THE FIRST AUMF: THE NORTHWEST INDIAN WAR, 1790–1795, AND THE WAR ON TERROR

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On September 29, 1789, while various state militias were involved in hostilities with the Indian tribes and with very little attention, Congress passed a bill to reorganize the federal military and allow President Washington to call upon state militias to protect the frontier from Indian incursions.1 While President Washington did not immediately call upon these powers, on June 7, 1790, he allowed Secretary of War Henry Knox to order General Josiah Harmar to begin a “punitive expedition” against the Indians in response to a prior raid.2 To support this mission, President Washington raised over 1500 militia and the federal government entered its first war under the new Constitution.3

Throughout American history, scholars have been asking whether the President has the power to begin a war without a formal declaration from Congress, a debate that has begun again with renewed interest since the outbreak of the War on Terror. This debate stems from the text of the Constitution itself, which prescribes that the President has the “executive Power”4 and is the “Commander in Chief”5 of the armed forces, while Congress has the power to “declare War” and “grant letters of Marque and Reprisal.”6 To argue that the President does have the power to start war without a congressional declaration, scholars have deployed a narrow reading of the Declare

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* J.D., 2016, University of Pennsylvania Law School, B.A., 2013, Northwestern University. My deepest gratitude goes to Professor Gregory Ablavsky, whose guidance and feedback made this Comment possible. Additional thanks to Professor John Low and the Northwestern University Latino Studies Department for piquing my interest in such questions and topics. Finally, I would like to thank my Journal colleagues for their hard work, as well as Mattie Castiel, Aaron Mendel, Zachary Mendel, and Kaley Stroup for their unyielding support.
1 See Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96 (authorizing the President to use the militia to fend off hostile Indians).
3 Id. at 102–08.
4 U.S. Const. art. II, § 1, cl. 1.
5 U.S. Const. art. II, § 2, cl. 1.
6 U.S. Const. art. I, § 8, cl. 11.
War Clause and used textual arguments to support the idea that a formal declaration is not needed. On the other hand, scholars favoring greater congressional authority have countered with a broader reading of the Declare War Clause and have supported their claims with statements from the founding generation. While this debate is important, scholars neglect the possibility that the Constitution does not require a single course of action for all possible scenarios, and that the constitutional solution is often contextual.

While the United States Congress has declared war five times in its history, the lack of a formal declaration has not prevented the United States from becoming involved in numerous military conflicts across the globe, and most recently in the War on Terror. In this Comment, I argue that constitutional America’s first war, the Northwest Indian War, represents the United States’ first use of a military authorization as opposed to a declaration of war, and continues to serve as a model for wars against non-state actors, most notably the War on Terror, to this very day.

The Northwest Indian War is particularly relevant to the War on Terror for two reasons. First, the United States has made direct comparisons between the War on Terror and the Indian wars of the past. Indian tribes did not always fulfill Euro-American conceptions of statehood and often used guerrilla warfare, tactics that some have compared to those of terrorists today. The Bush Administration’s Office of Legal Counsel even went so far as to explicitly liken the Indian wars of the nineteenth century to the 9/11 attacks. The Obama Administration has continued this practice, assigning the codename “Geronimo,” the name of the Apache resistance leader, to Osama Bin Laden. With the United States already making comparisons between the Indian wars and the War on Terror, Indian history should be considered to see whether these comparisons hold weight.

Second, the Northwest Indian War is particularly important due to the rise of originalist constitutional interpretation, a strain of which

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7 See, e.g., John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CALIF. L. REV. 167, 172 (1996) [hereinafter The Continuation of Politics] (explaining the divergent approaches of liberal and conservative ideology in construing the powers of the President to initiate war).
8 See, e.g., William Michael Treanor, Fame, the Founding, and the Power to Declare War, 82 CORNELL L. REV. 695, 698–99 (1997) (exploring the Founders’ intentions in delegating war powers).
10 Id. at 225–26.
11 Id. at 229.
holds that early precedents are particularly indicative of accepted constitutional practice. This makes the Northwest Indian War, constitutional America’s first war, extremely relevant to understanding the division of the war powers. Scholars favoring broad congressional authority have often noted the active role Congress played in the prosecution of the war, while those favoring broad executive power tend to focus on the lack of an official declaration and the limited tools used by Congress to manage the war.

In this Comment, I argue that the role of each branch has always depended on the context of the war itself and that only by examining the ways by which America has waged war can we understand how the war powers actually function. While this contextual understanding of the war powers may lead to a broader interpretation of such powers with regards to non-state or sub-sovereign actors, the consequent determination of sovereignty brings to light a troubling paradigm with which originalist scholars have to grapple. The decision of who is a sovereign has often been linked to Euro-American notions of sovereignty and civilization, and it is difficult to separate these notions from the contextual understanding of the war powers, which allow for greater executive discretion.

In Part I of this Comment, I describe the War on Terror and the current debate surrounding the application of the war powers doctrine to the Authorization for the Use of Military Force (“AUMF”). In Part II, I discuss the history of the Northwest Indian War and examine the United States’ first authorization for the use of military force, drawing on the concepts that allowed for the United States to enter a war without a formal declaration. In Part III, I discuss the connections between the United States’ current War on Terror and the Northwest Indian War, and show how the Northwest Indian War Authorization is a precursor to the War on Terror’s AUMF. Finally, in Part IV, I address the implications of understanding the Northwest Indian War Authorization as a constitutional basis for the AUMF and challenge originalist scholars to grapple with the Euro-American notions of sovereignty which can allow for greater executive military discretion.

I. The Debate Over the War Powers and the AUMF

In Part I of this Comment, I will define the parameters of the War on Terror and review the existing war powers literature as applied to the Authorization for the Use of Military Force. Indeed, the need for a more contextual understanding of the war powers is needed because of the current War on Terror—without such an understanding,
it is difficult if not impossible to discern the constitutional parameters of the current war. In Part I.A., I define, for the purpose of this paper, the War on Terror and delineate which conflicts do and do not fall within the definition of this war. In Part I.B., I discuss the war powers as applied to the War on Terror.

A. Understanding the Parameters of the War on Terror

The War on Terror is the name of the extended military conflict that followed the attacks of September 11, 2001. The War on Terror is not a traditional war and has parameters that make the conflict potentially limitless.\(^\text{12}\) As opposed to being at war with a specific state or group of states, the United States’ enemies in the War on Terror are primarily citizens and residents of friendly nations or even the United States.\(^\text{13}\) The battlefield, once a definable location, has no known limitations, and can include any location, domestic or international, in which terrorists are found.\(^\text{14}\) Furthermore, without a definite enemy to be defeated, it is difficult to conceptualize when the enemy has been defeated and the conflict is over.\(^\text{15}\) In the words of Professors Curtis Bradley and Jack Goldsmith, “Our war on terror begins with al Qaeda, but it does not end there. It [does] not end until every terrorist group of global reach, has been found, stopped, and defeated.”\(^\text{16}\)

Because of the potentially broad scope of the war itself, defining the War on Terror in traditional terms can be difficult. Despite this breadth, however, the 2001 Authorization for the Use of Military Force ("AUMF") is a common link between the many theaters of the umbrella of the War on Terror.\(^\text{17}\) Therefore to understand the War on Terror, one must consider the text of the AUMF, which states in relevant part:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or per-

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13 Id. at 2049.
14 Id.
15 Id.
16 Id. (citation omitted).
17 Id. at 2055.
sons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.\textsuperscript{18} Therefore, any armed conflict engaged by the United States that has been authorized by the AUMF can be considered part of the War on Terror.\textsuperscript{19}

To further understand the AUMF, Professors Bradley and Goldsmith provide an analytical framework for understanding the breadth of a military authorization, which I will later apply to the Northwest Indian War. According to Professors Bradley and Goldsmith, a military authorization is defined by the: “(1) the authorized military resources; (2) the authorized methods of force; (3) the authorized targets; (4) the purpose of the use of force; and (5) the timing and procedural restrictions on the use of force.”\textsuperscript{20} With regards to the AUMF, they note that the authorization “to use all necessary and appropriate force” covers both the resources and methods that the President can employ.\textsuperscript{21} Furthermore, the authorized target of that force is all “nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,” a statement that gives the President broad power to determine who is an enemy.\textsuperscript{22} In addition, the purpose of the use of force is to “prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”\textsuperscript{23} Finally, the only limitation provided by the AUMF is that the President complies with the War Powers Resolution.\textsuperscript{24}

To this date, the conflicts initiated under the AUMF include the war in Afghanistan and military operations in Pakistan, Yemen, and


\textsuperscript{19} Executive statements are essential to which conflicts coincide with authorizations, as the courts generally refuse to review matters relating to the deployment of military in a conflict, finding it a non-justiciable political question. See Baker v. Carr, 369 U.S. 186, 212–13 (1962) (explaining the role of executive proclamations on the Court’s ability to review actions); see also Amanda L. Tyler, Is Suspension a Political Question?, 59 STAN. L. REV. 333, 404 n.374 (2006) (exploring judicial deference accorded to presidential decisions to commit troops to a conflict).

\textsuperscript{20} Bradley & Goldsmith, supra note 12, at 2072.


\textsuperscript{24} Id. at 2078 n.130.
In addition, President Barack Obama has recently claimed that the AUMF provides sufficient authorization for American strikes against the Islamic State in Syria ("ISIS") in Iraq. Notably, however, the initial War in Iraq, which began in 2002, is not part of the War on Terror because it had its own subsequent authorization separate from the AUMF. Therefore, it is only the aforementioned conflicts which will be considered part of the War on Terror for the purpose of this paper.

B. The Debate over the War Powers as Applied to the War on Terror

Locating the authority to initiate armed conflicts has been one of the defining constitutional debates of the last century. The origin of this debate stems from the division of powers established by the Founding Fathers, who gave the President the "executive Power," and made him the "Commander in Chief" of the armed forces, while giving Congress the power to "declare War" and "grant letters of Marque and Reprisal."

Arguments in favor of more broad executive authority have typically deployed textual reasoning to argue in support of a narrow reading of the Declare War Clause. Arguing the contrary, scholars favoring congressional authority have used originalist arguments, centered on statements from the Founding Fathers showing a deep fear of broad executive authority, to support a broader reading of the Declare War Clause.

In recent years, this debate has continued in the context of the War on Terror. Discussing the AUMF, Professors Bradley and Gold-
smith argue that the AUMF is equivalent to a declaration of war and the executive has the power to act accordingly. In support of this proposition, they note both historical practice and the development of international law. With regards to historical practice, they note that “[s] tarting with early conflicts against Indian tribes and the Quasi-War with France at the end of the 1700s, the United States has been involved in hundreds of military conflicts that have not involved declarations of war.” Furthermore, they note that the formal use of declarations of war was already falling out of practice prior to the ratification of the Constitution, and therefore argue that they should not be seen as a constitutional requirement. Of course, in response to such an argument, there are those who would certainly argue that “past violations are only that—violations;” the debate over the original understanding of the war powers has yet to produce a satisfactory answer.

The other argument Professors Bradley and Goldsmith use in support of their position is the idea that the development of international law had made formal declarations of war irrelevant. The United Nations now governs the rules of war but does not just apply these rules to “war[s]” but also to “armed attack[s]” and the “use of force.” Therefore, the rules of war, which were once triggered by a declaration of war, are now applied without exception to all armed conflicts. As a result of this development, formal declarations of war no longer serve a purpose in international law, and their use has declined as a result. While these developments may be true, they do not address the constitutional implications of such a change; many originalists would argue that twentieth century changes in international law should not affect our interpretation of an eighteenth century document.

Meanwhile, scholars such as Bruce Ackerman acknowledge that the War on Terror does not fit into the traditional definitions of war.

33 Bradley & Goldsmith, supra note 12, at 2057–66.
34 Id. at 2059–60.
35 Id. at 2058–59.
36 ELY, supra note 32, at 9.
38 Id. at 2061.
39 Id. at 2061–62.
40 See Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 862–63 (1989) (“[T]he central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned.”).
and that this has posed significant challenges for American constitutionalism.\textsuperscript{41} As Professor Ackerman notes, "War is traditionally defined as a state of belligerency between two sovereigns," and that while certain conflicts within the War on Terror can be defined as such, there are others which fall outside of this conceptual framework.\textsuperscript{42} He further notes the differences between the War on Terror and traditional war: the term "enemy" is relatively undefined and broadly applicable, and there is no clear method by which the war can end.\textsuperscript{43} Under this view of the War on Terror, the AUMF is therefore not seen as a formal declaration of war but rather the initiation of a "state of emergency," giving the President the powers associated with the latter but not the former.\textsuperscript{44}

While Professor Ackerman acknowledges that his approach is more normative than descriptive, it is grounded in a constitutional understanding of the war powers. Professor Ackerman notes that "[t]he constitutional text grants the power to Congress to 'declare war,' creating an opening for judges to tell the President and Congress what a 'war' is and when the consent of Congress is required."\textsuperscript{45} Judicial abdication of this opening, however, has led to an unlimited scope for war that significantly threatens constitutionally embedded civil liberties.\textsuperscript{46} By arguing that the AUMF is not a substitute for a declaration of war and indeed that the War on Terror is not itself a war, Professor Ackerman proposes a constitutional view where the powers of the executive are much narrower than their current use. Critically, under this conception of the War on Terror, the power of Congress is restored, because although the President has the power to initiate new "battles" without congressional consent, he cannot initiate new wars.\textsuperscript{47} However, while Professor Ackerman proposes a radically different understanding of the war powers, it is nevertheless limited for my purpose by its normative nature; it does not explain how the war powers actually function.

\textsuperscript{41} See Bruce Ackerman, \textit{The Emergency Constitution}, 113 \textit{Yale L.J.} 1029, 1032 (2004) [hereinafter \textit{The Emergency Constitution}].
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 1032–33.
\textsuperscript{44} Bruce Ackerman, \textit{This Is Not a War}, 113 \textit{Yale L.J.} 1871, 1873 (2004) [hereinafter \textit{This Is Not a War}]; see \textit{The Emergency Constitution}, supra note 41, at 1030–31 (explaining that the "paradigm case for emergency powers has been an imminent threat to the very existence of the state").
\textsuperscript{45} \textit{This Is Not a War}, supra note 44, at 1874.
\textsuperscript{46} \textit{Id.} at 1874, 1876–77.
\textsuperscript{47} \textit{Id.} at 1877.
Highlighting this point is the fact that players within the Bush Administration took a middle ground to their understanding of the AUMF and the War on Terror. In his article *Waging War Within the Constitution*, former Attorney General and Counsel to the President Alberto Gonzales argues that while Congress did not formally declare war by passing the AUMF, it nevertheless gave significant power to the President, most notably the power to indefinitely detain enemy combatants.\(^48\) Furthermore, Gonzales notes that the Bush Administration did not believe that the Geneva Conventions applied to the War on Terror, and that it was not a state of war that existed between the United States and the enemy but rather one of “armed conflict.”\(^49\)

Notably, Gonzales differentiates between the rules of the Geneva Conventions, war, and domestic criminal law in a way similar to Professor Ackerman’s contention that the War on Terror should be seen as something aside from war and criminal law.\(^50\) Also noteworthy is the way Gonzales distinguishes between a military authorization and a declaration of war, suggesting his disagreement with Professors Bradley and Goldsmith’s approach to viewing military authorizations and declarations of war as having identical purposes.\(^51\)

Related to his view on the AUMF, Gonzales saw legal differences between the ways in which wars could be waged against state and non-state actors. Critical to his view that the Geneva Conventions did not apply to al Qaeda, for example, was the idea that the United States was at war with non-state actors and that therefore the Geneva Conventions did not apply.\(^52\) With regards to the American military efforts against the Taliban in Afghanistan, the Bush Administration took the view that the Geneva Conventions applied only so long as it remained sovereign and that the President “could suspend the Geneva Conventions upon his determination that the sovereign state of

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\(^{49}\) Id.

\(^{50}\) Compare Gonzales, supra note 48, at 843, 845–46 (explaining that Congress did not formally declare war and that the government strove to distinguish and keep separate the systems of criminal law and armed conflict law), with The Emergency Constitution, supra note 41, at 1032–37 (finding that “neither of the standard legal rubrics”—the rubric of war and the rubric of criminal law—“was really adequate”).

\(^{51}\) Compare Gonzales, supra note 48, at 843, 845–46 (explaining that instead of formally declaring war, Congress passed a military authorization, thereby using the framework of armed conflict to enable the government to detain enemy combatants), with Bradley & Goldsmith, supra note 12, at 2061–62 (explaining that, historically, congressional authorizations and declarations go hand-in-hand, where Congress first declares war and then takes “the additional step of authorizing the President to use force to prosecute the war”).

\(^{52}\) Gonzales, supra note 48, at 850.
Afghanistan ceased to exist.\textsuperscript{55} While President Bush ultimately decided not to suspend the Geneva Conventions in Afghanistan, he retained the belief that he had the power to do so if Afghanistan's sovereignty was diminished.\textsuperscript{54} Furthermore, Gonzales acknowledges that President Bush's "decision established a new legal paradigm for the United States for dealing with non-state actors fighting an unconventional war using tactics in violation of the laws of war," and notes that the Obama Administration has embraced the Bush Administration's view.\textsuperscript{55} In other words, Gonzales's position accurately characterizes the current governmental understanding of the war powers as related to the War on Terror, and the role that the United States' determinations of enemy sovereignty factor into the application of the war powers.

The views of Bradley and Goldsmith, Ackerman, and Gonzales thus illustrate the diversity of opinions with regards to the role of the AUMF. Bradley and Goldsmith argue that the AUMF should be seen as the equivalent to a formal declaration of war, bestowing on the President all of the traditional wartime powers. Ackerman, on the other hand, notes that the paradigm of war or criminal law fails to capture the complexity of the War on Terror, and argues that the AUMF should be seen as guiding the United States down that third path. Gonzales, meanwhile, illustrates that the Bush Administration did see the War on Terror as a third path, albeit one very different than that proposed by Professor Ackerman. The Bush Administration's view on the AUMF was that it authorized a specific type of armed conflict, defined by the limited applicability of the rules of war to non-state or sub-sovereign actors. While Gonzales believes that the Bush Administration articulated a new paradigm, I will argue in Part II that the United States has always seen wars against non-state actors as having different rules.

II. THE NORTHWEST INDIAN WAR AND THE FIRST AUMF

More than just a minor conflict, the Northwest Indian War was the first war fought by the United States under the new Constitution. It was a significant endeavor for the new republic, consuming "almost

\textsuperscript{53} \textit{Id.} at 851.

\textsuperscript{54} \textit{Id.} (citing Memorandum from George W. Bush, President of the United States, to the Vice President, the Sec'y of State, the Sec'y of Def., the Attorney Gen., Chief of Staff to the President, Dir. of Cent. Intelligence, Assistant to the President for Nat'l Sec. Affairs, Chairman of the Joint Chiefs of Staff (Feb. 7, 2002), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf).

\textsuperscript{55} \textit{Id.} at 857.
five-sixths of all federal expenditures" from 1790 to 1796, and including the greatest military defeat the United States would ever suffer at the hands of an Indian army. In Part II.A., I provide a basic history of the Northwest Indian War, which will be considered throughout the Part. In Part II.B., I examine the existing literature applying the war powers debate from Part I to the Northwest Indian War. Part II.C. argues that the constitutional war powers must be considered in the context of existing international law and discusses the application of the rules of war to the Indian tribes. Finally, in Part II.D., I analyze the actions of Congress in the Northwest Indian War under the framework of the AUMF.

A. Understanding the Northwest Indian War

The Northwest Indian War stemmed from the expansion of the United States into the Northwest Territory, which included parts of modern-day Ohio, Indiana, Illinois, Michigan, and Wisconsin. Under the Articles of Confederation, the Northwest Ordinance of 1787 governed this expansion, representing the cession of the Northwest Territory by the expansionist states to the federal government. Of course, the land into which the United States sought to expand was not empty, but rather was occupied by several Indian tribes, including the Huron, Wyandot, Delaware, Shawnee, Ottawa, Chippewa, Potawatomi, Miami, Cherokee, and Wabash.

Despite the fact that this land was occupied by Indians at this time, the Northwest Ordinance included only two mentions of Indians. First, in Article III, the United States promised that "[t]he utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress." Despite this promise of "good faith," however, many scholars recog-
nize this policy as an "enormous charade." While good faith may have been promised, that promise paled in comparison with the Northwest Ordinance's "[commitment of] the United States to [the] possession and development of the very lands in question." Good faith was supposed to commit the United States to the purchase policy, but in reality the United States "would tell the Indians which tract was to be 'sold' and what would be paid for it." The goal of the policy articulated in the Northwest Ordinance was that "ultimately [the Indians] would be required to dispose of all needed lands." In more recent years, the Supreme Court has even acknowledged the extent of the "good faith" charade.

Second, the Northwest Ordinance is premised on the idea that Indians were to be excluded from the lands governed by the United States. In Section 8, the Northwest Ordinance gives to the governor of the territory power over all land "in which the Indian titles shall have been extinguished." The plan outlined in the Northwest Ordinance allowed for the development of representative governments once a certain population level was reached, and this population was not envisioned to include Indians. Taken together, these two sections outline the American plan to expand the United States through the territorial dispossession of the Indians.

Many Indian tribes, however, did not agree with this policy and contested American expansion. Previously hostilities between Indians and settlers were state issues, but the Northwest Ordinance put the tribes in direct conflict with the federal government. With the federal government now spurring expansion, many Indians recognized that this was a critical moment in the struggle to maintain con-

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63 Sword, supra note 58, at 50 (explaining that the matter was an "enormous charade" because "[a]ny prospect of fairly dealing with the Indians by 'purchasing' their lands paled under the overt declaration in the 1787 Northwest Ordinance, which committed the United States to possession and development of the very lands in question"); see also Anderson & Cayton, supra note 57, at 190 (noting that "Congress's immediate goal was to impose order on the Indian Country," and the Northwest Ordinance provided a "robust institutional framework for the American colonization").

64 Sword, supra note 58, at 50; Kohn, supra note 2, at 92.

65 Sword, supra note 58, at 50.

66 Id.

67 See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955) ("Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty ... it was not a sale but the conquerors' will that deprived them of their land.").

68 Northwest Ordinance § 8 (1787).

69 Anderson & Cayton, supra note 57, at 190.

70 Kohn, supra note 2, at 67; Sword, supra note 58, at 55-56.
control of their lands east of the Mississippi River, and as a result, a state of undeclared war broke out in the region.\footnote{SWORD, supra note 58, at 55, 72.}

Then, on June 21, 1788, the United States adopted another critical document: the United States Constitution.\footnote{See generally U.S. CONST. (founding a new rule of law for the young nation).} With the establishment of the new government, Congress had to decide what to do with the Northwest Ordinance and, in August of 1789, it readopted the ordinance with little alteration.\footnote{ANDERSON & CAYTON, supra note 57, at 190.} Indeed, the passage of the bill was such a foregone conclusion that there was minimal discussion of it on either the Senate or the House floors.\footnote{See 1 ANNALS OF CONG. 642, 659–60, 666 (1789) (Joseph Gale ed., 1834) (passing the Northwest Ordinance in the House on July 21, after two readings on July 16 and July 17); see also 1 ANNALS OF CONG. 51–52, 56–57 (1789) (Joseph Gale ed., 1834) (passing the Northwest Ordinance in the Senate on August 5 after three readings).} Furthermore, a month after Congress reauthorized the Northwest Ordinance, they also passed a bill to reorganize the federal military and allow President Washington to call upon state militias to protect the frontier from Indian incursions.\footnote{WILLIAM H. GUTHMAN, MARCH TO MASSACRE: A HISTORY OF THE FIRST SEVEN YEARS OF THE UNITED STATES ARMY, 1784–1791, at 173 (1975) (explaining that “the President was given authority by Congress to call upon the the state militia to supplement the small Federal force without asking permission of Congress”); KOHN, supra note 2, at 102 (describing how the 1789 instructions were used when Pennsylvania and Kentucky militia were called on).} With these two acts in place, Congress had reestablished the expansion policy that would necessitate the Northwest Indian War and authorized the force that would be used to prosecute it.

For a time, the undeclared hostilities between the settlers and the Indians would continue, but on June 7, 1790, President Washington allowed Secretary of War Henry Knox to order General Josiah Harmar to begin a “punitive expedition” against the Indians, a federal response to the raids of approximately 200 “renegade” Indian warriors.\footnote{KOHN, supra note 2, at 102.} To support this mission, President Washington raised over 1500 militia, which began assembling at Forts Washington and Steuben by mid-September.\footnote{SWORD, supra note 58, at 92; see also KOHN, supra note 2, at 102–03 (illustrating how General St. Clair convinced President Washington of the need for additional troops).} To this build-up, the Indians responded by assembling their own force of over 1000 warriors.\footnote{KOHN, supra note 2, at 102.} The American troops were poorly prepared and trained, and as one observer...
noted, "Their whole object seemed nothing more than to see the country without rendering any service whatever."

Nevertheless, on September 26, 1790, under the command of General Harmar, the American army began its advance upon the Indian tribes. The expedition was supposed to take the Indians by surprise, but by October 10, 1790, the army became aware of the fact they were under Indian surveillance. The Americans were never able to catch the Indians, only managing to burn abandoned villages while suffering significant casualties to Indian ambushes during smaller expeditions. When the expedition ended in November, a disheartened President Washington would replace General Harmar with General Arthur St. Clair. This move, however, proved unsuccessful, as the territorial governor would lead an even more disastrous campaign the following year, in which two-thirds of the federal force would be destroyed. St. Clair’s campaign remains the most devastating loss the United States would ever suffer against the Indians.

Yet in a December address to Congress, President Washington would address the military expedition, claiming authority for his actions under a 1789 act, and the formal status of the war was cemented. The Northwest Indian War would continue for a few more years, with several failed attempts to establish a treaty and lasting peace with the Indians. It would take the defeat of the Native tribes by General Anthony Wayne at the Battle of Fallen Timbers in 1794 and the 1795 Treaty of Greenville for the war to finally subside.

B. The Application of the War Powers Debate to the Northwest Indian War

The Northwest Indian War was the United States’ first war, and therefore, from an originalist perspective, it deserves much consider-

79 SWORD, supra note 58, at 92 (citing American State Papers: Military Affairs, 1:24; 2 W 335, Draper Manuscripts).
80 SWORD, supra note 58, at 95.
81 Id. at 97.
82 Id. at 98–116.
83 Id. at 121.
84 Id. at 190, 195 (noting that in the terminal battle of General St. Clair’s expedition “[a] staggering 55% of the American combatants had become casualties within only a few hours,” and that, by one count, “[t]he dead and missing numbered 630”).
85 ANDERSON & CAYTON, supra note 57, at 192–93.
86 KOHN, supra note 2, at 107.
87 See, e.g., 3 ANNALS OF CONG. 816 (1793) (describing the cost of war, in dollars and the lives of American soldiers); 4 ANNALS OF CONG. 135–36 (1793) (discussing a treaty that would provide the Native American tribes with a lump sum of $50,000 and an annual payment of $10,000 thereafter in exchange for peace).
88 KOHN, supra note 2, at 181–82.
ation. While there are many variations of originalism, in general "it refers to the practice of explicitly returning to Founding-era understandings and intentions to reach conclusions about what the Constitution means today." Many scholars value originalism for its majoritarian underpinnings and promises of judicial restraint. Due to its focus on "Founding-era understanding" originalism "requires immersing oneself in the political and intellectual atmosphere of the time . . . a task sometimes better suited to the historian than the lawyer." Originalism therefore requires that one delve into the history to understand the meaning of the Constitution. While not all originalists accept this premise, post-ratification history is essential to this historical endeavor and "[t]he Supreme Court has interpreted evidence that the first Congress either took, approved, or acquiesced in some action as a virtually irrefutable indication of the constitutional validity of that action." The Northwest Indian War, prosecuted by the United States' earliest Congresses and its first President, is therefore critical to understanding the original meaning of the war powers.

Furthermore, while most scholars have not fully considered the constitutional implications of the Northwest Indian War, some have analyzed its constitutional significance. For example, Professor John C. Yoo argues that the conduct of President Washington and Congress during the Northwest Indian War supports his conception of the war powers. Professor Yoo notes that President Washington had broad discretion in deciding how to prosecute the war, and only ap-

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90 Id.; see, e.g., John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution, 98 Geo. L.J. 1693, 1700 (2010) ("[A] good constitution is the product of a consensus of the nation."); Scalia, supra note 40, at 864 ("Originalism establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.").
91 Scalia, supra note 40, at 856–57.
92 Rebecca L. Brown, Tradition and Insight, 103 Yale L.J. 177, 184–85 (1993); see also Friedman & Smith, supra note 89, at 50 ("[I]t should come as little surprise that originalist judges themselves regularly interpret the Constitution by relying . . . on . . . post-ratification practices.").
93 Professor Yoo, currently a faculty member at the University of California-Berkeley Law School, was previously a member of President George W. Bush's Office of Legal Counsel from 2001 to 2003. John Choon Yoo, BERKELEY LAW FACULTY PROFILES (Feb. 19, 2015 1:58 PM), https://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235.
pealed to Congress when he needed "increases in the size of the army, military spending, or the approval of agreements—in other words, those areas where the Constitution specifically provided for a legislative role." While he acknowledges that Congress did play a significant role in the prosecution of the war, he suggests that this was not because of the Declare War Clause but rather because there were insufficient troops for the President to command. According to Professor Yoo, the Northwest Indian War shows that the primary check of Congress in the prosecution of a war is its power of the purse, and not its power under the Declare War Clause.

In contrast to Professor Yoo, Abraham Sofaer argues that the Northwest Indian War suggests a more tempered pro-executive model. According to Professor Sofaer, "The scheme devised by the Framers of the Constitution enables the President in certain situations to use force without prior legislative approval, but subject to Congress's ultimate control." Critically, Professor Sofaer believes that the lack of specificity with regard to the authorizing statute gave President Washington broad discretion with regard to the federal use of the militia against Indian incursions. At the same time, however, Professor Sofaer acknowledges Congress's constant monitoring of the size of the military establishment and suggests that this incessant monitoring suggests congressional approval of executive actions. Therefore, Professor Sofaer argues, it is congressional approval and not the specific authorization that is critical to the presidential use of the war powers. Professor Sofaer thus articulates a constitutional model of the war powers in which the President has extensive discretion as Commander-in-Chief so long as the actions being taken are in line with the will of Congress. This is a more narrow conception of the executive authority than suggested by Professor Yoo, who believes

95 Id.
96 Id. at 19. Professor Yoo notes, "After assuming office, Washington reported to Congress that the existing army numbered only 672 officers and soldiers, scattered across the frontier." Professor Yoo explains that "[b]y comparison, Indian tribes menacing Georgia could field 5000 warriors for battle." Id.
97 See id. at 19 (detailing the practical difficulties of declaring war if Congress refuses to authorize funding); The Continuation of Politics, supra note 7, at 285 (showing how early concerns that the President could abuse his war powers were alleviated by Congress's powers to defund the military).
98 See Abraham D. Sofaer, The Power over War, 50 U. MIAmI L. Rev. 33, 34 (1995) (asserting that the President is "not so powerless").
99 Id. at 34–35.
100 Id. at 41.
101 Id.
102 Id. at 51.
that executive power is nearly unlimited so long as it is not specifically checked. The difference is one of timing, in that Professor Sofaer argues that after military action has been authorized, the executive has broad discretion in prosecuting the war so long as Congress does not impose any limitations, while Professor Yoo states a conception of the war powers where the executive has the power to take military action prior to authorization so long as Congress has not taken any limiting action.

While Professors Sofaer and Yoo argue for differing conceptions of the war powers, these scholars rightfully recognize the importance of the Northwest Indian War in understanding the constitutional war powers. Although this recognition is important, they still fail to address the context of the war itself. In addition to considering the allocation of war powers in the Northwest Indian War, the very nature of the war as an Indian war needs to be considered. It is my contention that the Northwest Indian War is not necessarily a model for war against all actors but rather only against non-state actors. In the remaining sections of Part II, I shall examine the specific rules regarding Indian wars that shaped the prosecution of the Northwest Indian War.

C. The International Rules of War at the Time of Ratification

The international rules of war significantly influenced the Framers' determination of how wars should be waged with regards to different types of actors. Although not written into the Constitution, the rules of war provide a framework for understanding how the Framers anticipated the Constitution would function. The Framers distributed the war powers amongst the branches of government in a specific context, and understanding that context is critical to understanding this distribution. Recognizing this backdrop, scholars regularly rely on the international rules of law to provide context to their interpretations of the constitutional war powers, in accordance with its original meaning. While the Constitution does not have to be read as consistent with current international law, understanding eighteenth century international law and the rules of war is critical to

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104 Compare Al-Bihani v. Obama, 619 F.3d 1, 44 (D.C. Cir. 2010) (holding that Hamdi v. Rumsfeld, 542 U.S. 507 (2004), did not apply an international law limiting the President's authority under the AUMF), with Roper v. Simmons, 543 U.S. 551, 5-75 (2005) (concluding that international law is relevant to the assessment of evolving standards of decency under the Eighth Amendment).
determining the original understanding of the war powers. Indeed, in the words of Justice Antonin Scalia, originalism “requires immersing oneself in the political and intellectual atmosphere of the time.”

Furthermore, one early war powers case, Brown v. United States, holds that eighteenth century international law should be read into the war powers. Discussing whether the President had the power to confiscate enemy property during wartime, Chief Justice Marshall turned to the Declare War Clause and wrote, “In expounding [the] constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere.” By making such a statement, Chief Justice John Marshall explicitly endorses the idea that the Declare War Clause should take shape within the contours of international law. Justice Joseph Story, writing in dissent, agreed with the Chief Justice with regards to the critical context of international law in understanding the constitutional war powers; it was only his interpretation of international law that led to his dissent. Considering the precedential value of Chief Justice Marshall’s opinion and the nature of the originalist project, proponents of originalism must consider the international rules of war in order to fully understand the war powers.

One influential international theorist whose work strongly influenced the Framers of the Constitution, including those who would become part of the Washington Administration, was Emmerich de Vattel. Prior to Vattel, most Euro-American thinkers believed in the Christian idea of just and unjust war. This theory, in the words of the sixteenth century theologian Francisco de Vitoria, could be summed up as the idea that “[a] prince may do everything in a just war which is necessary to secure peace and security from attack.” Under just war theory, hostilities were just so long as the cause was just and unjust when the cause was unjust. As a result, just war theory failed to establish rules of conduct and often led to increasing levels of hostilities, as each side believing their cause just, responded to the actions of the other with increased violence.

105 Scalia, supra note 40, at 866–.
107 Id. at 125.
108 Cleveland, supra note 103, at 20.
109 Id.
112 Id.
113 Id.
Vattel, recognizing this problem, proposed the revolutionary idea that "[r]egular war is to be accounted just on both sides."114 This principle dramatically changed the fundamental nature of the rules of war, as it allowed for nations to set aside the righteousness of their causes and focus on the conduct of war.115 As a result of Vattel’s rule of regular war, extreme hostilities would no longer be permissible simply because the nation’s leaders believed in the just nature of their cause.116 Within this framework, rules for limiting war could emerge.117

The rules of war, however, did not apply to everyone, and there was much debate about to whom the rules applied. As one commentator noted, Vattel’s rules were a way by which “the civilized powers of Europe” could reduce “the horrors of war,” but there were questions as to how those rules were to be applied outside traditional European wars.118 Within the American context, the Washington Administration acknowledged the independence of the Indian tribes but also considered them to be lesser sovereigns existing within the borders of the United States as set by the Treaty of Paris.119 As President Washington’s Secretary of State, Thomas Jefferson used Vattel’s theories to argue that European dealings with the Indians would be considered an impingement on American sovereignty.120 As Professor Gregory Ablavsky writes, “this inclusion [of Indian nations within the territorial limits of the United States] meant that the United States now possessed ‘territorial title’—what we would now call territorial sovereignty—over Indian country.”121 Furthermore, Professor Ablavsky notes that that “this shared sovereignty suggested that Natives did not possess sovereignty equivalent to that of the United States or Spain or Britain.”122 Instead, “[t]erritoriality established Native sovereignty as subordinate to the sovereignty of the United States.”123 Under this framework, the subordinate sovereignty of the Indian tribes permit-

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114 Id.
115 Id. at 18.
116 Id.
117 Id.
118 Id. at 19.
119 Ablavsky, supra note 110, at 1063.
120 Id. at 1065–66.
121 Id. at 1063.
122 Id. at 1064.
123 Id.; see also THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION, 398 (Theodore J. Crackel ed., Charlottesville: University of Virginia Press 2008) (showing that President Washington wrote about “the disputes which exist between some of the United States and several powerful Tribes of Indians within the limits of the Union”) (emphasis added).
ted American deviation from the rules of war that applied to European state actors.

Furthermore, the Americans did not see much advantage in automatically applying international law and the rules of war to their conflicts with the Indians. One reason for declining to extend Vattel's rules to the Indians was that the Indians did not follow Vattel's rules. Therefore, the Americans saw themselves as free from that restraint. Americans considered the Indians to be savage nations, and as Vattel noted, "When...at war with a savage nation who observe no rules...we may punish them in the persons of any of their people." Critically, Vattel believed such enemies to be "savage beasts, whom every brave man may justly exterminate from the face of the earth."

The conception of the Indian tribes as savage nations to whom the rules of war did not apply predates the Constitution and is embedded in the United States' founding texts. In the Declaration of Independence, the colonists went so far as to note amongst their grievance against King George III that "[h]e has excited domestic insurrections amongst us, and has endeavoured [sic] to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes, and conditions." Thomas Jefferson argued that "[t]he known rule of warfare with the Indian savages is an indiscriminate butchery of men[,] women[,] and children." Such a statement was rather tame by Jeffersonian standards, as the future president would also proclaim that "[t]he same world will scarcely do for them and us" and that the remedy to this situation was "their extermination."

The Jeffersonian conception of Indians as savages carried over into the First Congress. Throughout its sessions, both President Washington and the members of Congress would refer to the Indians as savages on the congressional floor. Such statements allowed for the Americans to argue that international law and the theory of regular

124 WITT, supra note 111, at 16-17.
125 Id. at 92.
126 Id. at 32.
127 THE DECLARATION OF INDEPENDENCE (U.S. 1776).
128 WITT, supra note 111, at 32.
129 Id.
130 See, e.g., 1 ANNALS OF CONG. 702 (1789) (Joseph Gale ed., 1834) (questioning whether making treaties with the Indians is "nothing more than holding out a bribe for the savages to commence hostilities whenever they want presents from the United States"); 1 ANNALS OF CONG. 893 (1789) (Joseph Gale ed., 1834) (describing the warring Indians in the west as "savages" in President Washington's words).
war could not apply to the Indian tribes. In other words, "the Wash-ington Administration acknowledged considerable Native autonomy but did not recognize Native nations as the United States' equals in the community of nations." This conception of the Indians allowed for the rules of war to apply quite differently to the Indian tribes than it would to European nations.

D. An Examination of the Role of Congress in the Prosecution of the Northwest Indian War

President Washington claimed that his military actions were au-thorized by Congress as part of their enactment of a bill that gave the President the power to raise militias for defensive maneuvers against the Indians. The congressional response to the President's declara-tion can therefore be seen as the first test of the American war pow-ers. Were Congress to rebuke the President and claim that the mili-tary operations had not been authorized or explicitly declare war against the Indian tribes in the Northwest Territory, that would strongly suggest a broader reading of the Declare War Clause. On the other hand, were Congress to permit the President to prosecute the war as he chooses, that would suggest a broader interpretation of executive powers. Under an orginalist framework, the ways by which Congress responded to this first invocation of the war powers is illus-trative of the way the Founders likely intended the war powers to work.

To begin, however, one must first understand that the authoriza-tion of military force was requested by President Washington, who be-lieved the establishment of a national military was critical to the suc-cess of the new nation. Under the Articles of Confederation, President Washington's party, the Federalists, had sought the estab-lishment of a national army, but had been unable to achieve this goal. In particular, the Federalists believed that a national army was critical to the protection of the frontier, but were only permitted to post a few garrisons of federal troops in the west "to be maintained in time of peace at the expence [sic] of the United States for their secu-rity and defense." On August 7, 1789, little over a month before the passage of the bill, President Washington renewed his push for the establishment of a national army, again to protect the western fron-

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131 Ablavsky, supra note 110, at 1067.
132 Kohn, supra note 2, at 40–44.
133 Id. at 52.
In a letter to Congress, President Washington wrote that “the disputes which exist between some of the United States and several powerful Tribes of Indians within the limits of the Union...seem to require the immediate interposition of the general Government.” In response to these hostilities, President Washington sought the establishment of a commission to establish a treaty with the Indians, and should that fail, the establishment of “some uniform and effective system for the Militia of the United States.”

President Washington not only believed that the establishment of a national army may be necessary for this conflict, but also supported the immediate creation of such a force because he feared that the military knowledge that was now “disseminated throughout the several States,” was “daily diminishing by death and other causes.” President Washington argued, “To suffer this peculiar advantage to pass away unimproved, would be to neglect an opportunity which will never again occur, unless, unfortunately, we should again be involved in a long and arduous war.” As this letter illustrates, President Washington was not only concerned with the state of the hostilities on the frontier, but also feared that American military knowledge was being lost. By calling for the immediate establishment of a national force, President Washington was not only able to prepare for the possible use of military force, but also was able to preserve the young American military tradition.

Critically, however, President Washington wished to ensure that any military action was done in conformity with the Constitution. He believed that he had the power to direct the forces already under his control via an act passed by Congress under the Articles of Confederation, but sought that these actions “be conformed, by law, to the Constitution of the United States.” President Washington seemed to believe that he had the ability to use the troops that had been assigned to him under the Articles of Confederation, but because of the establishment of the new government, sought reauthorization to ensure constitutional conformity.

In response to President Washington’s request, the House of Representatives and Senate each established a committee to consider the

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134 See, generally THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION, supra note 123, at 398-99 (describing President Washington’s letters to Congress, in which he urged that Congress prioritize a "uniform and effective system for the" national army).
135 Id. at 398.
136 Id.
137 Id.
138 Id.
139 Id. at 413.
use of military force against the Indians.\textsuperscript{140} The House Committee came to conclude "that an act ought to pass providing a proper system of regulations for the militia of the United States,"\textsuperscript{141} and on September 29, 1789, that act came to fruition as Congress passed the United States' first authorization for the use of military force.\textsuperscript{142} The bill states:

That for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians, the President is hereby authorized to call into service from time to time, such part of the militia of the states respectively, as he may judge necessary for the purpose aforesaid; and that their pay and subsistence while in service, be the same as the pay and subsistence of the troops above mentioned.\textsuperscript{143}

This text represents what I believe to be America's first "AUMF," and I plan to analyze this bill under the framework introduced earlier to analyze the AUMF for the War on Terror, which included: "(1) the authorized military resources; (2) the authorized methods of force; (3) the authorized targets; (4) the purpose of the use of force; and (5) the timing and procedural restrictions on the use of force."\textsuperscript{144}

First, when considering the authorized military resources, the bill allows the President to use the "militia of the states." This provision is rather straightforward in that it specifies which military units the President may use, namely "the militia of the states."\textsuperscript{145}

Second, the bill specifies that the use of the militia is the authorized method of force. While the militia was a specific part of the military establishment, it had certain capacities, and can be seen as a method of force. Militias had a certain military capacity, and that capacity was to be used at the discretion of President Washington.

Third, the bill authorizes the use of force against Indians. Notably, Congress did not specify against which tribes force could be used, allowing for considerable executive discretion in determining the targets. Given the knowledge the Americans had of the tribes, Congress could have distinguished between those that were hostile and those that were not.\textsuperscript{146} While there were shifting alliances and factions within tribes which differed in their stance towards the United States, Congress could have been more specific in its authorization.

\textsuperscript{140} 1 Annals of Cong. 64 (1789) (Joseph Gale ed., 1834); id. at 685.
\textsuperscript{141} Id. at 688.
\textsuperscript{142} Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95.
\textsuperscript{143} Id.
\textsuperscript{144} Bradley & Goldsmith, supra note 12, at 2072.
\textsuperscript{145} Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95.
\textsuperscript{146} See, e.g., 1 Annals of Cong. 82. (1789) (Joseph Gale ed., 1834) (listing which tribes had treaties and which tribes did not).
In not specifying against which tribes force could be used, Congress left such necessary determinations to the President.

Fourth, the purpose of the authorized force is to “[protect] the inhabitants of the frontiers of the United States from the hostile incursions of the Indians.”147 The authorization seems to permit President Washington to use force to defend the frontier. However, most current constitutional scholars believe that the President, as part of his Commander-in-Chief power, can defend the United States from invasion without congressional authorization.148 Therefore the proper reading of this provision may be that the line between defensive and offensive measures is blurred, and that the authorization allows for any military action necessary to “protect the inhabitants of the frontier.”149 In that way, this bill can be seen as a broad grant of authority to the President.

Fifth, with regards to limitations, Congress stated that this bill was to only “be in force until the end of the next session of Congress, and no longer.”150 This explicit limitation is critical in that it only allowed the President to call upon the militia so long as the bill was in effect. By providing a sunset provision to the bill, Congress ensured for itself the opportunity to remain engaged in the prosecution of the war. Notably, before President Washington declared his intent to use military operations, however, the bill was repealed and reauthorized, with the extra provision of raising 1216 federal troops.151 The only change made to the militia provision was the requirement that the militia conform to the “rules and articles of war.”152 Congress wished to continue to provide President Washington with the discretion to make decisions with regards to war as necessary.

147 Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95.
148 See U.S. CONSt. art. I, § 1, cl. 2 (delineating Congress’s composition and vesting it with “[a]ll legislative Powers”); see also Michael Bahar, The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States, 5 HARv. NAT’L SEC.J. 537, 543, n.20 (2014) (noting that “it is fairly well-settled that in times of invasions, or threat thereof, presidential authority to defend the homeland is at its height, regardless of legislative sanction”); Yoo, supra note 7, at 246–48 (differentiating between a declaration of war power and an authorization of war).
149 Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95.
150 Act of Sept. 29, 1789, ch. 25, § 6, 1 Stat. 95.
151 See generally An Act for Regulating the Military Establishment of the United States, Apr. 30, 1790, Ch. 10, 1 Stat. 119. Throughout the rest of this paper, I will refer to both this act and the Act of Sept. 29, 1790, as the Authorization for the Northwest Indian War. While these are two different acts, the language regarding the use of force against the Indians in the Northwest Territory is largely the same. When referring to the specific act, I will use the full name of the act; however, when I am speaking of the general authorization, that is the language I will use.
152 Id.
Finally, it is worth noting that this authorization came in the form of an appropriations bill. As Professor Yoo has stated, one of the ways by which Congress can check the presidential use of force is through appropriations. While today military appropriations are a regular part of the budget and the United States has a peacetime army, there was no significant standing army in the United States during the 1790s. Congress was tasked with paying for the federal force, and made sure to only pay as much as they felt was appropriate by setting soldiers' salaries, even going so far as to charge the soldiers for their uniforms. Despite these cost concerns, or perhaps because of them, five-sixths of all federal expenditures from 1790 to 1796 were used on the war effort.

Immediately after Congress passed the military authorization, President Washington began to establish a military force, but did not immediately take military action. It was not until over a year after the initial authorization, on December 8, 1790, that President Washington delivered a speech to Congress informing them of his decision to use offensive measures against the Indians. President Washington noted that the Indians' "aggravated provocations rendered it essential to the safety of the Western settlements, that the aggressors should be made sensible that the Government of the Union is not less capable of punishing their crimes, than it is disposed to respect their rights and reward their attachments." Furthermore, President Washington stated, "As this object could not be effected by defensive measures, it became necessary to put in force the act which empowers the President to call out the militia for the protection of the frontiers." By making this proclamation, President Washington claims that these military actions are in accordance with the congressional authorization. In addition, President Washington's statement supports the proposition that the permission to "[protect] the frontier" allowed for both offensive and defensive measures.

Worth noting, however, is that the President did not just state his intention to use the militia; he also planned to combine that force with the federal regulars positioned in the area. In President Washington's speech, President Washington noted that the Indians' "aggravated provocations rendered it essential to the safety of the Western settlements, that the aggressors should be made sensible that the Government of the Union is not less capable of punishing their crimes, than it is disposed to respect their rights and reward their attachments." Furthermore, President Washington stated, "As this object could not be effected by defensive measures, it became necessary to put in force the act which empowers the President to call out the militia for the protection of the frontiers." By making this proclamation, President Washington claims that these military actions are in accordance with the congressional authorization. In addition, President Washington's statement supports the proposition that the permission to "[protect] the frontier" allowed for both offensive and defensive measures.

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WASHINGTON's own words, he "authorized an expedition, in which the regular troops in that quarter area [are] combined with such draughts of militia as were deemed sufficient." Under the Act for Regulating the Military Establishment of the United States, however, the President was not explicitly authorized to use regular troops for such provisions. President Washington, who valued constitutional compliance, clearly believed he had the power to use such troops. Notably, however, this belief was in line with the dominant thought of the day, in which federal troops were associated with the executive branch, whereas the militias were associated with the people and their representative body, Congress. That President Washington would have more discretion with regards to federal troops than militias should be seen as an inherent part of the executive's Commander-in-Chief power.

Congress accepted President Washington's decision. The day after President Washington's speech, Connecticut Senator Oliver Ellsworth gave a reply on behalf of the Senate, noting that the decision was made "in pursuance of the powers vested in [the President]." Meanwhile, in a speech delivered on behalf of the House of Representatives on December 11, Pennsylvania Representative and Speaker of the House Frederick Muhlenburg stated that the House "[beheld] with approbation the watchfulness and vigor which have been exerted by the Executive authority." Had either house of Congress believed that the President's actions were unlawful, they likely would have said as much, considering President Washington's desire for constitutional conformity. That did not occur, suggesting congressional approval of the President's actions.

Congress's approval of President Washington's actions, however, was not their last involvement with the prosecution of the Northwest Indian War. Indeed, Congress accepted the President's claim while continuing to meticulously legislate the conduct of the war. Part of

160 Id.
161 See generally An Act for Regulating the Military Establishment of the United States, Apr. 30. 1790, Ch. 10, 1 Stat. 119.
162 See ELY, supra note 32, at 4 (describing the belief that militias belonged to Congress); DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 26 (2003) (noting that the militia belonged to the state).
163 2 ANNALS OF CONG. 1733 (1790) (Joseph Gale ed., 1834).
164 Id. at 1799.
165 See THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION, supra note 123, at 413.
166 See, e.g., An Act for Regulating the Military Establishment of the United States, Apr. 30. 1790, Ch. 10, §§ 1, 3, 5 1 Stat. 119 (illuminating the level of control that Congress exercised over military matters and details).
this meticulous legislation had to do with the fact that prior to the Northwest Indian War, the United States did not, as mentioned earlier, have a standing army ready to act at the command of the President. For this reason, conducting a war necessarily required more legislative involvement in the 1790s than it does today. Nevertheless, there are striking similarities between the military authorizations for the Northwest Indian War and today's War on Terror, which will be examined in Part III.

III. LINKING THE NORTHWEST INDIAN WAR AND THE WAR ON TERROR AND ITS CONSTITUTIONAL IMPLICATIONS

In Part III, I will link my analyses of the authorizations for the Northwest Indian War and the War on Terror, and argue that originalists should consider the Northwest Indian War as a constitutional model for wars against non-state actors. In Part III.A., I argue that neither the Northwest Indian War nor the AUMF constitute formal declarations of war within the constitutional context. Formal declarations have specific purposes within international law, and neither authorization purports to serve those purposes. In both cases, I argue, the reason that a formal declaration was not constitutionally required was that the United States was initiating military action against non-state actors. In Part III.B., I address the idea that both authorizations claim to be protective measures, and raise the question of whether such an authorization could permit purely offensive military action. In Part III.C., I address the considerable amount of executive discretion Congress has allowed in determining who is and is not an enemy. Finally, in Part III.D., I argue that both authorizations allowed for the President to initiate hostilities in military theaters without returning to Congress, albeit subject to congressional limitations.

A. AUMF, Not Formal Declarations of War

Neither the AUMF nor the Northwest Indian War Authorization is a formal declaration of war in accordance with constitutionally-prescribed international law. As Professor Yoo notes, in the eighteenth century, "a declaration of war served the purpose of notifying...

167 See 2 ANNALS OF CONG. 1791 (1790) (Joseph Gale ed., 1834) ("Ordered, That a [House] committee be appointed to prepare and bring in a bill or bills more effectually to provide for the national defence [sic] by establishing a uniform militia throughout the United States.")
the enemy, allies, neutrals, and one’s own citizens of a change in the state of relations between one nation and another.\textsuperscript{168} Neither authorization, however, notified enemies, allies, neutrals, or citizens of a change in status because they both left open the question of against whom force was to be used, with context only clearly linking the use of military force to the Taliban and al Qaeda in Afghanistan. Against no other party did either AUMF indicate a specific plan to initiate a war. In fact, both documents explicitly fail to establish a state of war in that they leave open the questions of against whom the hostilities will occur and when they will begin. Furthermore, instead of changing formal relations within international law, both authorizations serve the domestic purpose of notifying the President of his increased authority to initiate a military conflict. Internationally, neither AUMF sufficiently signals to any other party, with the exception of the Taliban and al Qaeda, of a changed relationship.

With regards to the Authorization for the Northwest Indian War, Congress gave President Washington the power to use military force for protective purposes against the Indians if necessary on September 29, 1789, and allowed him to use that force for the designed purpose whenever he should choose to do so, which he did the following December. Because it did not immediately initiate hostilities nor specify against whom military action was to take place, the Northwest Indian War Authorization cannot be seen as a formal declaration, as it served no purpose with regards to the notification of the to-be Indian enemies.

Furthermore, the reason the United States was able to go to war without a formal declaration was because the rules of war did not apply in full force to the Indian tribes. While Congress did eventually determine that the rules of war were to apply to the military conflict with the Indians, the inclusion of that provision suggests that such adherence was a voluntarily imposed congressional limitation upon the President.\textsuperscript{169} Because the rules of war were voluntary, Congress could constitutionally decide to initiate hostilities without a formal declaration, while still demanding that the actual military force comply with international law.

The AUMF, likewise, functioned in a similar manner. Congress passed the AUMF on September 14, 2001, and President Bush signed

\textsuperscript{168} The Continuation of Politics, supra note 7, at 207.
\textsuperscript{169} See An Act for Regulating the Military Establishment of the United States, Apr. 30, 1790, Ch. 10 § 16, 1 Stat. 119 (authorizing President Washington to use force if he deems it necessary); see also Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95. (including the provision to allow President Washington to use force).
the bill into law on September 18, 2001.\textsuperscript{170} If one agrees with Professor Yoo that a declaration is nothing more than a notification of a changed legal status, in whatever form that notification may come, then the AUMF could be seen as a formal declaration of war against the Taliban and al Qaeda in Afghanistan because the impending hostilities were readily foreseeable. Indeed, in his address to the nation on the evening of September 11, 2001, President Bush announced that there would be a “war against terrorism.”\textsuperscript{171} The next day, Senator Charles Schumer of New York addressed the Senate and noted that “all fingers seem to point” to Afghanistan as the nation from which the terrorist attacks originated.\textsuperscript{172} Furthermore, the Taliban was already known to be harboring al Qaeda leader Osama bin Laden and was resisting cooperation with his extradition.\textsuperscript{173} By the time the AUMF was passed on September 18, war against the Taliban and al Qaeda in Afghanistan seemed inevitable. For that reason, there is an argument that the AUMF did serve as a formal declaration of war against the Taliban and al Qaeda in Afghanistan.

On the other hand, the AUMF cannot be seen as declaration of war against the other parties later attacked under the purview of the AUMF. While groups such as al-Shabaab, al Qaeda-Arabian Peninsula, the Pakistani Taliban, and now ISIS are in violent opposition to the United States, “many of these groups did not even exist on September 11, 2001, and the ones that did were not directly involved in the attacks.”\textsuperscript{174} If one of the purposes of a declaration of war is to notify the enemy of a change in legal status associated with the initiation of hostilities, it is logically impossible to declare war against enemies who do not yet exist. While one could argue that this is evidence that the executive has exceeded his power under the AUMF, the President can easily claim some link between these organizations and those in-


\textsuperscript{172} 147 CONG. REC. S16868 (daily ed. Sept. 12, 2001) (statement of Sen. Schumer).


\textsuperscript{174} Graham Cronogue, A New AUMF: Defining Combatants in the War on Terror, 22 DUKE J. COMP. & INT’L L. 377, 394 (2012).
volved with the 9/11 attacks. Nevertheless, because these organizations are non-state actors, as the Indian tribes were considered to be, the rules of international law as understood by the Founding Fathers do not apply, and for that reason a formal declaration of war is not constitutionally necessary.

B. Preventative Measures

The AUMF and the Northwest Indian War Authorization both claim to be preventative measures. To begin, the Northwest Indian War Authorization allows for the President to use force to “[protect] the inhabitants of the frontiers of the United States from the hostile incursions of the Indians.” On the other hand, the AUMF authorizes the President to use force “to prevent any future acts of international terrorism against the United States.” These acts show that Congress envisioned its allowance of executive discretion as necessary for defensive purposes.

With regards to the Northwest Indian War Authorization, offensive operations were allowed under the principle that the best defense was a good offense. In order to protect the frontier from Indian incursions, Congress permitted the use of “punishing” operations in retaliation. Likewise, in his December 8, 1790 address to Congress, President Washington noted that the Indians’ “aggravated provocations rendered it essential to the western settlements, that the aggressors should be made sensible that the government of the Union is not less capable, than it is disposed to respect their rights and reward their attachments.” Furthermore, President Washington noted that “[a]s this object could not be effected by defensive measures, it became necessary to put in force the act which empowers the President to call out the militia for the protection of the frontier.” These statements show that rather than distinguishing between defensive and offensive operations, the authorization was read as permitting any measure, offensive or defensive, that would “protect” the frontier.

176 Act of Sept. 29, 1789, ch. 25, § 6, 1 Stat. 95.
178 Kohn, supra note 2, at 101–02.
179 2 ANNALS OF CONG. 1729 (1790) (Joseph Gale ed., 1834).
180 Id.
The text of the AUMF, likewise, shows Congress's expectation for offensive "protective" measures. While the goal of preventing future attacks frames the text in defensive measures, the authorization to use "all necessary and appropriate force" enables the President to use offensive operations. If the target is appropriate, another executive determination, and the President can make a case that offensive measures are necessary to protect the United States, then military operations are permitted. The AUMF, like the Northwest Indian War Authorization, allows for the offensive use of force to further "defensive" or "preventative" aims.

One critical potential constitutional limitation to such broad authorizations is that it arguably must be framed in defensive terms. Many scholars have noted that the President's Commander-in-Chief power is likely at its height when the security of the nation is threatened.\footnote{Bahar, supra note 148, at 543 (noting that "it is fairly well-settled that in times of invasions, or threat thereof, presidential authority to defend the homeland is at its height, regardless of legislative sanction"); see also The Continuation of Politics, supra note 7, at 246–48 (describing the increased powers during wartime).} Although outside the scope of this paper, it is worth questioning whether such broad executive discretion would be permitted were the aims framed in solely offensive terms, even if the enemy was a non-state actor.

C. Discretionary Determinations of the Enemy

Both the AUMF and the Northwest Indian War Authorization provide expansive definitions of the enemy which allow for great executive discretion in determining targets. With regards to the AUMF, the potential enemies include all "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."\footnote{Bradley & Goldsmith, supra note 12, at 2078 (quoting Authorization for the Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224).} While this seems to require a relational nexus with the attacks of September 11, 2001, the President has broad discretion to determine who falls within that nexus.\footnote{Cronogue, supra note 174, at 379–80.} This provision is extremely broad and allows the President considerable discretion in determining against whom force is to be used. Furthermore, when the definition of the enemy is seemingly limitless, the President is given by extension broad discretion to determine the scope of the war, as has been seen in the numerous operations that have taken place under the parameters of the AUMF.
Indeed, the precedent for the AUMF is again the Northwest Indian War Authorization. While the authorization was limited to defining Indians as the potential enemies, it did not state which Indians. This lack of specificity can be seen as problematic in that the tribes took different positions with regards to American expansion. On the one hand, tribes such as the Senecas were very willing to cooperate with the Americans in order to gain peace and favored-nation status, while other tribes, such as the Miamis, Shawnees, and Kickapoos, were in favor of more militant resistance.

Nevertheless, Congress's broad grant of authority allowed the President to use force with regards to any Indian nation within the Northwest Territory, and one could argue that this breadth is a strength of the bill. Indeed, this first AUMF gave President Washington much-needed discretion in determining the scope of the military operation as necessary. One could argue that this flexibility was vitally important to the war effort, in that it allowed President Washington to account for shifting alliances and potential treaties with Indian tribes.

D. No Return to Congress Necessary

Simply put, both the AUMF and the Northwest Indian War Authorization allow for legitimate military engagement to be initiated by the executive branch. Despite not being a formal declaration of war, the Northwest Indian War Authorization allowed for President Washington to initiate a war with the Indians without returning to Congress. Critically, President Washington waited over six months after the initial authorization to take military action against the Indians, and then waited an additional six months to return to Congress to claim that his action was permitted under the initial authorization.

Indeed, the very purpose of the authorization was seemingly to allow for the establishment of a military force to meet the needs of the nation as determined by the President, within the scope permitted by Congress.

184 SWORD, supra note 58, at 61.
185 Id.
186 See Kohn, supra note 2, at 101–02 (noting that that administration hesitated to act in January 1790 but could not resist the impulse to act during campaigning season in late May).
187 See 2 Annals of Cong. 1729 (1790).
188 See id. at 1791 (discussing a letter sent from President George Washington in January 1791 asking the Senate and the House of Representative to "make such arrangements as may be essential to the preservation of good order, and the effectual protection of the frontiers").
While Congress allowed for considerable executive discretion, President Washington was still bound by congressional parameters. Indeed, during the Northwest Indian War, Congress regularly spoke as to how it believed the war should be conducted, as they cut the pay of troops, determined which forces could be used, and in what formations the troops should be assembled. President Washington, as Commander-in-Chief, had discretion only where that discretion has been left in place by Congress. The actions of President Washington, however, do not suggest that the President has the power to ignore the acts of Congress when it comes to the prosecution of the war.

Furthermore, it seems as though this division of the war powers remained intact throughout the War on Terror. President Bush, and President Obama thereafter, have used the military force they have been provided without claiming to be required to return to Congress prior to the initiation of a new military conflict. While President Obama is currently seeking a new authorization for military action against ISIS, he has already stated that he does not believe such an action is required, suggesting a political reason for his seeking reauthorization.

In addition, the Supreme Court has suggested that this division of powers is constitutional. For example, in Rasul v. Bush, the Court reversed an appellate court’s decision allowing the executive branch to deny the writ of habeas corpus to those detained in Guantanamo Bay. The Supreme Court overturned the decision because they read the general federal habeas corpus statutes, 28 U.S.C. §§ 2241–2243, as allowing the detainees to bring habeas petitions. While President Bush had argued for a broader conception of his wartime powers, the Supreme Court rejected a broader conception of the executive Commander-in-Chief power that would allow him to avoid statutory limitations. The fact that the Supreme Court made its deci-

189 An Act for Regulating the Military Establishment of the United States, Apr. 30, 1790, Ch. 10, § 5, 1 Stat. 119.
190 Id. at § 1.
191 Id. at § 3.
193 Spencer Ackerman, supra note 26.
194 See Rasul v. Bush, 542 U.S. 466, 485 (2004) ("What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals . . . .").
195 Id. at 483–84.
sion on statutory and not constitutional grounds suggests that indeed the President is significantly bound by congressional acts in the prosecution of a war. The critical component of a military authorization as opposed to a formal declaration, however, is that it allows for the President to determine within the scope of the congressional authorization what military actions to take. Furthermore, while it is debatable what constitutes a formal declaration, that discussion has no bearing on wars against non-state actors, upon whom the rules of international law do not apply.

IV. THE IMPLICATIONS OF THE NORTHWEST INDIAN WAR AS A MODEL FOR THE WAR ON TERROR

In the preceding sections, I argued that under an originalist perspective, the Northwest Indian War can be seen as a constitutional model for wars against non-state actors, most notably the current War on Terror. At the time of the ratification of the Constitution, international law dictated that the rules of war only had to apply to sovereign states. The Indians, however, did not fit within the American conception of sovereignty, and therefore Congress was able to decide whether they wanted the United States to obey the rules of war. In issuing the Authorization for the Northwest Indian War, the first AUMF, Congress decided that although they wanted the army to obey the rules of war, adherence to the rules was optional and a formal declaration of war was not necessary. This decision that the rules of war need not apply constitutionally allowed for much greater executive discretion in determining the scope, timing, and intended targets of the military operation.

The United States has charted a similar course in its current War on Terror. As former Attorney General Gonzales has noted, the Bush Administration took the position that the United States was going to war against non-state actors and that therefore a formal declaration of war was not needed. This determination, coupled with the great breadth of the AUMF, has given both the Bush and Obama Administrations considerable discretion in engaging in new military conflicts across the globe without returning to Congress.196 Since no formal declaration of war is needed, the President is constitutionally able to use the military as he so chooses, so long as he can make a case that his actions are authorized by the longstanding AUMF.

196 Gonzales, supra note 48, at 843, 845-46.
While this history does suggest that it is constitutionally permissible for the United States to go to war against non-state actors without a formal declaration of war, there remains the normative question of whether this distinction should still be observed. As Antony Anghie argues, the War on Terror and its application of sovereignty-based distinctions, has reinforced a view of international law which "created and [enforced] distinctions between civilized and uncivilized states" by holding "that one set of laws was applicable between civilized states in their mutual dealings but that another set of practices was justified in relation to uncivilized states [who by definition were not sovereign]."\textsuperscript{197} Furthermore, Anghie claims that this ideology "distinguishes between...liberal and nonliberal states, democratic and non-democratic states, and premodern and post-modern states,"\textsuperscript{198} justifying military action to conquer and transform the latter when considered a threat to the former.\textsuperscript{199} Neo-colonial in its nature, it is this ideology that justified the American conquest of the "savage" Indian tribes, with devastating results for Indian people.\textsuperscript{200}

Furthermore, this ideology is particularly potent when measures, such as an AUMF, allow for executive power to go unchecked. As Bruce Ackerman notes, "the president's bureaucratic-military machine is always primed for engagement,"\textsuperscript{201} and the United States must consider what is lost when military conflicts can be initiated without the deliberation and consensus of the national legislature. Professor Ackerman disapproves of this form of executive power, referred to as "government by emergency," which he argues has become increasingly common in recent years.\textsuperscript{202} According to Professor Ackerman, this process is characterized by "(1) the invocation of a crisis (2) to justify deeply problematic...executive action that (3) has enduring legal consequences, lasting long beyond the initial 'crisis.'"\textsuperscript{203} In doing so, "government by emergency" has allowed for the President to claim even more power as Commander-in-Chief.\textsuperscript{204} This

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\item \textsuperscript{197} Antony Anghie, Rethinking Sovereignty in International Law, 5 ANN. REV. L. & SOC. SCI. 291, 293 (2009).
\item \textsuperscript{198} Id. at 307.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} See Natsu Taylor Saito, Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism, 1 GEO. J. LAw & MOD. CRITICAL RACE PERSP. 67, 109–10 (2008) ("U.S. officials now argue that established rules of warfare do not apply in the war on terror because the enemy does not behave rationally.").
\item \textsuperscript{201} BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 73 (2010).
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} See Anghie, supra note 197, at 305 (noting that, according to the Bush Administration, "in times of emergency, power is transferred to the president and...other institutions of
is particularly problematic with regards to military responses to terrorism, in which the incessant threat “could give rise to a permanent state of emergency.” Indeed, one could easily argue that it already has.

“Government by emergency,” permissible due to the perceived lack of sovereignty of both tribes and terrorists, allows for expansive and oftentimes troubling assertions of executive power. Therefore, as Professors Matthew L.M. Fletcher and Peter S. Vicaire note, the precedent of the Indian wars continues to be used in troubling ways to justify executive actions in the War on Terror. For example, they note the Bush Administration’s claim that the Modoc Indian Wars of 1871–1873 supported the proposition that prisoners from the War on Terror could be tried by military commissions. During the Modoc Wars, they argued, members of non-state entities could be tried by military commissions so long as their actions were directed against the United States generally, and therefore those accused of terrorism should be treated in a similar manner.

The use of this precedent is troubling in that seeks to render permissible a strain of thought that was used to perpetuate significant injustices. While the Modocs did kill American officers during a peace parley, the Americans had also killed forty-one Modocs in a similar fashion, actions for which there was no reprimand and which helped spark the current conflict. Furthermore, the commission was a sham, as General Jefferson Davis, who oversaw the proceeding, made sure to appoint “military men with deep emotional hatred toward the Modoc defendants” to serve on the commission and “hastened the opening of the trial to prevent an attorney hoping to represent the Modocs from arriving on time.” Simply put, the “conviction and execution of the Modocs was inevitable.” Yet despite this troubling history, American executives have continued to
rely on this precedent, and others like it, to justify controversial military practices.

In Indian country, the effects of these precedents have already been seen. The American conquest of the Indians took place through a series of military conflicts and treaties, backstopped by the doctrines of discovery and rights of conquest.\(^{212}\) The doctrine of discovery endowed European colonial powers and by extension the United States the exclusive right to settle "vacant" lands occupied by American Indians.\(^ {213}\) Conquest, meanwhile, allowed for the acquisition of land only when the cause was just; demarcations of Indians as savage and treacherous thereby "provided the basis for English claims of a legal right to wage wars of conquest based on the nature and character of the enemy."\(^ {214}\) These doctrines, only applicable due to the perceived lack of tribal sovereignty and inapplicability of international law, had disastrous results for Indian tribes, leading to debates over whether what occurred was genocide or "instances of genocide."\(^ {215}\) The results were that grim. Differential treatment of enemies based on American conceptions of sovereignty may be constitutionally permissible, but to enact this dichotomy is to revive a doctrine that has had catastrophic consequences. To revive this distinction to allow for expansive executive action in the War on Terror is particularly noteworthy in that it recalls the ways by which international law was subverted to allow for grave atrocities and injustices to be committed against the Indian tribes. Proponents of originalism must therefore grapple with the moral implications of continuing to use such distinctions, even if it is constitutionally permissible.

CONCLUSION

Too often the context of the specific war itself has been left out of debates over the proper scope of the war powers, debates which have been revived during the current War on Terror. To examine the constitutionality of this war, I have undertaken an originalist examination of the Northwest Indian War, paying particular attention to the rules of international law at the time and the way those rules may have infused the Constitution. To conclude, my analysis of the Northwest Indian War and its authorization suggest that it may be a

\(^{212}\) Saito, supra note 200, at 83, 109–10.
\(^{213}\) Id. at 83 (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572 (1823)).
\(^{214}\) Saito, supra note 200, at 87.
constitutional model for understanding the War on Terror and other wars against non-state actors. However, I question whether such differentiation between state and non-state actors should be used in the modern era, noting the troubling underpinnings and results of this theory. I challenge proponents of originalism to address this issue.