assertive presidents who had seriously challenged the position of Congress.[34] It is also true that presidents had asserted – and, on occasion, exercised – a unilateral power to 'safe American lives' by using military force abroad from the early 20th century on.[35] In general, however, it can be said that presidents who held office during the period between 1789 and 1945 were generally able to do relatively little in the field of war without the consent of congress. It was generally acknow-

26 Fisher (2013), 5.
27 Ibid, p. 4.
28 Ibid.
29 Ibid.
30 Ibid.
31 Hasabe (2012), 469.
32 Fisher (2013), 8-9.
33 Griffin (2015), 353.
34 Fisher (2013), 17 et seq. Polk's role in the Mexican War and Lincoln's role in the Civil War are notable and were, at least at the time, controversial in light of the division of war powers that was supposedly provided by the US Constitution. See: Fisher (2013), 38 et seq. (about Polk) and Fisher (2013), 47 et seq. (about Lincoln).
35 Fisher (2013), 56 et seq.

ledged, even by the presidents themselves,[36] that the commander-in-chief could only commence hostilities against foreign nations – both in the context of limited and total war – after explicit congressional authorization.[37] Indeed, major wars that were fought between 1789 and 1945 (the War of 1812, the Mexican War of 1846, the Spanish-American War, World War I and World War II) were formally declared. Countless less familiar wars and hostilities were, with only a few exceptions, preceded by an express congressional authorization in some alternative form.[38] Moreover, during the first 150 years or so of the American republic, it was generally acknowledged that Congress could regulate the war powers of the commander-in-chief. In the traditional understanding, the Commander-in-Chief Clause only protected the presidential prerogative of superintendence (and, with that, civilian control over the military[39]).[40] Other than that, the president had to operate in accordance with the wishes of Congress. Also consider that the ability of most pre-1945 presidents to wage war was also significantly limited as a practical matter. Until 1941, with the exception of the periods during the Civil War and the First World War, the United States maintained, in accordance with the doctrine of 'isolationism', a relatively small army that was only capable of conducting conventional – that is, overt – operations.[41] This concretely meant that, without Congressional approval (and funding), presidents hardly had the practical capacity to unilaterally send troops into harm's way, even if they wanted to.

The following anecdote illustrates the interdependent relationship between the president and Congress in the US Constitutional order before 1945.[42] As is well-known, the British were already fighting Nazi Germany in 1939. The British Prime Minister Winston Churchill repeatedly tried to convince the American President Franklin Roosevelt to involve the US in the struggle against Nazism. The US supported England with supplies, but the country officially remained neutral and did not send troops. When, after the German defeat of France, Churchill tried to persuade Roosevelt to deliver a more serious – military – commitment and declare war against Germany, Roosevelt tellingly replied that 'he could not commit the United States to military intervention in the war'. He told the British Prime Minister that 'only Congress can make such commitments'. Indeed, although we know that Roosevelt had probably wanted to join the fight against Nazi Germany much sooner, the full-scale

36 No pre-1945 president has asserted a unilateral authority to initiate major military operations (in sharp contrast to post-1945 presidents, as we will see later). See: Lederman and Barron (2008), 948-950. Zeisberg (2013), 18 and 92.

37 Lederman and Barron (2008), 948-950. Griffin (2013), 17. Adler (1988), 2.

38 Griffin (2013), 46-47.

39 Levinson 2012, p. 193.

40 Lederman and Barron (2008), 767-800.

41 In 1939 and 1940, the US military ranked only 20th in the world in terms of ground forces. Griffin (2013), 55.

42 See: Griffin (2013), 56.

war effort of the United States in the Second World War would only begin after the congressional declarations of war against Japan (on 7 December 1941) and Germany and Italy (both on 11 December 1941).

4.2.2 Developments at the outset of the Cold War

By 1945, after four years of intense fighting in four continents, the United States had the most powerful military in the world, capable of conducting overt, covert, and nuclear operations around the globe. After the First World War, the US had largely decommissioned its armed forces, but this time many political actors believed that the circumstances required a different approach. The perceived security environment surrounding the country and its new self-understanding as a leading 'superpower' with major responsibilities towards the 'free' world compelled the US to maintain the larger part of its armed forces and sweepingly reform its national security policy. In particular, the Soviet Union and the ideology of communism were considered major threats to American national security and international stability. In an influential document known as the 'Long Telegram' (a 5000-word piece) sent from Moscow on 22 February 1946, the diplomat George Kennan famously characterized the Soviet Union as a

> 'political force committed fanatically to the belief that with US there can be no permanent modus vivendi, that it is desirable and necessary that the internal harmony of our society be disrupted, our traditional way of life be destroyed, the international authority of our state be broken, if Soviet power is to be secure.'[43]

Suggesting that the Soviet leadership was '[i]mpervious to logic of reason, and […] highly sensitive to logic of force,' Kennan recommended a (further) militarization of the emerging conflict with the Soviet Union.[44]

In this context, a couple of policy reforms took place that significantly enhanced the president's capacity to use military force.

The two most important manifestations of these policy reforms are the National Security Act of 1947[45] and a top-secret document called NSC-68, which was drafted in 1950.[46] The National Security Act marks the establishment of what came to be known as the 'National Security State'. It formally

43 'George Kennan to George Marshall ["Long Telegram"]', February 22, 1946. Harry S. Truman Administration File, Elsey Papers. https://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/6-6.pdf

44 Ibid, p. 15.

45 Public Law 253, 80th Congress; Chapter 343, 1st Session; S. 758.

46 'A Report to the National Security Council – NSC-68' was drafted in 1950, and declassified in 1975. It can be retrieved from the Truman Library: http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/10-1.pdf

purports to enhance the efficiency of the US security apparatus, including the armed forces, by centralizing its coordination and placing its direction under unified control.[47] To that end, the Act established three institutions. The first is the 'National Security Council', which is presided by the president. This council is attributed the function to advise the president in matters of national security and to coordinate armed forces and the other departments and agencies of the US Government to cooperate more effectively in matters involving national security.[48] The second is the National Security Act, which established the 'Central Intelligence Agency' (CIA), which is attributed several functions related to the coordination and execution of intelligence activities under the direction of the National Security Council.[49] The third institution is the National Security Act, which establishes the 'National Security Resources Board', attributed the function of advising the president concerning the coordination of military, industrial, and civilian mobilization to meet the demands of the American security apparatus in times of war.[50]

While the National Security Act outlines the organigram of the (much more centralized) Cold War security apparatus, the strategy for how this apparatus was to be used was crystalized in (NSC-68). NSC-68 largely adopts the suggestions Kennan had contemplated in his Long Telegram. It defines the position of the US as 'the center of power in the free world' and assumes that such a position 'place[s] a heavy responsibility upon the United States for leadership'. It formalizes the strategy 'containment' of global communist expansion, famously contending that 'the assault on free institutions is worldwide now' and that 'a defeat of free institutions anywhere is a defeat everywhere', and it endorses the use of force where necessary to oppose the Soviet Union.[51]

From the outset, observers noticed that the new US security policy would make it much harder for Congress to control and regulate the president as commander-in-chief. The National Security Act substantially expanded the potential scope of presidential activity, especially in the area of covert operations. The newly formed Central Intelligence Agency (CIA), for example, became responsible for clandestine intelligence gathering operations in war as well as in peace time. The organization did not have a detailed charter and it would fall directly under the authority of the president. Hence, it would provide the president with the new option to solve foreign policy problems by using force covertly, without direct legislative oversight.[52] NSC-68, in its turn, by striking nothing short of an apocalyptic tone – 'The issues that face us are momentous,

47 Public Law 253, 80th Congress; Chapter 343, 1st Session; S. 758, sec. 2.
48 Ibid, sec. 101.
49 Ibid, sec. 102.
50 Ibid, sec. 103.
51 'A Report to the National Security Council – NSC-68'.
52 Griffin (2013), 112.

involving the fulfillment or destruction not only of the Republic but of civilization itself'[53] – seems to implicitly call for a much stronger executive in the field of national defense. Indeed, the policies contemplated by NSC-68 would require a vast military buildup; in particular, the strategy of containment required a much more assertive commander-in-chief.[54] Moreover, in a framework in which a president would constantly have a vast standing military at his disposal (and would therefore not require separate funding for every action), and in which policy required swift military action, it would be much harder for the legislature to control presidential conduct.

The tension between the new security strategy and the meaning of the US Constitution's text embodied by the traditional, pre-1945, constitutional order was obvious, even for contemporaries.[55] Furthermore, historians and scholars of war power have observed that NSC-68 was crafted deliberately as what Griffin calls a 'white paper for a new constitutional order', because it embraced the idea that the old (pre-1945) constitutional order was no longer adequate.[56] However, there is no evidence that constitutional actors who brought about NSC-68 considered amending the War Clauses of the US Constitution.[57]

4.2.3 Korea and Truman's precedent

The consequence of the new American security policy for constitutional practice would soon become apparent. On June 25, 1950, communist North Korean forces, backed by the Soviet Union, crossed the 38th parallel invading South Korea. Only five days later, President Truman responded with a major counter-attack, in accordance with the doctrine of 'containment' stipulated by NSC-68. Under the terms of the constitutional plan for war, as it was generally understood before the Second World War, Truman would have need explicit congressional approval before going to war. However, following his Secretary of State Dean Acheson's advice to try to create a constitutional precedent for a broad unilateral presidential prerogative in the field of national security, Truman strikingly did not seek congressional authorization before commencing a large-scale military intervention abroad.[58]

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53 'A Report to the National Security Council – NSC-68', 9.

54 Finally, on the basis of the presumptions and strategies set out in NSC-68, the US defense budget was more than tripled, the development of tactual and strategic nuclear weapons was approved, and an extensive chain of overseas bases set up that would be used to legitimate a number of military interventions abroad. See: Hixson (1993), 508.

55 Kennan had already noted the constitutional challenge of dealing with the threat of Soviet Communism: 'the greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping'. See: 'Long Telegram'.

56 Griffin (2013), 61.

57 Griffin (2013), p. 67.

58 Lederman and Barron (2008), 1057.

Initially, there was little opposition in Congress against Truman's unilateral action.[59] A debate in the legislature only occurred the following winter, when the initial optimism about the possibility of success in Korea was fading and when Truman announced that he was going to send four army divisions to Europe – without congressional authorization – to reinforce NATO forces opposing the (perceived) Soviet threat.[60] Faced with a critical Congress, Truman asserted that, under 'the President's constitutional powers as commander-in-chief of the Armed Forces, he has the authority to send troops anywhere in the world' without consulting with Congress.[61] This unprecedented assumption of unilateral war powers reportedly set off an extended debate in the Senate that lasted more than three months.[62] During this debate the Truman administration further extended its claim about presidential unilateral deployment powers: a January 1951 Department of State memorandum asserted that such authority was not only implied by the constitution's Commander-in-Chief Clause, but was also preclusive of congressional control.[63] As the memorandum states,

> '[n]ot only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.'[64]

A memorandum about the 'powers of the president to send the armed forces outside the United States' submitted one month later put it even more avowedly, arguing that 'since the direction of the armed forces is the basic characteristic of the office of the Commander-in-Chief, the Congress cannot constitutionally impose limitations upon it.'[65]

Scholars of war power have recognized the transformative nature of Truman's claim and unilateral presidential use of military power. Griffin called Truman's 1950 intervention in Korea 'a sharp break in our [American] constitutional tradition' because such a major commitment of US military forces to combat without congressional authorization had 'no parallel in any previous

59 Ibid, 1059. See also Fisher (2013), 99.
60 Lederman and Barron (2008), 1059.
61 Harry S. Truman: 'The President's News Conference,' January 11, 1951. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=14050.
62 Lederman and Barron (2008), 1059.
63 Memorandum (Jan. 6, 1951), in Assignment of Ground Forces of the United States to Duty in the European Area: Hearings on S. Con. Res. 8 Before the S. Comm. on Foreign Relations and the S. Comm. on Armed Services, 82d Cong. 88 (1951), cited by Lederman and Barron (2008), 1060.
64 Ibid.
65 'Powers of the President to send armed the armed forces outside the United States', 16 (Comm. Print 1951). Cited by Lederman and Barron (2008), 1060.

military intervention.'[66] Also, Lederman and Barron noted that, in committing troops to assist South Korean forces against attack from the North without seeking Congress' approval before or after taking these steps, Truman took 'a dramatic step forward in the history of unilateral presidential use of military power.'[67] Indeed, while it is likely that presidents before Truman had occasionally sought to broaden the scope of the independent presidential war power, Truman was the first president to ever claim the power to initiate large-scale hostilities without congressional authorization.[68] Moreover, before 1945, the US constitutional war powers had been more or less divided between president and Congress: the capacity of the president to take independent action in matters of national security was significantly limited by both institutional and practical factors. But institutional reforms at the outset of the Cold War, the 'militarization of the Cold War',[69] the direct availability of troops, the (perceived) security environment surrounding the US and the (perceived) responsibilities of the US as international 'superpower' had apparently created a context in which the president could assert and exercise a broad unilateral prerogative to use military force against another nation.

4.2.4 Vietnam and the War Powers Resolution

The course of events surrounding the next major conflict the US became involved in, the Vietnam War, would highlight the enduring character of Truman's break with the pre-1945 constitutional tradition.[70] Indeed, the history of this war would confirm, in at least two ways, that it had become extremely hard for Congress to regulate and limit the constitutional powers of the president as commander-in-chief.

In the first place, the Vietnam War has showed that, in the second half of the 20th century, Congress was no longer able to control the beginning of war. Already in the early 1950s, President Eisenhower sent a first contingent of military personnel to what was then the French colony of Indochina to aid the French in their fight against communist freedom fighters from the North. For the first couple of years, the US commitment remained limited to only a few hundred serviceman. The French tried to persuade the US to deliver a larger commitment and intervene with bombing missions and naval operations, but Eisenhower refused. It was only after the French surrendered at Dien Bien Phu in 1954 and the subsequent division of Vietnam along the 17th parallel that the US position changed. Between 1954 and 1960, the number of US service-

66 Griffin (2013), 32.
67 Lederman and Barron (2008), 1055.
68 Lederman and Barron (2008), 1055 and Zeisberg (2013), 18 and 92.
69 On this broader context, see also Zeisberg (2013), 125.
70 Lederman and Barron (2008), 1055.

men stationed in Vietnam to assist the South in its struggle against the communist North increased rapidly. By 1960, around 16,000 US military 'advisors' were deployed in Vietnam. American aid also included the delivery of armed helicopters, piloted by Americans, which were used to by the South to conduct raids against the North.[71] From the late 1950s, various types of US covert operations had been conducted.[72] However, even by mid-1964 – when the Johnson administration was seriously contemplating the possibility of starting large-scale overt military action[73] – the executive had not yet asked Congress for approval. It was only on August 2, 1964, when a US destroyer was (allegedly[74]) attacked by the North Vietnamese navy that President Johnson asked Congress for a resolution 'expressing the support for all necessary action to protect our armed forces'.[75] This request revealed that modern presidents could place Congress for a difficult dilemma: once confronted with the presidential request for authorization – or, in the president's words, 'support' – Congress was effectively forced to choose between endorsing a military operation that it might actually oppose and declining to fund further military actions, cutting supplies, and thereby possibly endangering troops already deployed in the field.[76]

In the second place, the course of events surrounding the War in Vietnam made it clear that Congress had lost its ability to control the course of war. When Congress debated Johnson's request to support the military intervention in Vietnam, Johnson publicly highlighted that the American response to the incident in the Tonkin Gulf would be 'limited and fitting'[77] and that the US intended 'no rash-ness' and sought 'no wider war'.[78] On August 10, Congress nearly unanimously adopted 'The Tonkin Gulf Resolution', which states that

> 'Congress approves and supports the determination of the President, as Commander-in-Chief, to take all necessary measures to repeal any armed attack against the forces of the United States and to prevent any further aggression'.[79]

71 Fisher (2013), 127-128.
72 Moïse (1996), 2.
73 Ibid.
74 Historians have later concluded that there was in fact no North Vietnamese attack. See Moïse (1996).
75 Lyndon B. Johnson: 'Special Message to the Congress on U.S. Policy in Southeast Asia,' August 5, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26422.
76 Hasabe (2012), 470.
77 Lyndon B. Johnson: 'Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin,' August 4, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26418.
78 Lyndon B. Johnson: 'Special Message to the Congress on U.S. Policy in Southeast Asia,' August 5, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project.
79 Tonkin Gulf Resolution, Public Law 88-408, 78 Stat. 384.

Interestingly, when signing the resolution, Johnson said that the responsibility of the military intervention in Vietnam was 'mine – and mine alone'.[80] In this way, he made two important things clear.[81] The first was that he did not regard the authorization of congress as a necessary legal condition; following Truman's precedent, he asserted that congressional approval for waging was not constitutionally required. The second was that he would not acknowledge the constitutionality of congressional meddling with operational decisions. From the Johnson administration's perspective, the purpose of the resolution was to express the political *support* of Congress; it was not seen as the legal justification.

Although the Tonkin Gulf Resolution of August 10, 1964, merely authorized the President to 'take all necessary measures to repeal any armed attack against the forces of the United States and to prevent any further aggression',[82] US involvement in Vietnam would gradually deepen in the next four years.[83] In February 1965, large bombing runs began. From the spring of 1965, the number of combat forces deployed in Vietnam increased steadily. By July 1965, 125,000 servicemen were deployed in Vietnam and by the end of 1965, this number had already risen to 184,000 servicemen. Eventually, by the end of 1968, more than 500,000 US servicemen were fighting in Vietnam.

The purpose of the 'escalation' of the war was to bring a swift victory over the North Vietnamese. However, during 1968 it became clear that the war had reached a bloody stalemate. Many thousands of American casualties, a much higher Vietnamese death toll, horrifying journalistic reports of the situation, and the lack of concrete results and an appealing war aim made the war effort increasingly controversial. A powerful nation-wide anti-war movement led Johnson to announce that he would not run for a second tenure as president. Nevertheless, the war would not end soon. Johnson's successor, Richard Nixon, who had run a campaign that promised to end the war in Vietnam, actually extended it into Cambodia and Laos in 1970. These actions made the war effort in South-East Asia even more controversial.

In reaction, Congress enacted a series of legislative amendments designed to constrain the ability of the president to continue to use military force in South-East Asia. In 1971, Congress prohibited the use of public funds for introducing US ground combat troops and military advisors in Cambodia.[84] Around the same time, Congress repealed the Tonkin Gulf Resolution.[85]

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80 See: Lyndon B. Johnson: 'Remarks Upon Signing Joint Resolution of the Maintenance of Peace and Security in Southeast Asia,' August 10, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26429

81 Griffin (2013), 123-125.

82 Tonkin Gulf Resolution, Public Law 88-408, 78 Stat. 384.

83 Fisher (2013), 134.

84 Public Law 91-653-JAN. 5, 1971 (84 stat. 1943, sec. 7(a) (1971)).

85 Public Law 91-672-JAN. 12, 1971 (84 Stat. 2053, sec 12 (1971)).

Finally, in 1973, Congress cut funding for all combat activities in South-East Asia.[86] This measure finally ended the Vietnam War.

In an effort to restore its pre-1945 constitutional position, or at least strengthen its constitutional position, Congress enacted the War Powers Resolution (WPR) shortly after the end of the Vietnam War.[87] The formal purpose of this resolution was

> 'to insure that the collective judgement of both the Congress and the president will apply to the introduction of United Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations'.[88]

Section 3 then provides that, 'in every possible instance', the president has to consult with Congress before introducing US armed forces into hostilities and that, after each introduction, the president must regularly consult with Congress until the armed forces have been withdrawn. Section 4 stipulates that in any case in which the US armed forces are introduced into hostilities without a declaration of war, the president is required to submit a report to Congress explaining: (A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement. Section 5 provides for a 60-to-90-day 'clock'. It says that within 60 days after submitting the report about commenced hostilities to Congress, the president must terminate the use of US armed forces, unless Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. The 60-day period may be extended for not more than an additional 30 days

> 'if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces'.

86 Public Law 93-53-JULY 1, 1973 (87 Stat. 130, sec. 108 (1973)). 'Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.'

87 The War Power Act of 1973, Public Law 93-148.

88 Sec. 2.

In addition, section 5 states that, at any time US armed forces are engaged in hostilities outside the territory of the US, its possessions and territories without a declaration of war or specific statutory authorization, 'such forces must be removed by the President if so directed by a concurrent congressional resolution.'[89]

The WPR was immediately vetoed by President Nixon. He argued that the 60-days clock was 'CLEARLY UNCONSTITUTIONAL' [*sic*], because it was an 'attempt to take away, by mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years'.[90] Interestingly, Nixon found that the

> 'only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution – and any attempt to make such alterations by legislation alone is clearly without force'.[91]

However, Congress did not share Nixon's view and passed the WPR over his veto.

Despite this, the WPR changed little. The WPR is generally regarded a failure because it did not place effective limits on the war powers of the executive or strengthen the hand of Congress in decisions pertaining the use of military force by the US.[92] Rather, by recognizing that the president has a 60-90-day window to use military force without seeking congressional approval, it appears to have had the effect of promoting independent presidential moves.[93] Moreover, presidents after Nixon have also refused to acknowledge the constitutionality of the WPR.[94] Only twice have they reported to Congress under section 4,[95] and the 60-90-day clock was never formally started.[96]

89 This provision is generally regarded unconstitutional in light of *INS v Chada*, which the Supreme Court stipulates that actions by Congress having the purpose or effect of altering the rights, duties and relations of executive branch officials must be subjected to the possibility of a presidential veto. See: 462 U.S. 919 (1983) cited by Hasabe (2012), 471.

90 Richard Nixon: 'Veto of the War Powers Resolution,' October 24, 1973. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=4021.

91 Ibid.

92 Hasabe (2012), 470. Hassabe follows Ely (1993), 48-54, Bobbit (1994), 1397, Tribe (2000), 667-669. Dorf (2006), 172.

93 Fisher (2013), 144. For an example of how presidents interpret the 60-day clock, see: Office of Legal Council, 'Authority to Use Military Force in Libya', April 1, 2011, p. 1. Explaining the 60-day clock, the office claims that this provision only makes sense if makes sense 'if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress.'

94 Hasabe (2012), 471.

95 Fisher (2013), 149.

96 Ibid.

Also, since the enactment of the WPR, presidents have commonly continued to assert a unilateral and preclusive power to deploy US armed forces abroad.[97] Presidents from Ford to Reagan have a fairly uniform record. As Fisher explains, when conducting short-term military operations in relatively isolated areas of the world, modern presidents generally acted unilaterally; for the use of force on a larger scale or for the use of force that carried the risk of involving other nations, they commonly sought congressional authorization (or 'support'), but they would not typically admit that they needed such an authorization legally.[98]

4.2.5 After the Cold War: no congressional come-back

The original – that is, pre-1945 – allocation of the American constitutional war powers, which had significantly changed during the Cold War, was not restored when the Cold War was over. Indeed, the course of events surrounding the Gulf War would indicate that the Cold War plan for war would outlive the Cold War itself.

Like his modern predecessors, when President Bush sent several thousands of troops to Saudi Arabia in early 1990, he did not seek congressional approval, claiming that the operations had a purely defensive nature.[99] When it became clear that the operations in the Middle East would probably take a more offensive posture, Secretary of Defense Dick Cheney testified before the Senate Armed Services Committee that he did 'not believe that the President requires any additional authorization from the Congress before committing US forces to achieve our objectives in the Gulf'.[100] (Interestingly, by using the phrase 'additional authorization', Cheney innovatively suggested that the UN Security Council approval was constitutionally sufficient for the US Executive to take military action.[101]) Moreover, when 53 members of Congress challenged the authority of the president to initiate an offensive attack against Iraq without fist securing congressional authorization, the Justice Department suggested[102] that it was up to the executive to determine whether an offensive action taken by US armed forces constitutes an act of war and whether such an act requires

97 Ibid, 144-145. Lederman and Barron (2008), 1069 et seq.

98 Fisher (2013), 154.

99 Ibid, 168.

100 'Crisis in the Persian Gulf Region: U.S. Policy Options and Implications', hearings before the Senate Committee on Armed Services, 101st Cong., 2d Sess. 701 (1990).

101 In this innovative assertion, the administration was backed by a New York University law professor, Thomas M. Frank, who argued in the *New York Times* that Congress had 'neither a constitutional obligation nor a right to declare war before the U.S. joins in a U.N.-sponsored police action in the Persian Gulf'. See: Thomas M. Franck, 'Declare war? Congress can't', *The New York Times*, 11 December 1990.

102 Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) par. 1145 and footnote 11.

the explicit consent of Congress in the form of a declaration of war or alternative statutory approval.[103] Despite these assertions, in a letter dated January 8, 1991 to congressional leaders regarding the Persian Gulf Crisis, President Bush requested that Congress adopt a resolution stating that Congress supports the use of all necessary means to implement the UN Security Council Resolution 678.[104] Interestingly, he added that he was 'determined to do whatever is necessary to protect America's security' and asked Congress to 'join with me in this task'.[105] The following day, when reporters asked him whether he believed that he needed congressional resolution for the use of military force in Iraq, Bush replied that he did not feel it was necessary: 'I feel that I have the authority to fully implement the United Nations resolutions.'[106] On January 12, 1991, Congress passed a joint resolution to 'authorize the use of United States Armed Forces pursuant to United Nations Security Council Resolution 678.'[107] Two days later, however, on signing the resolution into legislation, Bush stated:

> 'As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's

103 In *Dellums v. Bush*, which is one of the few cases in American history in which a Federal Court considered the justifiability of the US Constitution's Declare War Clause, 53 members of Congress, who believed that the initiation of offensive United States military action in Iraq was imminent, requested an injunction directed to President Bush to prevent him from initiating such action without first securing a declaration of war or another explicit congressional authorization for such action. The congressional plaintiffs argued that offensive US action in the Persian Gulf would be unlawful in the absence of a declaration of war by Congress of a statutory authorization, as 'a war without concurrence by the Congress would deprive the congressional plaintiffs of the voice to which they are entitled under the Constitution'. The court rejected the implicit argument of the Justice Department that it is up to the executive to determine whether certain types of military action require a declaration war (see par. 1145 and footnote 11). As Justice Greene noted: 'This claim on behalf of the Executive is far too sweeping to be accepted by the courts. If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an "interpretation" would evade the plain language of the Constitution, and it cannot stand' (at 1145). Ultimately, however, the court decided not to grant the plaintiffs' request for a preliminary injunction because it found that the controversy was not ripe for judicial decision.

104 George Bush: 'Letter to Congressional Leaders on the Persian Gulf Crisis,' January 8, 1991. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=19196.

105 Ibid.

106 George Bush: 'The President's News Conference on the Persian Gulf Crisis,' January 9, 1991. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=19202

107 Public Law 102-1—JAN. 14, 1991. 105 STAT. 3.

> constitutional authority to use the Armed Forces to defend vital US interests or the constitutionality of the War Powers Resolution.'[108]

Also after the war against Iraq, Bush repeatedly made it clear that, in his view, he could have legally started the war without congressional authorization. In a speech given at Princeton University, in which he explained how he had understood his role of the president as commander-in-chief in the Persian Gulf crisis, Bush said:

> 'Though I felt after studying the question [of the allocation of war powers] that I had the inherent power to commit our forces to battle after the U.N. resolution, I solicited congressional support before committing our forces to the Gulf War.'[109]

During the 1992 presidential campaign, Bush said that some people had asked him why he had not been able to bring the same kind of purpose and success to the domestic scene as he had done to the war in Iraq. 'The answer is', as the president told his Texan audience, that 'I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait. That's the reason.'[110]

The second post-Cold War president, Bill Clinton, followed the line of his post-1945 predecessors in asserting that Congress had no authority to restrict the war powers of the Executive.[111] In fact, in places such as Bosnia and Haiti, Clinton initiated military interventions without consulting with Congress at all.[112] In each case, members of Congress (unsuccessfully) proposed legislation directing the president to obtain congressional consent prior to using troops. When Clinton was asked in a radio interview whether he would veto such legislation, he replied:

> 'All I can tell you is that I think I have a big responsibility to try to appropriately consult with Members of Congress in both parties – whenever we are in the process of making a decision which might lead to the use of force. I believe that. But I think

108 George Bush: 'Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq,' January 14, 1991. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=19217

109 George Bush: 'Remarks at Dedication Ceremony of the Social Sciences Complex at Princeton University in Princeton, New Jersey,' May 10, 1991. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=19573.

110 George Bush: 'Remarks at the Texas State Republican Convention in Dallas, Texas,' June 20, 1992. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=21125.

111 See: Hendrickson (2002), 163.

112 Fisher (2013), 178-184.

> that, clearly, the Constitution leaves the President, for good and sufficient reasons, the ultimate decision-making authority.'[113]

In the same interview, Clinton agreed that a president should be careful and circumspect in committing the lives of Americans. 'But', he emphasized, 'still the President must make the ultimate decision, and I think it's a mistake to cut those decisions off in advance' by issuing constraining legislation.[114] At an October 19, 1995, news conference, Clinton was asked whether he would send ground troops to Bosnia, even if Congress did not approve. He responded:

> 'I am not going to lay down any of my constitutional prerogatives here today. I have said before and I will say again, I would welcome and I hope I get an expression of congressional support. I think it's important for the United States to be united in doing this. […] But I believe in the end, the Congress will support this operation.'[115]

In December 1995, Clinton did send 20,000 ground troops to Bosnia without first seeking or obtaining congressional authority.[116]

However, Clinton's most striking action was arguably his 1999 decision to use military force in Yugoslavia.[117] As we have seen, presidents since Truman have asserted a unilateral and preclusive power to deploy troops abroad. Moreover, most modern presidents have indeed ordered the use of military force without obtaining congressional approval in one or more instances. But, except for the Korean War, interventions without congressional approval had commonly been relatively minor in scope. Major interventions after the Korean War, such as the Vietnam War and the Gulf War, had – despite unilateral presidential claims and moves – ultimately been (more or less[118]) authorized by Congress. Also, prior to the beginning of the US intervention in Yugoslavia, the Clinton administration consulted with Congress to win its 'support'.[119] Several resolutions – some of which supported Clinton and some of which did not – were voted on, but no joint resolution was presented to the president to be vetoed or signed into law. On March 24, 1999,

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113 William J. Clinton: 'Interview With Radio Reporters,' October 18, 1993. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=47217.

114 Ibid.

115 William J. Clinton: 'The President's News Conference,' October 19, 1995. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=50666.

116 Fisher (2013), 190.

117 Fisher (2013), 197.

118 It is debated, of course, whether the Tonkin Gulf Resolution actually provided authorization for the large-scale conflict that the Vietnam War would become. See par. 4.2.4.

119 Fisher (2013), 197 et seq.

the US military intervention started without any statutory authorization. Indeed, the use of military force in Yugoslavia may be regarded as the second clear example of a major US military intervention undertaken by a president without any congressional authorization.[120] Controversies about Clinton's unilateral move arose immediately. On June 8, 1999, 25 members of the US House of Representatives went to court to seek a declaration that the president had violated the Declare War Clause of the US Constitution and the War Powers Resolution of 1973 by involving the US in the air offensive against Yugoslavia without congressional authorization.[121] However, both the District Court and the Court of Appeals dismissed the case for a lack of standing because 'plaintiffs had failed to demonstrate an actual confrontation or constitutional impasse between the legislative and executive branches.'[122]

Interestingly, during the bombing of Kosovo, Clinton's Undersecretary Thomas R. Pickering claimed that 'Congress had no authority to exercise its war powers since the beginning of World War II.'[123] According to Hendrickson, 'such statements illustrate how expansively the White House viewed its powers and how grossly it distorted Congress's constitutional powers'.[124] Hendrickson concluded his book on the use of war powers by the Clinton administration that 'institutionally and constitutionally, Clinton left office as commander-in-chief who was nearly omnipotent in military affairs'.[125] Even if this characterization is somewhat exaggerated, it seems to suggests correctly that the Cold War practice of unilateral presidential use of military force has been persistent, even beyond the Cold War itself.

4.2.6 Developments at the outset of the War on Terror

The terrorist attacks of September 11, 2001 arguably mark the beginning of a new chapter in the transformation of the constitutional relation between Congress and the president as commander-in-chief, and the powers of this latter office. The (perceived) failure to protect the US against a major terrorist attack and the strong call for presidential leadership after the attacks produced a strong incentive to further expand the war powers of the executive.[126] With

120 Ibid, 197.
121 Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999). Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).
122 Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999), at 45.
123 Hendrickson (2002), 163.
124 Ibid.
125 Ibid.
126 Reportedly, President Bush explicitly ordered his attorney-general: 'Don't ever let this happen again'. Goldsmith (2007), 75. Goldsmith comments: 'Bush was not telling Ashcroft to do his best to prevent another attack. He was telling him to stop the next attack, period – whatever it takes.'

banner of the 'Global War on Terror', the people and public officials were told that permanent wartime had returned and that the capacities of the executive needed to be extended accordingly.[127] As former Assistant Attorney General Goldsmith reported,

> 'everyone in the administration with access to highly classified intelligence on threats to the homeland was scared of another deadly attack, and of not knowing how to prevent it. This fear created enormous pressure to stretch the law to its limits in order to give the President the powers he thought necessary to prevent a second 9/11.'[128]

In this context, at least two striking developments took place that would seem to have been of constitutional consequence.

In the first place, it appears that, since 9/11, Congress has reconciled itself to its role as junior partner in the field of national defense. Furthermore, on occasion, Congress appears to have even endorsed the shift towards an (even) stronger commander-in-chief. In the immediate aftermath of 9/11, the Bush administration requested Congress to pass an Act authorizing the use of force against terrorists. Within a week, Congress voted almost unanimously for, and the president had signed the 'Authorization for Use of Military Force' (AUMF) of, a statute that authorizes the president to

> 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 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'.[129]

Commentators note the unprecedented broad scope of the AUMF. Among other striking things, it authorizes the unlimited use of force against state and non-state entities responsible for 9/11 or entities that aided those responsible; it approves military action in multiple jurisdictions;[130] and it does not provide a time limit or expiration date.[131] Paulsen argued that, by adopting this resolution, 'Congress embraces the presidential view'.[132] He deems the AUMF extraordinary as it 'marks a stunning, landmark paradigm shift in the constitutional practice of powers, light years distant in tone and attitude from the War

127 Griffin (2013), 219.
128 Goldsmith (2007), 11.
129 Public Law 107-40-Sept. 18, 2001.
130 Griffin (2013), 252.
131 Paulsen (2010), 7.
132 Ibid.

Powers Resolution of 1973'.[133] Paulsen even went as far as to argue that, with this resolution, 'Congress has added its powers to those of the President.'[134]

President Bush himself, for that matter, clearly believed that he would not have needed the AUMF to wage the War against Terror and that he was not bound even by the broad terms of it.[135] Two days after military operations started in Afghanistan, Bush sent a letter to congressional leaders reporting that he had given orders to commence military action in Afghanistan 'pursuant to my constitutional authority to conduct US foreign relations and as Commander-in-Chief and Chief Executive.'[136] Bush cited the AUMF (Public Law No. 107-40), writing that

> 'I am providing this report as part of my efforts to keep the Congress informed, consistent with the War Powers Resolution and Public Law 107-40. Officials of my Administration and I have been communicating regularly with the leadership and other members of Congress, and we will continue to do so. I appreciate the continuing support of the Congress, including its enactment of Public Law 107-40, in these actions to protect the security of the United States of America and its citizens, civilian and military, here and abroad.'

Indeed, Bush regarded the AUMF as a source of 'support', but he did not recognize it as a source of authority.[137]

Also with regard to the decision-making process surrounding the War in Iraq, commentators have noted the accommodating stance of Congress in the context of the War on Terror. The War in Iraq would ultimately indeed be authorized by a separate congressional AUMF,[138] but commentators questioned whether Congress had sufficiently scrutinized the allegation on behalf of the executive that Iraq had weapons of mass destruction and that it supported Al Qaida. Fisher critically noted that, in the midst of confusing and contradictory claims about weapons of mass destruction and an Iraqi link to Al Qaida, Congress was not in a position to make an informed choice. 'Instead, they [Congress] voted under partisan pressures, with inadequate information, and thereby abdicated is constitutional duties to the President.'[139] Also, Griffin denounced the 'pathetic lack of inquiry by Congress' that did not 'push Bush to estimate casualties, the costs of the war or the likely consequence of

133 Ibid.
134 Ibid, 9.
135 Griffin (2013), 220. Balkin and Levinson (2010), 1820.
136 George W. Bush: 'Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters,' October 9, 2001. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=64785.
137 Fisher (2013), 209.
138 'Authorization for Use of Military Force Against in Iraq Resolution of October 2002', Public Law 107-243, Oct. 16, 2002, sec. 3.
139 Fisher (2013), 228.

victory.'[140] 'Even if we imagine that Congress would have favored the war no matter what', Griffin argued, 'it did not fulfill its role as a check on the executive.'[141]

Again, Bush himself made it clear that, in his view, he would not have required congressional approval to commence hostilities in Iraq. In his signing statement to the AUMF on Iraq, Bush referred to it as an 'additional resolution of support'.[142] Moreover, he declared:

> 'While I appreciate receiving that support, my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution.'[143]

When Bush reported to Congress on March 21, 2002 that military operations in Iraq had commenced, he declared:

> 'I now inform you that pursuant to my authority as Commander-in-Chief and consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) and the Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107-243), I directed U.S. Armed Forces, operating with other coalition forces, to commence combat operations on March 19, 2003, against Iraq.'[144]

By using the phrase 'consistent with [the AUMF]', he highlighted that he had not based his actions on any statutory authority conferred by Congress, but on his (supposedly) independent presidential war powers under the US Constitution.

A second post-9/11 development that seems to have had constitutional implications is that the president, as commander-in-chief, has also asserted broad unilateral and preclusive war powers outside of the context involving the actual conduct of hostilities. After 9/11, the Bush Administration, among other things, instructed the military and intelligence agencies to establish

140 Griffin (2013), 234.
141 Ibid.
142 George W. Bush: 'Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002,' October 16, 2002. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=64386.
143 Ibid.
144 George W. Bush: 'Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Iraq,' March 21, 2003. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=62688.

military tribunals,[145] to bring suspects of terrorism to foreign prisons ('extra-ordinary rendition'), the use of 'enhanced' interrogation techniques such as waterboarding in these foreign prisons,[146] to detain 'enemy combatants' indefinitely without trial (at Guantanamo Bay, Cuba),[147] and to monitor international communications of people inside the US, including US citizens, without a court-approved warrant.[148] These practices arguably have a strained relationship with statutes such as the Habeas Act of 1867,[149] the War Crimes Act of 1996,[150] the Torture Victim Protection Act of 1991,[151] the Foreign Electronic Surveillance Act of 1978,[152] and the Non-Detention Act of 1971.[153,154] However, Bush claimed that these statutes could not thwart his method of dealing with the fight against Al Qaida.[155] In the (in) famous 'Torture Memo', for example, the Office of Legal Council (OLC) denied that the interrogation techniques used by the CIA amounted to torture: 'Torture is not the mere infliction of pain or suffering on another', the OLC argued,

> 'but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.'[156]

Moreover, the OLC argued that

> 'even if an interrogation method arguably were to violate Section 2340 A [the statutory torture prohibition], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign'.[157]

145 George W. Bush: 'Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,' November 13, 2001. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=63124.
146 Fisher (2013), 247.
147 Ibid, 233.
148 Risen and Lichtblau (2005).
149 Sess. ii, chap. 28, 14 Stat. 385.
150 Public Law 104-192, 110 Stat. 2104.
151 Public Law 102-256, 106 Stat. 73.
152 Public Law 95-511, 92 Stat. 1783, 50 U.S.C. ch. 36.
153 Public Law 92-128, 85 Stat. 347.
154 Lederman and Barron (2008), 1096.
155 Ibid.
156 US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales Counsel to the President, 'Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A', August 1, 2002, 13.
157 Ibid, p. 31.

After all, the president enjoys 'complete discretion' as commander-in-chief of the armed forces.[158] Any effort by Congress to regulate the interrogation of battlefield combatants would be unconstitutional, because these laws would prevent the president, or so the memo argued. It is true that, to a certain extent, the disregard of certain statutes by the Bush administration represented nothing fundamentally new, as other post-WWII presidents had also sometimes claimed a preclusive war power outside the context involving the actual conduct of hostilities.[159] However, there was probably no sustained practice of actually disregarding statutes similar to what the Bush administration had showed since 9/11. As Barron and Lederman explained,

> 'some of the statutes that the current Bush Administration claims a constitutional authority to disregard are measures that modern administrations helped to craft and that modern presidents signed without objection.'[160]

Commentators have noted that Bush's claims regarding presidential war powers were strikingly more broad and aggressive than those of his modern predecessors since Truman. Barron and Lederman, for example, observed that Bush pushed the preclusive presidential claims 'to their logical extremes'.[161] Similarly, Griffin argued that 'Bush arguably set a new standard for the exercise of executive power, even in wartime'.[162] Levinson felt that 'there is no doubt that President Bush is making claims substantially more far-reaching than any of his predecessors in office.'[163]

At the same time, after 9/11 Congress seems to have largely resigned to the modern practice of the executive branch making the main decisions with regard to war and national security; since those terrorist attacks, Congress has barely made any attempts to limit the military capability of presidents and, on a number of occasions, has even endorsed extensive presidential power

158 US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales Counsel to the President, 'Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A', August 1, 2002, p. 33.

159 Lederman and Barron (2008), 1096.

160 Ibid, 1098.

161 '… the Administration has gone beyond merely asserting the preclusive power in signing statements, veto messages, or memoranda to Congress. It appears to have relied upon such claims to engage in outright defiance of statutory restrictions in exercising coercive governmental authority. With the exception of the actions of President Ford in the extraordinary chaos of the last days of the Vietnam War, we are not aware of a similarly consequential act of executive disregard, premised on executive war powers, undertaken in the presence of a sitting Congress. The Bush Administration has exercised this claimed power, moreover, for prolonged periods of time and on multiple fronts.' See: Lederman and Barron (2008), 1094.

162 Griffin (2013), 216.

163 He added: 'There is more than a touch of "*L'etat c'est moi*" in Bush's conception of his role.' See: Levinson (2006), 81.

assertions.[164] The federal courts, for that matter, hardly encroached upon the Bush administration's methods to wage the War on Terror. In *Hamdan v. Rumsfeld*[165] and *Boumediene v. Bush*[166] the Supreme Court condemned the administration's use of military commissions. However, with regard to practices such as those associated with the extra-ordinary rendition program, the use of enhanced interrogation techniques, the warrantless-wiretapping[167] and the detention of 'enemy combatants' indefinitely without trial,[168] the administration either successfully blocked litigation by invoking the 'state secret privilege' or, if litigation commenced, the higher federal courts refused to reach the merits of the cases that were presented, mainly because they thought the plaintiffs lacked standing.

4.2.7 The Obama administration and beyond

During his first presidential campaign, Barack Obama criticized the aggressive security policies of the Bush administration. Moreover, in a comprehensive December 2007 Q&A with reporter Charlie Savage, then-presidential candidate Obama highlighted that he believed that the 'President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.'[169]

However, although President Obama (as far as we know) did not order his agencies to use 'enhanced' interrogation techniques in foreign prisons,[170] and although he attempted several times to close the prison facility on Guantanamo Bay, no attempts were made under his administration to structurally (re)circumscribe the powers of the president as commander-in-chief. Obama did not launch a fundamental critique on the foregoing practices of his predecessor,[171] and made every effort to preclude the judiciary from declaring

164 As Balkin and Levinson note, '[e]very time the President asked for broad new authorities from Congress, he received them'. Balkin and Levinson (2010), 1820.

165 *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006).

166 *Boumediene v. Bush*, 553 U.S. 723 (2008).

167 Clapper v. Amnesty International USA, 569 U.S. __(2013).

168 Rumsfeld v. Padilla, 542 U.S. 426 (2004). Hamdi v. Rumsfeld, 542 U.S. 507 (2004). In *Hamdi*, the Supreme Court recognized the authority of the government to detain enemy combatants, including US citizens under certain (narrow) circumstances. It also found that a citizen held in the US as an enemy combatant is entitled to rebut the factual basis for that detention before a neutral decision maker. In this way, the Supreme Court rebutted some of the most striking claims of the administration, but it did little more than round the sharp edges. Indeed, in later years the president asserted and exercised authority to detain enemy combatants 'for the duration of the armed conflict'. See: Fisher (2013), 255.

169 Charlie Savage, 'Barack Obama's Q&A', *Boston Globe*, December 20, 2007.

170 Scott Shane, Mark Mazetti, Helene Cooper, 'Obama Reverses Key Bush Security Policies', *The New York Times*, Jan 22, 2009.

171 Ackerman (2010), 121.

the practices of President George W. Bush illegal.[172] Indeed, the fact that a sweeping condemnation of Bush's practices remains forthcoming could make it a lot easier for lawyers in the Trump administration to revitalize Bush's harsh defense policies.[173]

While Obama repudiated some of Bush's most sweeping assertions to the war powers, he continued others. For one thing, evidence suggests that extraordinary rendition continued under Obama's administration.[174] Also, NSA surveillance was maintained under Obama. In 2013, *The Washington Post*, among other newspapers, revealed that the NSA and the FBI had been gathering the data of nine leading US internet companies and collecting Americans' phone records since 2006.[175] Obama defended these activities, amongst other times, in a June 19, 2013, speech in Berlin, arguing that NSA's data-gathering practices constitute 'a circumscribed, narrow system directed at us being able to protect our people.'[176] While the surveillance programs were indeed commonly considered lawful under the revised FISA Act of 2008, their constitutionality was questioned, particularly in light of the Fourth Amendment.[177] However, when the issue reached the Supreme Court, the court held that it could not address the principle question because the plaintiffs lacked standing.[178] Moreover, Obama maintained the Bush administration's claim that it can legitimately detain persons classified as 'enemy combatants' indefinitely without trail.[179]

In a sense, President Obama's claims to the war powers have even gone a step further than those of President George W. Bush. Most strikingly, Obama started major military operations against Libya and against ISIS without congressional authorization. When Obama notified Congress about the military intervention in Libya on March 21, 2011, he declared:

172 Charlie Savage, 'Hasher Security Tactics? Obama Left Door Ajar, and Donald Trump is Knocking', *The New York Times,* 13 November 2016.

173 Ackerman (2010), 121.

174 Craig Whitlock, 'Renditions continue under Obama, despite due-process concerns', *The Washington Post*, January 1, 2013.

175 Glenn Greenwald and Ewen MacAskill, 'NSA Prism program taps in to user data of Apple, Google and others', *The Guardian*, 6 June, 2013.

176 Barack Obama: 'The President's News Conference With Chancellor Angela Merkel of Germany in Berlin, Germany,' June 19, 2013. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=103833.

177 Laura K. Donoheu, 'NSA surveillance may be legal – but it's unconstitutional, *The Washington Post*, June 21, 2013.

178 *Clapper v. Amnesty International USA* (568 U.S. ___2013).

179 See, e.g., Barack Obama: 'Statement on Signing the National Defense Authorization Act for Fiscal Year 2012,' December 31, 2011. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=98513.

> 'I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive'[180]

and that he had provided the report as 'part of my efforts to keep the Congress fully informed, *consistent with* the War Powers Resolution' [*emphasis added*].[181] When Obama commenced military action ISIS, in August 2014, he informed Congress that he had 'authorized' the US Armed Forces to conduct targeted air strikes to support operations by Iraqi forces to recapture the Mosul Dam.[182] Again, the president argued that he did not need Congressional approval for these actions. As he wrote to Congress:

> 'I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive'.[183]

Also in the field of covert combat operations, the Obama administration again pushed the authority of the president as commander-in-chief a step further than the Bush administration, most notably by dramatically extending the program of the so-called 'targeted killings' with unmanned drones. As Klaidman wrote, Obama's 'most notable strategic shift is his fight against al Qaeda was the unrelenting use of hard lethal power in the form of the CIA's covert drone program'.[184] CIA director Leon Penetta reportedly commented that

> 'we [the CIA] are conducting the most aggressive operations in our history as an agency. That largely flows from this president and how he views the role of the CIA.'[185]

Klaidman estimated that

> 'by the time Obama accepted the Nobel Peace Prize in December 2009, he had authorized more drone strikes, including strikes against American citizens, than George W. Bush had approved during his entire presidency'.[186]

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180 Barack Obama: 'Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya,' March 21, 2011.Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=90174.

181 Ibid.

182 Barack Obama: 'Letter to Congressional Leaders Reporting on the Commencement of Military Operations in Iraq,' August 17, 2014. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=106813.

183 Ibid.

184 Klaidman (2012), 117.

185 Ibid, p. 121.

186 Ibid.

Also, in the years thereafter, it is likely that hundreds, if not thousands of strikes have been executed in places such as Afghanistan, Pakistan, Iraq, Syria, Sudan, and Yemen.[187] A few US citizens were reportedly killed as well.[188] While the Justice Department memos that provide the executive's legal justification for the drone program have been kept secret until to date, *The New York Times* revealed in 2011 that the secret legal memo that justified the killing of Anwar Al-Aulaqi, an American citizen, asserted that strikes against US citizens suspected of terrorism are lawful if it is not feasible to capture them alive.[189] Furthermore, in 2013, a classified, unsigned and undated Justice Department 'white paper' was leaked.[190] In this document, the Justice Department claimed that a US citizen who is a senior operational leader of Al Qaida can lawfully be killed if:

> '(1) an informed high level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles'.[191]

The same document argued that the constitutional Due Process Clause does not immunize a citizen from lethal operation because the interest in a person's live must be balanced against the United States' interest in forestalling the threat that 'senior operational leader' of Al Qaida may pose.[192] Multiple law suits were filed against the Obama administration challenging its use of the war powers. In 2010, for example, a case about the constitutionality of drone strikes against US citizens surfaced in court.[193] However, the court ruled that the plaintiff, a father of a US citizens who was supposedly on the government's kill list, lacked standing. Indeed, in this and other cases, Obama successfully sought to retain the war powers that have been acquired by himself and his predecessors since Truman.[194]

Under Obama's term, Congress further retreated from the field of national security. Most strikingly, it refused to vote on a possible AUMF for ISIS. As the

187 The Bureau of Investigative Journalism, 'Get the data: Drone Wars'. https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/ (16-1-2017)
188 Mark Mazzetti, 'Killing of Americans Deepens Debate over Use of Drone Strikes', *The New York Times*, April 23, 2015.
189 Charlie Savage, 'Secret U.S. Memo Made Legal Case to Kill a Citizen', *New York Times,* October 8, 2011.
190 Charlie Savage and Scott Shane, 'Memo Cites Legal Basis for Killing U.S. Citizens in Al Qaeda, *New York Times*, February 5, 2013.
191 'Department of Justice white paper', p.1. see: http://www.nytimes.com/interactive/2014/06/24/us/killingcitizenswhitepaper.html?_r=0
192 Ibid, p. 2.
193 *Al-Aulaki v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010).
194 Ackerman (2010), 121.

editorial board of *The New York Times* commented, by refusing to vote on this AUMF, 'Congress appears perfectly willing to abdicate one of its most consequential powers: the authority to declare war'.[195] Reportedly, some lawmakers would rather not face a war authorization vote shortly before a midterm election, claiming that 'they'd rather sit on a fence for a while to see whether an expanded military campaign starts looking like a success story or a debacle'.[196] Interestingly, the board realizes that the reservations of members of Congress about becoming involved in matters of war and peace may have long-term constitutional implications: 'by avoiding responsibility, they allow President Obama free reign to set a dangerous precedent that will last well past this particular military campaign.'[197]

At the time of writing this study, we do not know whether President Trump will try to realize the security plans he suggested during his campaign. The only thing we know is that, as commander-in-chief, Trump will have a sufficiently broad scope of substantive war powers to do so. We also know that it will be very difficult, if not impossible, for Congress to control these powers. It is true that Congress still has the power of the purse, but cutting funds for the military is an extreme measure[198] that hardly provides a means to hold the executive in check, especially in a country in which militarization is politically, economically, socially and culturally entrenched to such a significant extent as it is in the United States.[199]

4.2.8 Conclusion: have the War Clauses changed?

In the traditional – that is, pre-WWII – understanding, the US Constitution's Declare War Clause constituted a prerogative for Congress to authorize the use of military force by the president and regulate the ways in which the president could use such force. The Commander-in-Chief Clause, in turn, guaranteed the president's right to superintendence over the military.

However, as we have seen above, a range of developments during the Cold War and the War on Terror, taking such forms as executive claims, policies, ordinary legislation and changing understandings – but not formal constitutional amendments – have made the president, as commander-in-chief, ever more powerful and independent in the field of national security. A contemporary president has the ability to initiate large-scale hostilities and assert a broad set of war powers outside the context involving the actual conduct of hostil-

195 The Editorial Board, 'Legal Authority for Fighting ISIS', *New York Times*, Sept. 11, 2014.
196 Ibid.
197 Ibid.
198 Levinson (2012), 194.
199 See on this topic: Sherry (1997).

ities. At the same time, Congress has *de facto* lost its ability to limit and regulate these powers. They are by and large preclusive of congressional control.

How have these developments related to the US Constitutions War Clauses and vice versa? A legal-doctrinal perspective would enable us to argue that the traditional (or original) meaning of the Declare War Clauses has not been affected by the Cold War and War on Terror security shifts, because these shifts have taken place outside authoritative sources of changing the constitution. Conversely, taking such a perspective could lead to the conclusion that the Declare War Clauses have had profound meaning for real-world practices in the field of national security. Insofar as these practices have deviated from the War Clauses as originally understood, such practices could be considered legally invalid – that is, 'unconstitutional' – deviations from the formal precepts of the constitution, at least in a legal-doctrinal view.[200]

However, although it could provide helpful arguments for a case in court, for example, a legal-doctrinal perspective tends to provide an overly formalistic account of the significance of the Declare War Clauses and the consequences of legal and socio-political developments that take place in the context of these clauses. In other words, a strictly legal-doctrinal account does not seem to adequately represent the real-life impact the Declare War Clauses have had, and it also fails to appreciate the forces and actors involved in bringing about fundamental change in the area of national security. If we accept that, ultimately, the import of formal norms cannot be meaningfully explained and described without taking into account the legal and socio-political context in which these norms are embedded (see chapter 2), we may observe that the traditional meaning of the US Constitution's War Clauses has been seriously called into question, even though these Clauses have not been subject of a formal constitutional amendment or judicial re-reinterpretation. Indeed, the evolution of constitutional practice during the Cold War and the War on Terror in the area the War Clauses purport to regulate have deviated substantially from the traditional constitutional plan. Most of these changes seem to be persistent and have been recognized as legally valid – or 'constitutional' – by most constitutional actors. It is true that some constitutional actors have resisted the development towards an ever more powerful and independent executive in the field of foreign affairs. In particular, Congress has made serious efforts to revitalize the traditional constitutional plan, most notably by adopting the War Powers Resolution. Over time, however, more and more constitutional actors, including the president and – eventually – also Congress, have largely accepted the validity of the modern allocation and use of the constitutional war powers under the US Constitution. In those circumstances, we could – at least in theory – hold on to a strictly legal-doctrinal account of constitutional development. But such an account would not enable us to appreciate the fact

200 E.g., Ackerman (2010). Fisher (2013).

that, in the context of the Cold War and the War on Terror, actors such as the president, Congress and other policymakers – but not the constitutional legislator – have reshaped the material meaning of several provisions of the US Constitution.

That is not to say that the implications of the evolution of constitutional practice in the field of national security for the meaning of the War Clauses of the US Constitution are (already) entirely clear. Some practices that deviate from the traditional meaning of these clauses seem persistent and largely accepted by the community of constitutional actors as legally valid under the formal constitution. The consequences of other deviating practices for the normative content of the formal constitution, particular some of the most extreme practices outside the context involving the actual conduct of hostilities (such as torture), remain unclear. The relation between some of these practices and the formal precepts of the constitution is still the subject of intense debate, and institutional history has not (yet) revealed whether they have staying power or whether they are just part of the ordinary ebb and flow of political development. Moreover, we may observe that even though the larger part of the community of constitutional actors has acknowledged that the traditional meaning of the US Constitution's War Clauses no longer holds true, this meaning might still have some force of attraction. As we have seen, some commentators continue to question the legality of presidential activity in the field of national security by using the traditional interpretation of the War Clauses of the US Constitution as a normative framework. Indeed, this effort seems to have had some real-world effects because even contemporary presidents still seem to use military force with rather than without congressional approval, even though they possess the capacity to act unilaterally.

At the same time, taking an historical institutional view, we also have to be prudent and acknowledge that the direction in which future developments will go is not pre-determined. The developments that have expanded the capacity of American presidents to unilaterally use military force seem to have been accepted and persistent for now, but we cannot exclude that future events will trigger shifts in an entirely different direction. Another large-scale terrorist attack, for example, may provoke new and even broader claims to the war power on behalf of the presidency and further reduce the ability of Congress to regulate and limit this power. On the other hand, new (perceived) 'policy disasters' may aggravate new attempts by Congress and others to re-circumscribe the president and restore its traditional (that is, pre-1945) legislative prerogatives that apparently still have at least some normative appeal.[201] Indeed, although it has been challenged to a significant extent by post-WWII developments, the traditional meaning of the US Constitution's War Clauses

201 As the UK Parliament currently attempts to do. See: Reuters, 'Corbyn: MPs could take action against Blair for misleading Common over Iraq – video', *The Guardian*, 6 July 2016.

may turn out to be stickier than it seems and to have not yet entirely lost its relevance and force of attraction.

4.3 Why have the US Constitution's War Clauses never been amended?

As we have seen, in the traditional pre-1945 American constitutional plan, the war powers were divided between the president and the Congress. Pursuant to the Commander-in-Chief Clause, the president had the prerogative of superintendence of the armed forces, but could only use military force in accordance with the will of Congress, both as a practical and as a legal matter. After 1945, however, a range of developments have taken place that have made the US president increasingly powerful and independent in the field of national defense. During the Cold War and the War on Terror, presidents, as commanders-in-chief, have acquired substantive unilateral and preclusive powers both inside and outside the context involving the actual conduct of hostilities. Meanwhile, Congress has gradually become the commander-in-chief's junior partner.

The evolution of constitutional practice since 1945 has clearly had a strained relationship with the traditional constitutional regime. Despite this, the War Clauses of the US Constitution have never been amended. This section seeks to explore why this is the case. What reasons or factors may explain why shifts with regard to the allocation of US constitutional war powers have taken place solely through alternative processes of constitutional change, despite the fact that these shifts have been at loggerheads with formal precepts of the constitution, at least as they were traditionally understood?

Without purporting to be comprehensive, this section will put forward four important explanations of what we may call 'textual stickiness': amendment difficulty, controversiality of formal amendment, (perceived) unnecessariness of formal amendment, and judicial deference.

4.3.1 Amendment difficulty

A first possible reason why substantial shifts with regard to the allocation of US constitutional war powers have never crystalized in the US Constitution is that it has simply been too difficult for constitutional actors, at least as a practical matter, to amend the US Constitution. In fact, one could doubt whether constitutional actors who favored constitutional reform in the field of national defense have had a realistic amendment option at all. Indeed, the US Constitution is generally considered one of the most difficult-to-amend constitutions in the world.[202] The document has been deeply entrenched,

202 E.g., Lijphart (2012), 208 and Lutz (1995), 244.

both formally[203] and culturally,[204] which has meant it has an extraordinary low amendment rate.[205] In its 225 years of existence, roughly 10,000 amendments have been proposed, but only 27 of these proposals have been adopted. If one considers that the first ten amendments – known as the 'Bill of Rights' – were ratified three years after the original document was adopted, the real amendment rate is even lower. Furthermore, if one agrees that not all of the 17 remaining amendments are truly fundamental[206] and that several of the textual additions in fact added nothing to the body of fundamental rules that regulate the American government,[207] then the substantive constitutional amendment rate may reasonably be considered lower still. According to Levinson, Article V even makes it 'functionally impossible to amend the Constitution with regard to anything truly important'.[208] Indeed, taking the factor of amendment difficulty into account, it is perhaps not surprising that the US Constitution has mainly adapted to changing circumstances and demands through alternative processes of change rather than by way of formal constitutional amendment.[209]

4.3.2 Controversy

A second, and related, reason for the fact that the US Constitution has never been amended with regard to the allocation of war powers is that, even if a realistic amendment option were available, the issue would probably be too controversial to be subject of a formal constitutional amendment. Still, many so-called 'congressionalists' have challenged the legitimacy of the broad unilateral and preclusive presidential claims to the war power.[210] If they endorsed any amendments to the US Constitution's War Clauses at all, congressionalists would presumably only endorse those amendments that aim to reverse de shifts in the *de facto* allocation of war powers that have occurred

203 According to Article V, the US Constitution can be amended in two ways. First, an amendment may be proposed by a two-thirds majority in both houses of Congress and ratified by the legislatures of three-fourths of the several states. Second, it can be amended following the procedure of a national convention.

204 Levinson (2012), 336.

205 Lutz (1995), 244.

206 The 18th amendment, prohibiting the sale, manufacture and transportation of alcohol for beverage purposes and the 21st, repealing the 18th, provide examples of formal constitutional amendment that are not truly fundamental to the system of government. See: Kelsen (2007), 125.

207 Because they declared or recognized what was already there and did not truly change the preexisting legal reality. See: Levinson (1995), 26.

208 Levinson (2012), 338. For a different opinion see: Jackson (2015) – Jackson deems the (perceived) unamendability of the US Constitution a myth. I personally do not agree with this view; see: Passchier (2015).

209 E.g., Levinson (2006), 164 and Lutz (1995), 266.

210 E.g., Ackerman (2010).

in the past 70 years. At the same time, it is likely that most presidentialists would not object to formal constitutional amendments that reflect the expanded capacity of the president to use military force (apart from their cultural or ideological hesitation to employ formal constitutional amendment as a means of fundamental change[211]). However, presidentialists might still disagree about how such amendments should be formulated and how far they should go in terms of broadening the power of the executive. Indeed, some presidentialists favor a regime in which the president has exclusive control over military affairs.[212] They might want to totally diminish the formal role of Congress by, for example, erasing the Declare War Clause entirely. Other presidentialists might only be willing to support a more moderate revision of the formal allocation of war powers, claiming that Congress should still have *some* authority to limit and regulate the power of the president. Thus, even if a realistic amendment option were available, and even if some consensus with regard to the desirability of codifying amendments did arise, the controversial nature of the war powers issue would probably still make it too difficult to agree on a specific text to bring about such amendments.

4.3.3 Formal amendment considered unnecessary

A third reason why the US Constitution's War Clauses have never been formally amended may be that a significant part of constitutional actors have not yet considered formal amendment to be necessary. Some presidentialists have argued that developments in the field of national security after 1950 have not actually changed anything, contending that presidents have had a preclusive and unilateral power to use military force since the US was founded.[213] In this view, the modern allocation of war powers still completely coincides with the traditional constitutional plan. Other presidentialists have acknowledged that (substantial) security shifts have indeed taken place in the past 70 years, but they have expressed the belief that these changes perfectly fit within the 'flexible' framework the US Constitution supposedly establishes.[214]

Furthermore, amending the US Constitutional War Clauses also seems to have been considered unnecessary for an entirely different reason. Remember

211 See, e.g., Sullivan (2001).

212 Cf. Zeisberg (2013), 14.

213 Yoo, for example, claimed that, following the English tradition, the framers´ constitutional system ´encouraged presidential initiative in war´. See, e.g., Yoo (1996). According to Fisher, Yoo´s views, ´contradict not only statements made at the Philadelphia convention and the state ratification debates but also the text of the Constitution´. Fisher (2013), 16. Griffin pointed out that Yoo ´has no direct evidence in support of his general position´. Griffin (2013), 43.

214 E.g., Posner and Vermeule (2010).

that the shifts in the allocation of US constitutional war powers have taken place in a relatively recent stage of US constitutional history. Indeed, by the second half of the 20th century, several other significant constitutional developments had already taken place in the American constitutional order, without formal constitutional amendment.[215] As an example, consider the constitutional developments that are associated with the 1930s New Deal. These developments, outside the formal amendment procedure, fundamentally changed the power and prestige of the presidency, the nature of American federalism, and the ability of Congress and federal agencies to intervene in the economy and deal with social problems.[216] The course of events in the New Deal might have taught constitutional actors that effective and legitimate change could be brought about without investing the amount of political capital required to bring about a formal constitutional amendment.[217]

4.3.4 Judicial deference

A fourth reason for the fact that the constitutional developments in the field of national security have not been crystalized in the US Constitution by way of formal constitutional amendment could be that the judiciary has never really stood in the way of these developments. As we have seen, the American judiciary has consistently refused to address the principle questions that the war powers issue has raised over time. This has presumably made it less urgent – if not unnecessary – for American constitutional actors to consider whether the issue should be settled by changing the text of the Constitution. As Llewellyn reminds us, unless the judges have vetoed it, or unless political and constitutional actors expect that the judges will veto it if called upon, a formal constitutional amendment is 'in the main unnecessary and rarely resorted to'.[218] However, it should be noted that, in the American context, the absence of judicial vetoes only has *some* explanatory force. On the hand, it could be argued that, as a consequence of the infamous *Dred Scott* case, constitutional actors could indeed only decisively abolish slavery by way of formal constitutional amendment.[219] On the other hand, reforms associated with the New Deal were also vetoed by the judiciary, although it ultimately

215 See, e.g., Ackerman (1993), Ackerman (1996), Ackerman (2014), and Strauss (2001).
216 Griffin (1996), 36-40. See also Ackerman (1996).
217 Griffin (1996), 67.
218 Llewellyn (1934), 23.
219 In the *Dred Scott* case, the Court held that 'a negro, whose ancestors were imported into [the U.S.], and sold as slaves', whether enslaved or free, could not be an American citizen and therefore had no standing to sue in federal court. It also held that the federal government had no power to regulate slavery in the federal territories acquired after the founding of the United States. See: *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

proved unnecessary for Roosevelt and his followers to use the formal amendment procedure to overturn judicial decisions and reform the constitution.[220]

4.4 Implications of informal constitutional change

According to some, formal constitutional amendment is the only proper route for constitutional change. Yet, at least as an institutional matter, shifts in the allocation of American constitutional war powers have come about through a range of alternative processes of change.

What implications has informal constitutional change in the field of war had for a constitutional order that is supposedly established and regulated by a written constitution? Have alternative processes of change been able to generate the amounts of legitimacy a formal amendment process would supposedly generate? Have such processes proven to be effective means of bringing about constitutional change? And what implications have informal constitutional developments had for the shaping force of the constitutional text? In short, to what extent have alternative processes of change that we have seen at work in the area of war powers functionally substituted the formal amendment procedure of the US Constitution? These questions will be explored below.

4.4.1 Perceived legitimacy of change

American constitutional jurisprudence does not seem to have one general (legal) doctrine by which the legitimacy of informal constitutional change can be evaluated.[221] So-called 'originalists' believe that the US Constitution has a fixed meaning that can only be changed through the amendment procedures set out in Article V. Instead, proponents of 'living constitutionalism' contend that the US Constitution has a dynamic meaning that must be interpreted in the light of present-day views and circumstances.

Conservatives commonly present themselves as originalists, while the doctrine of living constitutionalism is popular among liberals. However, with respect to the debate about informal constitutional change that has taken place in the field of national security, the roles seem to be reversed. In this debate, conservatives, who typically seem to favor a broad and preclusive prerogative for the executive in the field of national security, have necessarily rested on a strong form of living constitutionalism.[222] A conservative thinker like Yoo, for example, uses a living constitutionalist perspective to argue that the numer-

220 Because they decided to instead threaten to 'pack' the Supreme Court. See Ackerman (1996).
221 Balkin (2011), 3 et seq.
222 Lederman and Barron (2008), 697.

ous military conflicts that were started without congressional authorization, the refusal of presidents to acknowledge the WPR, and the established practice ignoring the terms of the WPR all suggest that 'the branches of government have established a stable, working system of war powers'.[223] Especially post-9/11, it would be unworkable to require the president to seek explicit authorization for each individual conflict.[224] According to Yoo, therefore, it is a good thing that a system has emerged in which '[t]he President has taken the primary role in deciding when and how to initiate hostilities', in which

> 'Congress has allowed the executive branch to assume the leadership and initiative in war, and has chosen for itself the role of approving military actions after the fact by declarations of support and by appropriations'

and in which, '[t]he courts have invoked the political question doctrine to avoid interfering in war powers questions.'[225] Liberals like Fisher and Ackerman, on the other hand, have contested the legitimacy of the contemporary allocation of war powers in the American system. Fisher claimed that the modern allocation is 'not the framers' model'.[226] Quoting Casper, Fisher argued that 'unconstitutional practices cannot become legitimate by the mere laps of time' and, quoting Justice Frankfurter, that 'illegality cannot attain legitimacy through practice'.[227] Ackerman deems the pre-1945 constitutional shifts in the division of war powers illegitimate, claiming that they have led to a 'culture of lawlessness'.[228]

Especially Ackerman's work reveals that, in the American context, views regarding the legitimacy of informal constitutional change are commonly grounded in political or ideological preferences, rather than in some kind of 'neutral' legal doctrine that is consistently applied. In his three-volume We The People, Ackerman argued that the US Constitution can be changed legitimately outside the US Constitution's formal amendment procedure.[229] He essentially suggested that constitutional change has taken place legitimately when it has been endorsed by all three branches of government as well the electorate in 'several cycles of popular sovereignty'.[230] Taking this perspective,

223 Yoo (2006), 12-13.
224 Ibid, x.
225 Ibid, 13. See also Posner and Vermeule (2010).
226 Fisher (2013), 291.
227 Ibid, 297.
228 Ackerman (2010), 152.
229 Ackerman (1993), Ackerman (1996) and Ackerman (2014).
230 In Ackerman's account, the constitutional developments that are associated with the Civil Rights revolution were set in motion by the Supreme Court issuing *Brown vs. Board of Education* in 1954. Subsequently, Congress, backed by mobilized popular support, adopted the Civil Rights Act in 1964, the Voting Rights Act in 1965, and the Fair Housing Act in 1968. Finally, the new legislation was vigorously executed by committed presidents who had gained large popular mandates in landslide victories in successive national elections.

Ackerman vigorously defended the legitimacy of the New Deal and the Civil Rights Revolution, among other progressive developments in American history. However, Ackerman's enthusiasm for informal constitutional development tends to wane when it comes to shifts in the allocation of war powers after WWII and 9/11.[231] Even though many of these changes seem to have been approved, either implicitly or explicitly, by all branches of government as well as the electorate – just like the New Deal and the Civil Rights Revolution – Ackerman does not acknowledge that they have become part of the American constitutional 'canon'.

Thus, in appreciating the legitimacy of a certain informal constitutional development, American commentators seem to ultimately base their choice for a certain perspective – either originalism or living constitutionalism – on their ideological preferences with respect to the concrete topic at hand. American constitutionalism has no 'objective' legal doctrine that may settle disputes about the legitimacy of constitutional change that has taken place outside the Article V formal constitutional amendment procedure (as German constitutionalism knows, see chapter 5). In the absence of such a doctrine, informal mechanisms of constitutional change have not been able, at least not in the case under review here, to generate the amounts of legitimacy that a formal constitutional amendment process would supposedly produce.

4.4.2 Effectiveness of change

According to the Oxford English Dictionary, something is effective if it is 'successful in producing a desired or intended result'.[232] What was the desired or intended result of the alternative mechanism of constitutional change that has been employed in the field of national security? We do not always know, and most of the time we do not even know whether constitutional change was effected consciously.

What we can observe, however, is that after the Second World War, and again after 9/11, constitutional actors were able to quickly bring about the reforms they thought necessary in order to prevail against what they regarded an enemy threat. As early as 1950, President Truman was able to use force against Korea unilaterally and create a precedent that could be followed by his successors. Shortly after 9/11, President Bush was able to significantly expand his capacity to use the American security apparatus, even outside of the context involving the actual conduct of hostilities. Insofar as 'constitutional'

After several cycles of popular sovereignty, it was clear that We the People had ordained a new constitutional regime, or so Ackerman's argument goes. See Ackerman (2014).

231 See, for example, Ackerman (2010), 110.

232 https://en.oxforddictionaries.com/definition/effective (18-1-2017)

change was intended by these presidents, the informal means they used have proven to be highly effective means to bring about constitutional reform.

On the other hand, after 70 years of informal constitutional development, the allocation of US constitutional war powers is ever more ambiguous. This may make executive officials uncertain with regard to the risk they take following presidential orders.[233] For example, during the early years of the War on Terror, CIA officials doubted whether they could follow presidential orders to use 'enhanced interrogation techniques', such as waterboarding, because these orders seem to be against a 1994 criminal code that implemented the Convention against Torture.[234] (Ultimately, the issue was 'settled' by the 2002 'Torture Memo',[235] discussed above,[236] which functioned, in the words of one CIA official, as a 'golden shield' that provided enormous comfort.[237])

Moreover, while shifts in allocation of war powers have clearly had much staying power, alternative forms of change, such as executive interpretation and ordinary statutes seem unable to guarantee the same amount of stability as a formal constitutional amendment could supposedly provide. As we have seen, once amendments to the US Constitution have been brought about, they are deeply entrenched, both formally and culturally. However, alternative forms of constitutional change have no special formal status. Therefore, it is not unthinkable that significant shifts in the allocation of war powers will take place again. If new (perceived) security threats arise, presidents may seek to further broaden their capacity to use military force.[238] Conversely, after new (perceived) policy disasters – or violations of human rights for that matter – Congress, the courts, or presidents themselves may (again) make attempts to re-circumscribe the executive.

Thus, while the post-1945 and post-9/11 division of powers seems persistent, the new order is presumably not as stable as one that would have been established or codified by way of formal constitutional amendment.

4.4.3 The shaping force of the constitutional text

Shifts in the allocation of war powers seem to have made the Commander-in-Chief Clause more relevant than ever. The prerogative of superintendence has probably never been so exalted. Moreover, in the past seven decades more (substantive) meaning has been added to the Clause, which now attributes

233 Goldsmith (2007), 143.
234 Ibid.
235 US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales Counsel to the President, 'Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A', August 1, 2002.
236 Par. 4.2.6.
237 Ibid.
238 E.g., Ackerman (2006).

– at least in the reading of many constitutional actors – a capacity to initiate armed conflict unilaterally, and various broad preclusive powers inside and outside the context involving the actual conduct of hostilities.

On the other hand, the relevancy and normative force of the Declare War Clause seem to have diminished significantly during 70 years of national security shifts. Prior to the Second World War, the Declare War Clause effectively gave Congress the prerogative to authorize and regulate the use of both large- and small-scale military force. Major wars that were fought between 1789 and 1945 were formally declared, as were countless relatively minor conflicts, with only a few exceptions, preceded by an express congressional authorization in some alternative form.[239] It is telling that no pre-1945 president has claimed the unilateral authority to initiate major military operations.[240] In the post-1945 context, however, the congressional prerogative would become vulnerable for presidential claims to war powers. Many observers believed that the threat of communism and, later, terrorism required the president to assume a much more dominant role. As Posner and Vermeule put it, this is

> 'because the executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security, it is natural, inevitable, and desirable for power to flow to this branch of government. Congress rationally acquiesces, courts rationally defer.'[241]

Meanwhile, the availability of a large standing security apparatus after WWII allowed presidents to actually materialize their unilateral and preclusive claims; it made them less dependent on Congress for funding, and the availability of overt, covert, nuclear and intelligence capabilities allowed the president to move quickly and confront Congress with *faits accompli*, accomplished facts, as we have seen in the decision-making process surrounding the Vietnam War.[242] Moreover, after 1945, the relevancy of the Declare War Clause diminished because formal declarations of war had become outmoded in international law and practice.[243] The UN Charter, which uses the concept of justified use of armed force,[244] arguably had the effect of making 'war' and 'formal declarations of war' legally obsolete.[245] With the decline in declarations of war, the text of the Declare War Clause had become harder to explain. In any case, it appears to have become much more difficult for congressionalists to convincingly argue that the phrase 'to declare war' still

239 Griffin (2013), 46-47.
240 Lederman and Barron (2008), 948-950.
241 Posner and Vermeule (2007), 4.
242 See par. 4.2.4. above.
243 Ginsburg (2014), 498.
244 See: Articles 39-51.
245 Griffin (2015), 351.

included a congressional prerogative to authorize and regulate the use of military force, because the phrase had become vulnerable to semantic language.[246] The WPR of 1973 can be understood as the centerpiece of an effort to revitalize the Declare War Clause and restore the traditional role of Congress.[247] However, even if the WPR can be attributed some shaping force,[248] it largely failed to bridge the gap between the antiquated language of the Declare War Clause and post-1945 circumstances.

It would presumably be incorrect to conclude that the Declare War Clause has been completely undermined by alternative processes of constitutional change. Still, many constitutional actors believe that the Declare War Clause stipulates that the president needs legislative authorization before using military force,[249] and even presidents themselves seem to prefer to use military force with the support of Congress than without it. Nevertheless, it is arguably fair to say that, after 70 years of deviating interpretation and practice, the impact of the Declare War has significantly declined and that, in the absence of textual addition or clarification, the phrase 'to declare war' has lost much of its substance and normative force.

4.5 Concluding observations

In this chapter, I have explored and evaluated the relationship between the US Constitution's War Clauses and Cold War and War on Terror developments that have taken place in the area these Clauses seek to regulate. I will now summarize my findings and make some closing remarks.

The first section found that the traditional – that is, pre-1945 – meaning of the US Constitutional War Clauses have seriously been called into question by the evolution of constitutional practice in the Cold War and the War on Terror. I posited that, if we acknowledge that the import of formal norms cannot be meaningfully explained and described without taking into account the evolution of the legal and socio-political context in which these norms have been embedded, we must recognize that, as a consequence of Cold War and War on Terror developments, the material meaning of the US Constitution's War Clauses has changed, even though these changes do not show on the face of the list of amendments to the US Constitution.

246 Ambiguities surrounding the meaning of the word 'war' in the post-1945 context seem to have made it possible for modern executives to claim that certain uses of force, because of their anticipated 'nature, scope and duration', do not amount to 'war' in the constitutional sense and therefore do not require congressional authorization. See, for example, Walter Dellinger, 'Deployment of United States Armed Forces into Haiti', 27 September 1994.

247 Ginsburg (2014), 498-499.

248 Ibid, 499.

249 Griffin (2016), 351.

The second section listed some factors that might explain why, despite the fact that substantial shifts in the allocation of US constitutional war powers have taken place, the War Clauses of the US Constitution have never been subject of formal constitutional amendment. I found that what we may call 'textual stickiness' can be explained by pointing to the difficulty of formal constitutional amendment in the US context, the controversiality of the war powers issue, the perceived unnecessariness of bringing about constitutional change in the field of national security by way of formal constitutional amendment and the fact that the American judiciary has never really made amending the constitutional War Clauses necessary, because it has not intervened in the matter.

Finally, in the third section I sought to explain the extent to which informal processes of constitutional change in the field of national security have substituted for the functions that are commonly attributed to the formal constitutional amendment procedure. That section revealed that, insofar alternative mechanisms were consciously used by constitutional actors to bring about fundamental reform, they have proven to be pretty effective means of change because they seem to have produced the desired outcome and ensured that this outcome has had staying power. On the other hand, in absence of a more or less 'objective' (legal) doctrine of informal constitutional change in American constitutionalism, alternative processes of change have not generated the amount of support for reform a formal constitutional amendment would have been expected to generate. Moreover, while alternative processes have made the Commander-in-Chief Clause more important – after all, it previously only guaranteed a presidential prerogative of superintendence and it now awards a broad set of substantive war powers to the presidency – they have undermined the shaping force of the Declare War Clause. While this Clause previously awarded central power to Congress in terms of making decisions regarding war and peace, it currently only reminds presidents that it is perhaps better to use force with rather congressional support than without it.

Perhaps a future Congress, judiciary, or president will manage to change the direction of the development we have explored above. However, the history of the Cold War and the War on Terror shows that it is quite unlikely that the war powers of the American Executive will be re-circumscribed anytime soon. This is not only because the branches of government do not seem to support such an effort (especially not the recently elected and appointed ones), but also – paradoxically – because it is so difficult to amendment the US Constitution with regard to anything truly important.