

Burlamaqui, the Constitution, and the Imperfect War on Terror

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INTRODUCTION

And our nation has made a clear choice: We will confront this mortal danger to all humanity. And we will not tire and we will not rest until the war on terror is won.

~ President George W. Bush¹

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied . . . that congress may authorize general hostilities . . . or partial hostilities

~ Chief Justice John Marshall²

As the rubble settled from the terrorist attacks in New York and Washington, D.C., cries that “Congress should . . . immediately declare war”³ were heard across the country. Soon, the President, in response to the attacks, announced that the United States was in a “war on terror.” Yet it was clear this was not a traditional “war” with battlefields, geographic boundaries, and a clear national

1. George W. Bush, President Discusses War on Terror (Oct. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/10/print/20051028-1.html>.

2. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

3. Robert Kagan, *We Must Fight This War*, WASH. POST, Sept. 12, 2001, at A31.

enemy. Scholars differed on what the “war on terror” really was. Some rejected the phrase as merely a metaphor in a long list of metaphors, like the “war on drugs” or the “war on crime.”⁴ Others argued the “war on terror” really was a war.⁵

As there was a lack of agreement about what the War on Terror was, there existed equal disagreement about what powers the President had to prosecute the “war.” Some argued that as Congress had only the power “to declare war” and because the War on Terror was not a real war, the President could act freely without congressional authorization. Others argued that declarations of war were anachronistic and that the Authorization for Use of Military Force functioned as sufficient congressional authorization to grant the President the full panoply of war powers.⁶

But these arguments were not new. Similar arguments were made in the Gulf War,⁷ the Vietnam War,⁸ and the Korean War.⁹ Indeed, already by the dawn of World War II, there were predictions that “[u]nder the changed circumstances” of the modern times “the declaration of war [] seem[ed] . . . to be an anachronism to be discarded.”¹⁰

This Note disagrees with the premise, however, that the situation in the world has so radically changed post-World War II, post-Cold War, or post-9/11 that the Constitution no longer adequately describes how national security threats should be encountered. On the contrary, the Constitution provides the methods by which the nation can address both perfect or general wars, and also those that are more limited or “imperfect.” Congress has the power to declare perfect wars and to strictly authorize limited, imperfect wars by the totality of the War Clause. There are important distinctions between the formalities and scopes of perfect and imperfect wars, and there are “telltale” signs of when Congress

4. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1034 (2004).

5. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2049 (2005).

6. *Id.* at 2056–62.

7. President George H.W. Bush said, “I have great respect for Congress, and I prefer to work cooperatively with it whenever possible. Though I felt after studying the question that I had the inherent power to commit our forces to battle after the U.N. resolutions, I solicited support before committing our forces to the Gulf war.” George H.W. Bush, Remarks at Dedication Ceremony of the Social Sciences Complex at Princeton University in Princeton, New Jersey, 27 WKLY. COMP. PRES. DOC. 589, 590 (May 10, 1991), available at http://bushlibrary.tamu.edu/research/public_papers.php?id=2976&year=1991&month=5. Initially President Bush stated that he needed no congressional authorization at all. See J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 43 (1991); see also Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 122 (1991).

8. William Michael Treanor, *Fame, The Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695, 702–03 (1997) (noting that the State Department in the Vietnam War held the position that the President did not need congressional authorization to send troops to the war, but that Congress did provide some support to the President’s war).

9. *Id.* at 702 & n.41 (noting that President Truman relied on his powers as Commander-in-Chief to send troops to the Korean War and did not seek congressional authorization).

10. Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT’L L. 19, 19 (1938).

should declare war. However, this Note will argue that the difference in the legal operation between declarations of war and engagements in imperfect war is the level of autonomy granted to the President to wage the war as Commander-in-Chief. When Congress declares war, the President may undertake all actions not prohibited by International Law or our Constitution. In the case of imperfect war, the President's powers are confined to actions that are strictly and affirmatively authorized by Congress.

Part I will explain that great international thinkers such as Burlamaqui and Grotius had developed theories of "perfect war"—war that destroys the public tranquility—and "imperfect war"—conflicts that leave the public tranquility relatively undisturbed. Part II will demonstrate that these thinkers profoundly influenced the Founders and that the Founders adopted the idea of perfect and imperfect war into the Constitution when they assigned the "power of War" to Congress. Part III will show that the legal distinction between perfect and imperfect wars is the level of autonomy in prosecuting the conflict that Congress has granted the President and that there are telltale signs of general wars that should trigger congressional declarations of war. Finally, Part IV analyzes the NSA wiretap program under Justice Jackson's three-tiered framework from *Youngstown*¹¹ and the perfect/imperfect war framework and concludes that the imperfect war framework is more satisfactory: the imperfect war framework is more conclusive because Congress must always authorize hostilities; it is more flexible because the President has more authority and discretion to wage a perfect war and more limited authority in an imperfect war; and it ensures Congress must face the tough policy choice of whether to use hostilities. Part IV concludes that the War on Terror is an imperfect war, but the Authorization for Use of Military Force was too vague to affirmatively authorize many of the President's actions in the War on Terror, rendering such actions as the NSA wiretap program unconstitutional.

I. UNCHANGED TIMES: THE THEORY OF IMPERFECT WAR

The absence of a traditional battlefield in the War on Terror is not new; hostilities of a lesser magnitude than general war have been recognized for hundreds of years. Grotius and Burlamaqui, two of the thinkers that had the most profound influence on the Founders,¹² developed the theory of perfect and

11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Briefly, Justice Jackson's framework provides that when the President acts pursuant to congressional authorization, his power is at its maximum; when he acts in the absence of congressional authorization or the division of power is uncertain, the President acts in a "zone of twilight"; and when the President acts contrary to the expressed or implied will of Congress, his power is at its "lowest ebb." For a more complete discussion of *Youngstown* and Justice Jackson's framework, see *infra* notes 221–30 and accompanying text.

12. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967) ("In pamphlet after pamphlet the American writers cited . . . Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government."); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 *Geo. L.J.* 463, 466 & n.7 (2007). See

imperfect war. This theory was notable in three ways: (1) imperfect wars encompassed the idea of limited, constrained hostilities; (2) imperfect wars were intimately related to the idea of reprisals; and (3) imperfect wars, like defensive wars, did not require a declaration of war.

The first, quintessential quality of imperfect war is that it is fought with limited, particular means and that it may be waged without disturbing civil society in general. Grotius first described an imperfect war in 1625 in his book, *The Laws of War and Peace*, as “where a state of perfect war has not yet been reached, but where nevertheless there is need of an enforcement of a right by violent means, that is, by means of an imperfect war.”¹³ However, Burlamaqui, writing after Grotius, gives perhaps the best description of the difference between general or “perfect war” and the limited quality of imperfect war:

A perfect war, is that which entirely interrupts the tranquillity of the state, and lays a foundation for all possible acts of hostility. An imperfect war, on the contrary, is that which does not intirely interrupt the peace, but only in certain particulars, the public tranquillity being in other respects undisturbed.¹⁴

Second, Burlamaqui and Grotius’ theory associated imperfect war with reprisals and obtaining justice from a foreign government or person for a specific injury. In general, Letters of Marque and Reprisal, in the sixteenth and seventeenth centuries, were issued by sovereigns to “particular persons’ to seek recompense for specific wrongs” or injuries inflicted by a foreign national.¹⁵ Thus, the authority to act under a letter of marque and reprisal was very limited in scope and utterly dependent upon the affirmative grant of the sovereign’s authority. Burlamaqui and Grotius developed the concept of imperfect war, comparing it to reprisals. Burlamaqui reasoned:

By reprisals then we mean that imperfect kind of war, or those acts of hostility which sovereigns exercise against each other, or, with their consent, their subjects, by seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice; with a view to obtain security, and to recover our right, and in case of refusal, to do justice to ourselves, without any other interruption of the public tranquility.¹⁶

generally RAY FORREST HARVEY, *JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM* 75, 79–175 (1937) (discussing Burlamaqui’s profound effect on colonial America and on the Framers of the Declaration of Independence and the Constitution).

13. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRE TRES* [ON THE LAW OF WAR AND PEACE, BOOK THREE] 625 (Francis W. Kelsey trans., William S. Hein & Co., Inc. 1995) (1625).

14. JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 475 (Petter Korkman ed., Thomas Nugent trans., Liberty Fund 2006) (1763).

15. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1043 (1995).

16. BURLAMAQUI, *supra* note 14, at 475 (emphasis deleted).

Grotius likewise stressed the relation of imperfect war to reprisals and obtaining justice in the international system: “Another form of the enforcement of right by violence is . . . called by the more modern jurists the right of reprisals . . . and by the French . . . ‘letters of marque.’”¹⁷ He maintained that the right of reprisal could not be enforced except when “judgment [could not] be obtained against a criminal . . . within a reasonable time . . . [or if] judgment ha[d] been rendered in a way manifestly contrary to law.”¹⁸

Lastly, the theorists also asserted that in imperfect wars, as in defensive wars, the sovereign is not required to declare war. Grotius contended that “[i]n a case where either an attack is being warded off, or a penalty is demanded from the very person who has done wrong, no declaration is required by the law of nature.”¹⁹ Thus, the imperfect war paradigm, which originated in the seventeenth and eighteenth centuries, recognized and developed a systematic theory to account for limited, undeclared wars connected to the idea of justice for specific injuries.

II. THE THEORY EMBRACED: THE FOUNDERS GRANT CONGRESS THE POWER TO WAGE IMPERFECT WARS

Grotius and Burlamaqui’s ideas of perfect and imperfect war had traversed the Atlantic and become rooted in American thought by the time of the founding. This Part first describes the intellectual sway that Grotius and Burlamaqui wielded over the Framers and colonial Americans, resulting in the

17. Grotius, *supra* note 13, at 626–27.

18. *Id.* at 627. Although Grotius and Burlamaqui equate reprisals and imperfect war, the accepted relationship between the two concepts has been muddled throughout American history. Thomas Jefferson and Alexander Hamilton seem to equate the two terms. See discussion *infra* text accompanying notes 35–36. Some modern writers also find that imperfect wars and reprisals are equivalent. See Lobel, *supra* note 15, at 1046; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 695–97 (1972). However, in the first Supreme Court case to address the question, Justice Washington explicitly rejected this argument. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800) (Washington, J., writing *seriatim*). Justice Washington stated:

[I]t is said, that a war of the imperfect kind, is more properly called acts of hostility, or reprisal, and that congress did not mean to consider the hostility subsisting between *France* and the *United States*, as constituting a state of war . . . [However,] the degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government.

Id. See discussion *infra* text accompanying notes 65–72 for a more complete discussion of Justice Washington’s rejection of the argument equating reprisals and imperfect war. Justice Story offers perhaps the most satisfying explanation—that it does not matter because the War Clause is meant to be overlapping. See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 62 (1833).

In the theory of perfect and imperfect wars, all wars are either perfect or imperfect, see BURLAMAQUI, *supra* note 14, at 475, thus, because reprisals are not perfect and declared wars, they are a species of imperfect war. Therefore, the Marque and Reprisal Clause constitutes the constitutional anchor for the theory of imperfect war and limited presidential discretion in imperfect wars. See discussion *infra* text accompanying notes 121–31.

19. Grotius, *supra* note 13, at 634.

incorporation of many of these publicists' ideas into the Constitution, especially the idea of imperfect war. Second, this Part will discuss evidence showing that the Constitutional Convention granted Congress alone the power to wage both perfect and imperfect wars by including these ideas in the Constitution. Third, this Part will demonstrate that roughly at the time of the adoption of the Constitution, the nation engaged in its first imperfect war. This war and the Supreme Court cases arising from the hostilities confirm that the Constitution grants Congress alone the power to wage imperfect wars. Fourth, this Part will argue that the Pacifus-Helvidius debates arising out of that first imperfect war do not show, as some would contend, that the Founders fundamentally disagreed about which branch would have the power to wage war. And fifth, this Part will argue that although it is plausible that the power of imperfect war derives from the Marque and Reprisal Clause, it is more likely that the Declare War Clause, the Marque and Reprisal Clause, and the Captures on Land and Water Clause function together to prevent loopholes that the President could use to justify initiating hostilities.

A. THE INFLUENCE OF BURLAMAQUI AND GROTIUS ON THE FOUNDERS

The colonists and the drafters of the Constitution were intimately familiar with the works of Grotius, Burlamaqui, and other international law publicists. As one scholar has noted, “[i]n pamphlet after pamphlet the American writers cited . . . Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.”²⁰ *The Principles of Natural and Politic Law* by Burlamaqui, a professor at the Academy of Geneva and a renowned lecturer on natural and international law,²¹ was especially influential with the Framers of the Constitution.²² His book was published in its two-volume form for the first time in English in 1763, fifteen years after the death of the illustrious professor.²³ Ray Harvey, in his biography on Burlamaqui, related that for the state of printing at the time, Burlamaqui’s book was impressive in its wide distribution—in fact, it was mandatory reading for all law students and many college students of the time.²⁴ The Founders kept copies of Burlamaqui in their libraries and frequently referred to him, as well as Grotius, in their debates.²⁵ For instance, Hamilton, in one such debate, advised his adversary to “get himself at the first opportunity to some of the writings of Pufendorf, Locke, Montesquieu, and Burlamaqui to discover the true principles

20. See BAILY, *supra* note 12, at 27.

21. See Petter Korkman, *Introduction* to BURLAMAQUI, *supra* note 14, at ix–xi.

22. See HARVEY, *supra* note 12, at 79–175; Lofgren, *supra* note 18, at 689 (“Americans of the revolutionary generation paid considerable attention to a broad range of European . . . ideas The works of Hugo Grotius, Samuel Pufendorf, Emmerich de Vattel, and particularly Jean Jacques Burlamaqui were widely read and quoted.”) (footnotes omitted).

23. See Korkman, *supra* note 21, at xi, xiii.

24. See HARVEY, *supra* note 12, at 89–90, 105.

25. *Id.* at 90; see BAILY, *supra* note 12, at 27.

of politics.”²⁶ This shows that the Founders were well aware of Grotius and Burlamaqui and held them in high esteem.

B. EVIDENCE THAT THE CONSTITUTION GRANTS CONGRESS THE POWER OF IMPERFECT WAR

Grotius and Burlamaqui’s pervasive influence over the Founders extended to the theory of imperfect war. The Founders embraced the idea that there were imperfect or limited wars—wars that were connected to the idea of reprisals and that did not need to be declared—and assigned the power of imperfect war to Congress.

At the threshold, it must be recognized that the general “power of war” was granted to Congress. This idea was so elemental to the Framers that only one delegate to the Constitutional Convention, Pierce Butler, suggested that the President should have the power to start a war.²⁷ His suggestion was immediately rejected as unthinkable by Elbridge Gerry: “[I] never expected to hear in a republic a motion to empower the Executive alone to declare war.”²⁸ In fact, an earlier draft of the Constitution stated that Congress had the power to *make* war.²⁹ The language was changed in order to clarify that the President as the Commander-in-Chief would have the power to *conduct* wars and to repel sudden attacks.³⁰ After this change was made, Pierce Butler suggested that the Congress have the “power of peace as they were to have that of war” denoting that there was no perception that Congress was deprived of any power by the change from “make” to “declare.”³¹

Furthermore, the term “declare War” encompassed more than simply the formal declaration of war. Lofgren shows that the drafters believed the power to “declare War” had the same meaning that “determining on War” had in the Articles of Confederation, in which there *was no* Executive.³² Robert Livingston highlighted this point at the New York Convention: “But, say the gentlemen, our present [Confederation] Congress have not the same powers [as the new Congress]. I answer, They have the very same . . . [including] the power of making war . . .”³³ Thus, the fact that the power to “make War” was changed to “declare War” was not a significant change. Furthermore, the power to “declare War” is not now anachronistic, for as Madison

26. BAILY, *supra* note 12, at 27.

27. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3 (1993).

28. *Id.*

29. See Lofgren, *supra* note 18, at 675.

30. See ELY, *supra* note 27, at 5.

31. See JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 477 (W.W. Norton & Co. 1987) (1840).

32. See Sidak, *supra* note 7, at 61 (“[T]he Articles of Confederation lodged the power over foreign affairs and the power to declare war in the national Congress. Where else could such powers have been lodged in a federal government that had no separate executive branch?”).

33. See Lofgren, *supra* note 18, at 685 (quoting Robert R. Livingston, Speech to the Convention of the State of New York on the Adoption of the Federal Constitution, in 2 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 278, 284 & n.49 (J. Elliot ed., 1888) (alterations to the original in the quoted text)).

stated in Federalist 41: “Is the power of declaring [that is, commencing] war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative.”³⁴

The delegates to the Convention recognized the theory of imperfect war, related it to reprisals, and granted this power to Congress. Hamilton, one of the foremost proponents of a strong Executive, argued that the President’s constitutional power went no further than the “authority to *repel* force by *force* *Any thing beyond this* must fall under the idea of *reprisals* and requires the sanction of that Department which is to declare or make war.”³⁵ Thomas Jefferson likewise noted the exclusive power of Congress to wage hostilities short of war: “The making [of] a reprisal on a nation is a very serious thing [I]t is considered an act of war, . . . [therefore,] the right of reprisal [is] expressly lodged with [Congress] by the Constitution, and not with the Executive.”³⁶ Writing shortly thereafter in 1833, Justice Story agreed that the Constitutional Convention had placed the power of imperfect war with Congress: “The power to declare war may be exercised by congress, not only by authorizing general hostilities . . . [but also] by partial hostilities”³⁷ Through the totality of the War Clause, the Framers provided that all war-making power was granted to Congress. Both perfect and imperfect wars required the legislature’s imprimatur.

C. AMERICA’S IMPERFECT WAR WITH FRANCE AND THE SUPREME COURT’S RECOGNITION OF CONGRESS’S POWER OF IMPERFECT WAR

As has been shown, the debates provide much evidence that Congress—and Congress alone—can initiate perfect and imperfect wars. The first hostility fought under the new Constitution and the Supreme Court cases that ensued provide support for this proposition. When war broke out between France and England in 1793, President Washington declared that the United States was a neutral party.³⁸ Yet, despite this neutrality, U.S. merchant ships increasingly came under attack by the French, provoking Congress to pass a law authorizing merchant ships to arm and defend themselves and to recapture American vessels.³⁹ Confronting this situation in 1800, the Supreme Court Justices, writing *seriatim* in

34. THE FEDERALIST NO. 41, at 196 (James Madison) (Terence Ball ed., Cambridge Univ. Press 2003).

35. Letter from Alexander Hamilton to James McHenry (May 17, 1798), in 21 THE PAPERS OF ALEXANDER HAMILTON 461–62 (Harold C. Syrett ed., 1974) (some emphasis added).

36. Thomas Jefferson, Op. Sec’y of State (May 16, 1793), reprinted in 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 123 (1906).

37. See 3 STORY, *supra* note 18, at 62.

38. Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 171 (1988) (remarks of Charles J. Cooper at University of Miami Law Review Symposium).

39. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39 (1800) (Moore, J., writing *seriatim*); see also *id.* at 41 (Washington, J., writing *seriatim*) (“[C]ongress had raised an army; stopped all intercourse with *France*; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships; enjoining the former, and authorising the latter, to defend themselves against the armed ships of *France*, to attack them on the high seas, to subdue and take them as prize, and to re-capture armed vessels found in their possession.”).

Bas v. Tingy, held that the United States was engaged in an “imperfect war” and that Congress could act short of a declaration of war.⁴⁰ Justice Washington declared:

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn [that is, not declared], and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.⁴¹

Justice Chase stressed Congress’s involvement in authorizing the hostilities: “Congress is empowered to declare a general war, or congress may wage a limited war”⁴² Justice Patterson was of the same opinion: “An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations.”⁴³ Chief Justice Marshall, writing a year later about the same conflict, approved the imperfect war distinction made by the *Bas* Court and stated more clearly: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied . . . that congress may authorize general hostilities . . . or partial hostilities”⁴⁴

Finally, *Little v. Barreme*⁴⁵ in 1804 is especially illustrative. The Supreme Court concluded that even though Congress had authorized the President to order seizures of American vessels sailing to French ports, the President had no authority to expand this order to the seizure of American vessels sailing *from* French ports and so Captain Little had acted unlawfully.⁴⁶ Marshall wrote: “A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution.”⁴⁷ This conflict in the infant years of our nation suggests several important points about war powers and the Constitution. The Founders

40. See *id.* at 40 (Washington, J., writing *seriatim*); *id.* at 43 (Chase, J., writing *seriatim*); *id.* at 45 (Patterson, J., writing *seriatim*). J. Gregory Sidak criticizes the distinction between imperfect and perfect war in this case, remarking that this is a “dichotomy commonly (though somewhat mysteriously) attributed to the writings of Grotius and Vattel” and claims that their writings do not contain this distinction. Sidak, *supra* note 7, at 57 & n.147. However, Grotius and Burlamaqui used this distinction, and their influence was sufficient among the Founders to belie Sidak’s skepticism. See *supra* notes 15–18, 20–26, and accompanying text. Moreover, it is worth noting that the summary of the plaintiff’s case accompanying the decision in *Bas* contains cites to Burlamaqui, Grotius, Pufendorf, Vattel, and others. See *Bas*, 4 U.S. at 38. As the plaintiff (the defendant in error) won the case, it would be natural for the Court to cite the authorities that the plaintiff had used.

41. *Bas*, 4 U.S. at 40 (Washington, J., writing *seriatim*).

42. *Id.* at 43 (Chase, J., writing *seriatim*).

43. *Id.* at 45 (Patterson, J., writing *seriatim*).

44. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

45. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

46. See *id.* at 171, 177–79.

47. *Id.* at 170 (emphasis deleted).

were aware of imperfect wars, the Constitution granted the power to engage in imperfect wars to Congress, and the Supreme Court recognized these powers.

D. THE NOT-SO-DIVERGENT VIEWS OF THE ILLUSTRIOUS MESSRS. PACIFICUS AND HELVIDIUS

The debates, the first national conflict, and the first Supreme Court cases on the subject provide clear evidence that Congress alone could initiate perfect and imperfect wars. Despite this evidence, some scholars point to a series of virulent debates between Hamilton and Madison, under the pseudonyms Pacificus and Helvidius, respectively, to show that the Framers fundamentally disagreed about who should have the power of war.⁴⁸ These debates were occasioned by President Washington's Proclamation of Neutrality in 1793 at the beginning of the war between France and England.⁴⁹ Hamilton claimed that the President's proclamation of neutrality was proper,⁵⁰ while Madison held that it was patently unconstitutional.⁵¹

The modern literature on these debates casts doubt on the evidence that it was a bedrock constitutional principle at the founding that Congress alone could declare war. Some authors recount the debate, but then rely on either Hamilton or Madison depending on whether the article is pro-Executive or pro-Congress. For instance, Professor Rostow of Yale, recounts the debates and then concludes: "Hamilton's analysis of the Presidency leads logically to the conclusion that while only Congress can move the nation into a state of 'public, notorious, and general war' . . . the President can use the national force under all the other circumstances in which international law [allows] . . ."⁵² He dismisses Madison's argument, saying that it "failed in its purpose."⁵³ Professor Treanor, on the other hand, reviews the debates and concludes that Madison's "Helvidius letters are critical evidence concerning the meaning of the War Powers Clause and the motives which led the Founders to give Congress the sole power to initiate war."⁵⁴ Other discussions merely conclude that "Madison and Hamilton, who knew a great deal more about original intent than we are ever going to know, differed about the extent of the war power within a few years of the Convention."⁵⁵

Contrary to these authors' positions, Washington's proclamation of neutrality and the Pacificus-Helvidius debate signified very little about the power to *wage*

48. See Cooper et al., *supra* note 38, at 172–73.

49. See *id.* at 171–75.

50. See generally Alexander Hamilton, *Pacificus No. 1*, in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 35, at 33.

51. See generally James Madison, *Helvidius No. 1*, in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611 (J.B. Lippincott & Co. 1867).

52. Eugene V. Rostow, "Once More unto the Breach:" *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 15 (1986).

53. *Id.*

54. Treanor, *supra* note 8, at 748.

55. Cooper et al., *supra* note 38, at 197 (remarks of Eugene V. Rostow at the University of Miami Law Review Symposium).

war or commence hostilities. Although Hamilton argued that the Executive power was unlimited with only a few exceptions—one being the power to declare war and grant letters of marque and reprisal—he grounded his argument supporting the President's Neutrality Proclamation in the President's power to make treaties and conduct relations with foreign nations.⁵⁶ Hamilton argued that the Proclamation was not a new law, but that it only "proclaim[ed] a *fact* with regard to the *existing state* of the Nation."⁵⁷

Thus, the heated debate was not whether the President could commit troops to an engagement or defy a declaration of war by Congress (there was none), but whether the President could announce that the nation remained, for the time being, in a state of *peace*. Madison, in the persona of Helvidius, argued against giving the President even that much power. Hamilton's strong arguments make even more sense in the light of two facts. First, although the power to make war was given exclusively to Congress, the Constitutional Convention explicitly rejected the assertion that Congress should be given the exclusive power to make peace.⁵⁸ Thus, the debate over the President's ability to declare neutrality would have no bearing on his ability to declare war, as only the power of war was expressly given to Congress in the Constitution. Second, that Hamilton would consider the power to declare neutrality in the particular conflict as part of the President's treaty power⁵⁹ derives from the fact that the United States and the King of France had signed defense treaties prior to the French Revolution.⁶⁰ There was debate whether these treaties still applied under the new French government, and even if the treaties did apply, whether France was the aggressor against England in the current conflict⁶¹—if France was the aggressor, the defense treaties would not be triggered at all. Hamilton argued that it was within the President's power to decide the functionality of these treaties and to interpret them. Thus, despite the literature on the subject suggesting that Hamilton and Madison fundamentally disagreed, the Pacificus and Helvidius debates actually strengthen the claim that only Congress could wage perfect and imperfect wars.

E. THE WAR CLAUSE AS LOOPHOLE PREVENTION

Although it is clear that the Framers adopted Burlamaqui's theory of perfect and imperfect war and granted these powers to Congress, it is less clear how this theory was adopted into the War Clause. Several scholars who argue that

56. Hamilton, *supra* note 50, at 37 ("The Legislative Department is not the *organ* of intercourse between the [United] States and foreign Nations. It is charged neither with *making* nor *interpreting* Treaties. It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers . . .").

57. *Id.* at 43.

58. See Sidak, *supra* note 7, at 87 & n.307 (the proposed wording would have read: "Congress shall have Power . . . To declare War and Peace").

59. Hamilton, *supra* note 50, at 37.

60. See Cooper et al., *supra* note 38, at 171.

61. See *id.*

Congress has the power to wage limited hostilities find this authority within the Marque and Reprisal Clause.⁶² This is quite reasonable considering the connection between imperfect wars and reprisals drawn by the treatise writers Grotius and Burlamaqui,⁶³ and the Founders Hamilton and Jefferson.⁶⁴ However, the first Supreme Court case interpreting this proposition, *Bas v. Tingy*, rejected this very argument.⁶⁵

In *Bas*, the defendant's ship had been captured by a French ship and then re-captured by the plaintiff, who returned it to the defendant.⁶⁶ The plaintiff sought a salvage award—one-half the value of the ship, under a law that provided that “for the ships or goods . . . if re-taken from *the enemy* . . . the owners are to allow . . . salvage.”⁶⁷ The argument turned on whether France was “the enemy” at the time of the capture and re-capture.⁶⁸ The defendant argued that France was not the enemy at the time in question because the hostilities between France and the United States constituted only reprisals or an imperfect war.⁶⁹ But Justice Washington and the Court held for the plaintiff, rejecting the defendant's argument:

[I]t is said, that a war of the imperfect kind, is more properly called acts of hostility, or reprisal, and that congress did not mean to consider the hostility subsisting between France and the United States, as constituting a state of war [However,] the degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government.⁷⁰

Thus, although the Court and Justice Washington accepted that this was an imperfect war,⁷¹ Justice Washington rejected that this was a reprisal. He accepted the winning party's argument that “an imperfect, or qualified, public war, is still distinct from the case of letters of marque and reprisal.”⁷² Although the Court does not discuss the implications of this conclusion, by rejecting that this

62. See Lobel, *supra* note 15, at 1046; Lofgren, *supra* note 18, at 695–97.

63. See *supra* text accompanying notes 15–18.

64. See *supra* text accompanying notes 35–36.

65. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 41 (1800) (Washington, J., writing *seriatim*).

66. *Id.* at 37 (statement of the facts).

67. *Id.*

68. *Id.* at 40 (Washington, J., writing *seriatim*).

69. *Id.* at 41.

70. *Id.*

71. See *id.* at 40–42 (noting that “[i]f [war] be declared in form, it is called solemn, and is of the perfect kind But hostilities may subsist between two nations more confined in its nature and extent . . . and this is more properly termed *imperfect war*” and noting that France was still “the enemy” although the war was not declared because “[s]uch a declaration by congress, might have constituted a perfect state of war, which was not intended by the government,” implying that the present conflict was an imperfect war). Other Justices stated more succinctly what Justice Washington said through logic: “In my judgment, it is a limited, partial, war.” See, e.g., *id.* at 43 (Chase, J., writing *seriatim*).

72. *Id.* at 38 (summary of the plaintiff's argument).

was a *marque* and reprisal, the Court implicitly rejects that Congress's power to authorize the imperfect war derived from the *Marque and Reprisal Clause* alone. Yet, the Court never doubted Congress's authority to act and, in fact, declared that *only* Congress could authorize these hostilities.⁷³ Professor Eagleton, writing in 1933, recognized the *Bas* Court's reasoning, but was flabbergasted by such a notion: "Thus one may have war which is neither war nor reprisals! . . . [This] is an insupportable doctrine."⁷⁴

If the Court did not, in this early case, take the view of Professors Lobel and Lofgren that the power of imperfect war rested in the *Marque and Reprisal Clause*, there are at least two more options. The Court may have taken a view closer to the position argued by Professor Ely, which is that the power of imperfect war derives from the power to declare war directly.⁷⁵ Or, what is more likely, the Court took a view that was later expressed by Justice Story—that the "auxiliary clauses" in the *War Clause* were overlapping.⁷⁶ Story maintained that it "abundantly appear[s] from the remaining auxiliary clauses to the power to declare war, [that] the constitution abounds with pleonasms and repetitions, sometimes introduced from caution, sometimes from inattention, and sometimes from the imperfections of language."⁷⁷ In this view, the three auxiliary clauses—the *Declare War Clause*, the *Marque and Reprisals Clause*, and the *Captures on Land and Water Clause*—were merely overlapping and intertwining powers meant to ensure that the entire power to wage war would rest with Congress—in other words, loophole prevention. Professor Eagleton feared just this interpretation:

If such a principle be accepted, a state may conduct war to any degree and in any fashion that it may desire, limiting it according to its own will. International lawyers and courts would have not only the problem of determining whether war exists, but also of distinguishing between the various gradations of war and their legal consequences.⁷⁸

Professor Sidak, paraphrased this very real dilemma more succinctly: "How could one distinguish general war from limited war?"⁷⁹

73. See, e.g., *id.* at 43 (Chase, J., writing *seriatim*) ("Congress is empowered to declare a general war, or congress may wage a limited war In my judgment this is a limited, partial, war. . . ."); see also discussion *supra* notes 40–43.

74. Clyde Eagleton, *The Attempt To Define War*, 15 INT'L CONCILIATION 233, 275 (1933).

75. See ELY, *supra* note 27, at 3 ("The debates, and early practice, establish that this meant that all wars, big or small, 'declared' in so many words or not . . . had to be legislatively authorized.")

76. See 3 STORY, *supra* note 18, at 63.

77. *Id.*

78. Eagleton, *supra* note 74, at 275.

79. See Sidak, *supra* note 7, at 58.

III. THE DIFFERENCE BETWEEN PERFECT AND IMPERFECT WARS: CONGRESS AND CONTROL

To answer the question just posed, several issues must be addressed. This Part will discuss, first, the importance of the declaration of perfect wars and these wars' extensive scope. Second, it will define the legal operation of limited wars. Third, it will conclude that the functional legal difference between perfect and imperfect wars is the level of delegation Congress desires to grant to the President, as Commander-in-Chief, to manage the conflict. Finally, this Part will attempt to identify when a perfect war or the objective of a perfect war exists, triggering Congress's responsibility to declare war and grant full autonomy to the President.

A. DECLARING PERFECT WARS: SOLEMN, JUST, AND JUST PLAIN GOOD POLICY

Embodied in the Constitution is the theory of perfect war. Because these wars can be of extensive and tragic scope, they must be solemn wars, that is, declared wars. Burlamaqui emphasized that the function of such a declaration is to proclaim to the country's citizens and society in general the importance and justness of the country's cause.⁸⁰ The Declaration of Independence provides a useful example of the American ideal of perfect war, following nearly word-for-word, Burlamaqui's prescription. The Founders' purposefully embodied the policy of declared, perfect wars, granting Congress the power to ensure deliberation before committing the nation to war, and to prevent loss of public morale during the conflict.

1. Declaring Perfect Wars in Order that They May Be Solemn and Just

Although some scholars argue that declared wars have become obsolete in the twentieth century,⁸¹ this argument is ill-founded. Formal declarations to the enemy had largely become anachronistic at the time the Constitution was written,⁸² making it plausible that the Founders meant something other than out-dated ceremonies when they used the term "declare." Burlamaqui's publications, which became available twenty years before the Declaration of Independence and were widely read at the time of the Constitution's drafting, provide a much more realistic explanation of the Constitution's requirement that wars be declared.

Burlamaqui's discussion of the theory of war divided war into five categories: (1) just or unjust; (2) offensive or defensive; (3) solemn (declared and waged by

80. See BURLAMAQUI, *supra* note 14, at 484 ("For we ought to neglect no means to convince all the world . . . that it is only absolute necessity that obliges us to take up arms, for the recovery or defence of our just rights . . .").

81. See, e.g., Eagleton, *supra* note 10, at 19 ("[R]ecent happenings raise doubt as to whether war will ever again be declared by belligerents. Under these changed circumstances, the declaration of war seems to be regarded by some as an anachronism to be discarded.")

82. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *53; Lofgren, *supra* note 18, at 691.

the sovereign) or not solemn; (4) public, private, or mixed; and (5) perfect or imperfect.⁸³ He discussed a possible sixth category, a distinction of “wars which are carried on between two or more sovereigns, from those of the subjects against their governors.”⁸⁴ But he rejected this as a separate category of war because if the subjects’ cause is just, it is simply a war, and if not, it is only a revolt:

[I]t is plain, that when subjects take up arms against their prince, they either do it for just reasons, and according to the principles established in this work, or without a just and lawful cause. In the latter case, it is rather a revolt or insurrection, than a war, properly so called. But if the subjects have just reason to resist the sovereign, it is strictly a war; since, in such a crisis, there are neither sovereign nor subjects, all dependence and obligation having ceased. The two opposite parties *are then in a state of nature and equality*, trying to obtain justice by their own proper strength, which constitutes what we understand properly by the term *war*.⁸⁵

The categories Burlamaqui discusses are all separate, but interrelated. For instance, an offensive war, contrary to modern thought, can be just, and a solemn denunciation is necessary for a just war, but not sufficient. But, most importantly, Burlamaqui rejects Grotius’ argument that the *reason* a war is declared is to assure the people that the war was undertaken by the sovereign.⁸⁶ He says:

[T]he principal end of a declaration of war . . . is to let all the world know that there was just reason to take up arms [And that] declarations of war, and the manifestos published by princes, are marks *of the due respect* they have for each other, *and for society in general*, to whom by such means they give an account of their conduct, in order to obtain the public approbation.⁸⁷

Thus, Burlamaqui makes an important shift from Grotius, who wrote a century earlier, about the importance of the declaration of war. It is no longer about sovereignty but about the opinion of the citizens of the country and people worldwide.

Perhaps the best example of Burlamaqui’s theory in practice is the Declaration of Independence.⁸⁸ The Declaration followed Burlamaqui’s first prescription that war must have a just cause and “the dispute ought to be about

83. See BURLAMAQUI, *supra* note 14, at 467–78.

84. *Id.* at 478–79.

85. *Id.* at 479 (first emphasis added).

86. *Id.* at 485–87.

87. *Id.* at 486 (emphasis added).

88. Ray Harvey has pointed out the influence of Burlamaqui in other areas of the Declaration. Specifically, Jefferson altered the Lockean phrase “life, liberty, and property” to include the pursuit of happiness in his list of inalienable rights, which was a distinctly Burlamaquian idea. See HARVEY, *supra*

something of great consequence [T]here should be a real necessity for taking up arms.”⁸⁹ The Declaration states that, “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes [But] such is now the necessity which constrains [us] to alter [our] former Systems of Government.”⁹⁰ More importantly, the Declaration listed the “Injuries and Usurpations” of the King of Great Britain one-by-one, and “submitted [them] to a candid world.”⁹¹ By doing so, the Declaration echoed Burlamaqui’s admonition, “[f]or we ought to neglect no means to convince *all the world*, and even the enemy himself, that it is only absolute necessity that obliges us to take up arms, for the recovery or defence of our just rights.”⁹² The colonies took up arms for “something of great consequence,”⁹³ attempted to convince all the world of the justness of their cause by listing the injuries,⁹⁴ and waited until Britain “plainly refuse[d] to give [them] satisfaction.”⁹⁵

Next, because the Revolution fell into Burlamaqui’s category of war between a sovereign and his subjects, the colonists proclaimed their cause to be just—and thus a war and not simply a revolt.⁹⁶ Endorsing Burlamaqui’s conclusion that “in such a crisis, there are neither sovereign nor subjects . . . [t]he two opposite parties are then in a state of nature and equality,”⁹⁷ the Declaration stated that it had become “necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.”⁹⁸ Moreover, the colonists agreed that the purpose of a declaration was not about sovereignty in the recognized sense. Indeed it could not be in the colonists’ case, for the Declaration was “solemnly publish[ed] and declare[d]” in the “Name, and by Authority of the good People of the[] Colonies.”⁹⁹ Instead, as Burlamaqui put it, “[D]eclarations . . . are marks of the *due respect* [nations] have for each other, and *for society in general*.”¹⁰⁰ Or, as the Declaration more eloquently stated, “*a decent respect* to

note 12, at 106–30; *see also* Korkman, *supra* note 21, at xvi–xviii (discussing Burlamaqui’s theory of happiness as a natural right).

89. *See* BURLAMAQUI, *supra* note 14, at 479.

90. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

91. *Id.*

92. *See* BURLAMAQUI, *supra* note 14, at 484 (emphasis added).

93. *Id.* at 479. *Compare id.*, with THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (expressing the view that the colonies were not acting for “light and transient Causes”).

94. *Compare* BURLAMAQUI, *supra* note 14, at 484 (arguing that it is imperative to convince “all the world” of the justness for war), with THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“submit[ting] to a candid World” the facts of the King’s usurpations).

95. BURLAMAQUI, *supra* note 14, at 484. *Compare id.*, with THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776) (“In every stage of these Oppressions we have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.”).

96. *See* BURLAMAQUI, *supra* note 14, at 479.

97. *Id.*

98. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

99. *Id.* para. 32.

100. *See* BURLAMAQUI, *supra* note 14, at 486 (emphasis added).

the opinions of mankind requires that they should declare the causes which impel them to the separation.”¹⁰¹

Burlamaqui’s theory as reflected in the Declaration of Independence demonstrates that the Founders did not see a declaration of war as an empty exercise. The Founders saw it as very important to draft a formal, detailed document of grievances during the Revolutionary War—even though they risked much in signing it. However, the point of the document was not ceremonial or merely to give the enemy “fair warning,” but it was to announce to a “candid world” the importance and justness of the reasons for war and to “announce to the people at home, their new relations and duties growing out of a state of war.”¹⁰²

2. The Policy Behind the War Clause

Not only does the Declaration of Independence provide support that the Constitution embodies the notion that Congress should authorize perfect and imperfect wars, but there are important policy reasons why the Framers may have adopted congressional control over imperfect war. A declaration of war is very important in a republic. A just war is waged by competent authority,¹⁰³ and in the United States, the “sovereign” is the people.¹⁰⁴ By granting the power of war to Congress, the Founders ensured that the decision to go to war would be thoroughly deliberated and that the people would have a role in the decision. In the ratification debates, James Wilson confirmed that a congressional power over war would intentionally slow down the war-making process:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, . . . for the important power of

101. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

102. 1 KENT, *supra* note 82, at *55. The similarity between the Declaration of Independence and a declaration of war was not overlooked by Justice Chase, writing in *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 45 (1800) (Chase, J., writing *seriatim*). He reasoned that the legislature correctly waited to initiate limited hostilities with France until after 1793 because “hitherto the popular feeling may not have been *ripe* for a solemn declaration of war.” *Id.* He reasoned that the caution before declaring war in that conflict resembled that of the colonists’ before issuing their declaration:

The progress of our contest with France, indeed, resembles much the progress of our revolutionary contest; . . . watching the current of public sentiment, the patriots of that day proceeded, step by step, from the supplicatory language of petitions for a redress of grievances, to the bold and noble declaration of national independence.

Id. Thus, Justice Chase saw a direct comparison between declarations of war and the Declaration of Independence. Professor Yoo also recognized that the Declaration of Independence served as a guide to the Framers for declarations of war. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 246–47 (1996). He notes that the Declaration of Independence resembled British declarations of war but also mirrored the more modern understanding as developed by international scholars. *Id.*

103. See, e.g., GROTIUS, *supra* note 13, at 633.

104. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793) (Jay, J., writing *seriatim*); see also Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 71 (1972).

declaring war is vested in the legislature at large: . . . nothing but our national interest can draw us into war.¹⁰⁵

The decision to go to war was supposed to be slow, cautious, and deliberate.¹⁰⁶

However, not only does Congress's monopoly over war increase caution in proceeding to war, it is essential to the character of a republic. Joseph Story pointed out that because the people pay the taxes for wars and experience the personal sufferings, and because liberty itself may be threatened, "[i]t should therefore be difficult in a republic to declare war."¹⁰⁷ Over one hundred years later, Raoul Berger nearly mimicked this sentiment, noting that "the Constitution conferred virtually all of the war-making powers upon the Congress"¹⁰⁸ in large part because public debate "is a requirement of our democratic system. Those who are to bleed and die have a right to be consulted, to have the issues debated by their elected representatives."¹⁰⁹ The separation of powers "guards against the unrepresentative and unaccountable exercise of political power,"¹¹⁰ and is perhaps most important when it concerns the nation's commitment to war.

Because our country is a democracy, not only is Congress's authorization of war important to our constitutional structure, it is essential to the successful prosecution of a war.¹¹¹ War can be protracted and difficult. If the American people and Congress are not forced to deliberate about the decision to go to war, both Congress and the people will blame the President for his "unilateral" war when the popularity of the campaign falters.¹¹² This lessens the military's credibility with our enemies and strengthens the enemy's resolve to fight, knowing that the American public opinion may falter and the troops may be sent home. This has happened several times in U.S. history—the Vietnam War being the primary example.¹¹³ Where the goals of a war are ambitious, such as regime

105. James Wilson, Speech to the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution, in 2 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528 (Johnathan Elliot ed., 2d ed. 1891).

106. See, e.g., 3 *STORY*, *supra* note 18, at 59, 61; *Lobel*, *supra* note 15, at 1089; *Lofgren*, *supra* note 18, at 685.

107. See 3 *STORY*, *supra* note 18, at 61.

108. See *Berger*, *supra* note 104, at 82.

109. See *id.* at 85.

110. See *Sidak*, *supra* note 7, at 67.

111. I owe many of the ideas in the following paragraph to a class I took with Anthony Lake, National Security Advisor to President Clinton, at Georgetown University in 2004.

112. See *Rostow*, *supra* note 52, at 51.

113. *Berger*, *supra* note 104, at 85 ("[T]he loss of confidence in the government, results in large part from the fact that the Vietnam commitments were made without consultation with the people."). Although Vietnam is the primary example, the Korean War provides a similar example of U.S. opinion turning against an undeclared perfect war. See generally *GLENN D. PAIGE, THE KOREAN DECISION: JUNE 24–30, 1950* (1968). United States involvement in Somalia in the early 1990s provides an example of U.S. opinion turning against an imperfect war unauthorized by Congress. See generally *MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR* (2000).

change, or when the war will likely be a perfect war, a declaration of war, because of its seriousness and formality, requires further deliberation by Congress and the people.¹¹⁴ A declaration is not a mere formality or anachronism, but rather serves an important function in our democratic system. This practicality of congressional authorization for war, and declarations of war for perfect wars in particular, is almost unwittingly conceded by advocates of presidential war-making authority. Robert Bork surmised that “Presidential use or support of force abroad will succeed when the public approves and fail when it disapproves.”¹¹⁵ To ensure public accountability and solid policy, wars should not be waged by the President; they should be declared by Congress. Thus, the policy behind congressional deliberation and declaration of war is not only essential to a democratic government, it is essential to a successful war effort.

B. IMPERFECT WARS AND THE IMPORTANCE OF THE DIFFERENCE

Having described the concept of a perfect war and the importance of congressional deliberation and declaration of war, one aspect of the question posed by Professors Eagleton and Sidak remains: What defines an imperfect war?¹¹⁶ There are two main differences, which will be discussed in turn. First and foremost, imperfect and perfect wars differ in the amount of discretion Congress grants to the President to wage the war due to the legal status of perfect and imperfect war. Second, the scope or object of the hostility involves “telltale signs” of a perfect war, triggering Congress’s duty to declare war.

1. The Legal Status of Perfect and Imperfect War and Presidential Discretion

The importance of the difference between perfect and imperfect war is the level of discretion in waging the hostility that Congress desires to grant to the President. Imperfect wars are very limited in scope and are related to reprisals, leaving the public tranquility intact.¹¹⁷ However, imperfect war is a sort of “intermediate state between peace and war” that can quickly lead to general

114. See ELY, *supra* note 27, at 25. Although Ely is skeptical of the necessity of formal declarations of war, he notes that if Congress was forced to declare war it would “become difficult for Congress to play ‘we didn’t mean it.’” *Id.*

115. Robert H. Bork, Former Judge, D.C. Circuit, Erosion of the President’s Power in Foreign Affairs, Remarks at the Federalist Society Conference (Jan. 19–20, 1990), in Symposium, *The Presidency and Congress: Constitutionally Separated and Shared Powers*, 68 WASH. U. L.Q. 693, 700 (1990); see also Rostow, *supra* note 52, at 51 (“When the war in Vietnam became unpopular, far too many Congressmen were willing to forget their own repeated votes for the war, denounce what they called a Presidential war, and assure their constituents that no President in the future would be able to lure America into war by ‘stealth.’”).

116. See *supra* notes 78–79 and accompanying text.

117. See discussion *supra* notes 15–18 and accompanying text; see also BURLAMAQUI, *supra* note 14, at 475 (“An imperfect war . . . is that which does not intirely interrupt the peace, but only in certain particulars, the public tranquillity being in other respects undisturbed.”); 1 KENT, *supra* note 82, at *62; Lobel, *supra* note 15, at 1090.

war.¹¹⁸ Thus, one of the important difficulties of imperfect war is preventing the unintended escalation to general war. It was with this in mind that the power of imperfect war and reprisals was expressly given to Congress.¹¹⁹ The War Clause was designed to ensure that Congress would have the power to initiate all hostilities—to prevent presidential war-making loopholes.¹²⁰

Thus, the difference between imperfect and perfect war is that in an imperfect war, the President's actions must be strictly confined to those actions which have been affirmatively authorized by Congress. The textual anchor to this concept is provided by the Constitution's Marque and Reprisal Clause. As mentioned earlier, reprisals are intricately connected with the theory of imperfect war.¹²¹ Just as the totality of the War Clause functions as loophole prevention—prohibiting the President from initiating any type of hostilities—the Marque and Reprisal Clause provides the underlying support to this claim. Letters of Marque and Reprisal, in the sixteenth and seventeenth centuries, were issued by sovereigns to “‘particular persons’ to seek recompense for specific wrongs” or injuries inflicted by a foreign national.¹²² Thus, the authority to act under a letter of marque and reprisal was quite limited in scope and utterly dependent upon the affirmative grant of the sovereign's authority. By the eighteenth century, the concept of marque and reprisal had expanded to encompass a broader range of hostilities short of declared war, admitting for the idea of public reprisals—or reprisals conducted by the state armed forces,¹²³ but the requirement of an affirmative grant from the sovereign had not changed. Burlamaqui stated: “[I]t is plain that none but the sovereign can lawfully use this right, and that the subjects can make no reprisals but by his order and authority.”¹²⁴

The requirement that sovereigns provide definitive, affirmative authority to undertake reprisals continued in the years preceding the drafting of the Declaration of Independence and the Constitution, and this concept became increasingly intertwined with the idea that the President could only act within the scope

118. Lobel, *supra* note 15, at 1090 (quoting Albert Gallatin, in 8 ANNALS OF CONG. 1811 (1798)); see BURLAMAQUI, *supra* note 14, at 477 (“[R]eprisals are acts of hostility, and often the prelude or forerunner of a compleat and perfect war”); 1 KENT, *supra* note 82, at *61 (“[B]ut these special letters of marque and reprisal, limited to a specific object, are . . . a species of hostility, an imperfect war, and usually a prelude to open hostilities.”).

119. “‘The making of a reprisal on a nation was a very serious thing’ often leading to war; therefore ‘the right of reprisal is expressly lodged with Congress by the Constitution and not with the Executive.’” Lobel, *supra* note 15, at 1091 & n.260 (quoting Thomas Jefferson, Op. Sec’y of State (May 16, 1793), reprinted in 7 J. MOORE, A DIGEST OF INTERNATIONAL LAW 123 (1906)).

120. See *supra* section II.E; see also Jules Lobel, “Little Wars” and the Constitution, 50 U. MIAMI L. REV. 61, 70 (“The Marque and Reprisal Clause was inserted in Article I to ensure that lesser forms of hostilities came within congressional power.”).

121. BURLAMAQUI, *supra* note 14, at 475 (“By reprisals then we mean *that imperfect kind of war.*”); see *supra* notes 15–18 and accompanying text.

122. Lobel, *supra* note 15, at 1043.

123. *Id.* at 1045–46.

124. See BURLAMAQUI, *supra* note 14, at 477.

and framework provided by Congress.¹²⁵ This explains why the Supreme Court's early opinions found that the power of imperfect war was expressly lodged with Congress and that in a perfect war a President could not act beyond the authority granted to him by Congress. The power of imperfect war is integrally connected with the power to "Issue Letters of Marque and Reprisal,"¹²⁶ although it is not identical.¹²⁷ Justice Washington in *Bas* explicitly connected the idea of the reprisal's limited authority with imperfect war, saying "this is more properly termed *imperfect war*; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission."¹²⁸ In *Little v. Barreme*, Chief Justice Marshall took the connection between imperfect wars, reprisals, and presidential powers the last step by applying this framework to the President.¹²⁹ He stated, "A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution."¹³⁰ Thus, the President can act with full authority within the scope of hostilities Congress has authorized, but he can go no further in an imperfect war—" [Congress] authorized certain measures of hostility: but no citizen could go one step beyond what was authorized."¹³¹

In contrast, in a perfect war, the hostilities are of indefinite scope, and the permitted means are governed only by the war's goal, the Constitution, and the Law of War. As the goals of a perfect war are large—such as acquisition or control of large amounts of territory, control of a country's government, or authority over a country's population—the specific operations cannot be easily defined or limited by Congress.¹³² Thus, broad discretion, by necessity, is given to the President as Commander-in-Chief to strategize and wage the war.

The level of discretion the President is given to wage the war is closely connected to the legal status of a perfect war or an imperfect war. Professor

125. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804).

126. U.S. CONST. art. I, § 8, cl. 11.

127. For the argument that the idea of imperfect war and reprisals are related but not identical, see discussion *supra* notes 62–74.

128. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (Washington, J., writing *seriatim*).

129. *Little*, 6 U.S. (2 Cranch) at 170.

130. *Id.*

131. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 16–17 (1801).

132. Examples of United States involvement in perfect wars in the last century include: the first and second World Wars where the battlegrounds were vast portions of Europe in World War I and portions of Europe, Asia, and Africa in World War II. The Korean, Vietnam, Gulf, Afghanistan, and Iraq Wars were undeclared perfect wars where control of the territory of a country and the country's government were at issue. See Treanor, *supra* note 8, at 702 & nn.40–41 (Korea was an undeclared major war); sources cited *infra* note 151 (Vietnam was undeclared major war). See generally Sidak, *supra* note 7 (Gulf War was undeclared major war); see discussion *infra* note 175 (the war in Iraq is an undeclared perfect war). In short, perfect wars are those conflicts that one would normally term a "war."

Eagleton aptly notes that “[t]he declaration of war creates the legal status of [perfect] war.”¹³³ Chancellor Kent in his famous *Commentaries on American Law* noted several consequences that accompany the legal status of war. For example, all citizens of the enemy may be ordered to depart the territory,¹³⁴ property of the enemy in the country may be liable to seizure and confiscation,¹³⁵ and there is an “absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries”¹³⁶ and between one’s allies and the enemy.¹³⁷

The most important consequence of the legal status of perfect war, however, is that the President has much more discretion to wage a perfect war. In a limited war, the President’s actions are confined by the laws that Congress has specifically authorized; in a perfect war, the President must conform only to the broad mandates of the Law of War. In this vein, Justice Chase stated:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.¹³⁸

Thus, as with letters of marque and reprisal, in an imperfect war the President must strictly obey the guidelines of his authority delegated by Congress.

Although it has been argued that the President’s Commander-in-Chief power allows him to initiate hostilities short of full-blown war without Congress’s permission,¹³⁹ the Commander-in-Chief power is merely self-explanatory; it is the power to be the highest general of the United States. Hamilton assured his readers that the power of Commander-in-Chief “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy.”¹⁴⁰ As the highest general, the President would be in charge of battlefield tactics, and in a perfect war he would

133. Eagleton, *supra* note 10, at 21. Eagleton rejects the illogical assertion that because a declaration of war creates the legal status of a perfect war, that a perfect war cannot exist without a declaration. *Id.* Perfect wars can, and have, existed apart from a declaration. For an analysis of the telltale signs of a perfect war and how it exists without a formal declaration of war by Congress, see *infra* section III.B.2.

134. 1 KENT, *supra* note 82, at *56–57.

135. *Id.* at *59–60.

136. *Id.* at *66.

137. *Id.* at *69.

138. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J., writing *seriatim*) (emphasis added). Of course, in limited hostilities, the President must still obey the laws of armed conflict to the extent they apply. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (noting that in general hostilities the general laws of war apply and that in partial hostilities, the laws of war “so far as they actually apply to our situation, must be noticed”).

139. See generally Yoo, *supra* note 102, at 167 (arguing that the Commander-in-Chief power gives the President authority to initiate hostilities).

140. THE FEDERALIST NO. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

be in charge of war strategy to defeat the enemy or achieve the overall goal set by Congress.¹⁴¹ In short, the President would conduct the war.¹⁴² Moreover, the President's power would be much inferior to the British monarch; the President would not have the power to declare war or to raise or regulate the military.¹⁴³ In this vein, Madison stressed that the Commander-in-Chief power *did not* include the power to "commence" a war.¹⁴⁴ Thus, the Commander-in-Chief power does not increase the President's power to initiate hostilities. Especially in an imperfect war, Congress has the duty to clearly define the extent, goals, and means of operations. And similarly, the President has a duty to follow that municipal law,¹⁴⁵ and as Commander-in-Chief must carry out those instructions and not overstep the authority delegated to him.

2. Telltale Signs of a Perfect War

Congress has the *duty* to declare war in a perfect war in order to inform citizens and allies of their rights and obligations, to justify the cause of the war to society in general, and to recognize the legal status of a perfect war, including the delegation to the President of broad authority to wage the war.¹⁴⁶ Thus, for a perfect war to be *constitutional*, it must be *declared*. However, an *unconstitutional* perfect war can exist without a declaration. To hold the opposite—that a perfect war can exist only through a declaration of war—runs into many logical problems.¹⁴⁷ There are telltale signs of a perfect war that should trigger a declaration. In an imperfect war the "public tranquillity" is undisturbed, but "a perfect war, is that which entirely interrupts the tranquillity of the state."¹⁴⁸ Several telltale signs of perfect war, then, are vast levels of troop deployments, the destruction of cities or societal infrastructure, a large number of casualties anticipated on either side, and the expected duration of the war.¹⁴⁹ Likewise, seeking to gain control of a country's government is a fundamental disruption of

141. John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1387 n.32 (1988).

142. See ELY, *supra* note 27, at 5.

143. THE FEDERALIST NO. 69 (Alexander Hamilton); see Berger, *supra* note 104, at 35.

144. Ely, *supra* note 141, at 1387 n.32 (quoting 6 THE WRITINGS OF JAMES MADISON 148 (G. Hunt ed., 1906)).

145. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J., writing *seriatim*).

146. See *supra* sections III.A.1, III.B.1.

147. See Eagleton, *supra* note 10, at 21.

148. BURLAMAQUI, *supra* note 14, at 475.

149. In defining the contours of perfect war, it is important to note that a perfect war is not equivalent to an unlimited or total war. Roger Chickering states that in total war "[t]heaters of operations span the globe; the scale of battle is practically limitless. Total war is fought heedless of the restraints of morality, custom, or international law . . . Total war requires the mobilization not only of armed forces but also of whole populations." Roger Chickering, *Total War: The Use and Abuse of a Concept*, in *ANTICIPATING TOTAL WAR: THE GERMAN AND AMERICAN EXPERIENCES, 1871–1914*, at 13, 16 (Manfred F. Boemke et al. eds., 1999). However, Professor Yoo incorrectly equates perfect and total war. He says:

A declared "war" bore a specific meaning which we today would associate with total war. Burlamaqui called such wars "perfect" wars because they "entirely interrupt the tranquility of

society that would qualify as a perfect war. Indeed, Senator Boren pointed to just these factors when he correctly argued that the first war in the Gulf was a “war” that *should have been declared*: “[o]rdering more than 400,000 American troops into battle to restore the previous government in Kuwait is no gray area. Clearly if the constitutional provision requiring Congress to declare war is to have any meaning at all, it is applicable to this situation.”¹⁵⁰ Professor Ely pointed out similar factors in arguing that the war in Vietnam was a general war.¹⁵¹

One could argue that Congress could not possibly know these factors in advance of the war. How could Congress recognize a perfect war in advance and declare war based on these factors? Would not the President be able to incrementally escalate to a unilateral and undeclared perfect war from congressional authorization of an imperfect war?¹⁵² These questions merely underscore the importance of congressional control over imperfect wars. If Congress has not declared war, it can still initiate limited hostilities, but the scope must be narrow and the President’s discretion should be bound. Thus, any escalation that might lead to a more general war would need to be *congressionally approved*.¹⁵³ This is why the War Clause as loophole prevention is important—

the state, and lay[] a foundation for all possible acts of hostility.” “Imperfect” wars were less than total wars, like the covert or limited wars, such as the Vietnam and Korean conflicts.

Yoo, *supra* note 102, at 248 (quoting a different, though substantively identical translation of BURLAMAQUI, *supra* note 14, at 475). Although Burlamaqui said that perfect wars laid the *foundation* for total wars, he did not say that just because war is declared that the war necessarily is without limit or constitutes what we would call a total war. Rather, Burlamaqui specifically rejected this argument. Wars, even though declared, had to be limited by their just ends: “[E]very thing which has a connection morally necessary with the end of the war, is permitted, and no more [I]t would not be just, that, under a pretence of defending our right, we should think every thing lawful, and proceed, without any manner of necessity, to the last extremity.” BURLAMAQUI, *supra* note 14, at 487. Moreover, the scope of the wars in Korea and Vietnam was quite expansive; hundreds of thousands of people lost their lives. It stretches the term “limited” to incredulity to say that Vietnam and Korea were limited conflicts. *See* Sidak, *supra* note 7, at 39–40.

150. *See* Sidak, *supra* note 7, at 62–63 (quoting 137 CONG. REC. S169 (daily ed. Jan. 10, 1991) (statement of Sen. Boren)). Sidak also pointed out that early estimates of Iraqi casualties were between 50,000 and 150,000; he denied that the Persian Gulf War could be characterized as a limited war. *Id.* at 63.

151. ELY, *supra* note 27, at 13. Ely pointed out that there were 536,000 troops in Vietnam, it was the longest American war, the second most expensive, the fourth most costly in American lives, and over one million Vietnamese soldiers were killed. *Id.*; *see also* Alexander M. Bickel, *Congress, the President and the Power To Wage War*, 48 CHI.-KENT L. REV. 131, 135 (1971) (noting similar factors and stating that Vietnam “was really war”).

152. In other words, conflicts may seem small initially and then grow to the scale of perfect wars. For instance, in Vietnam the initial deployment of American military advisors incrementally escalated into the perfect war in Vietnam. *See generally* GEORGE C. HERRING, *AMERICA’S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950–1975* (4th ed. 2002).

153. This seems to be a weakness in Professor Sidak’s argument. He argues that Congress should declare war, but reasons that the President can initiate limited hostilities. However, this has been the usual end-run around the congressional power to declare war in the past as the President continues to escalate. *See* Sidak, *supra* note 7, at 60 (“Saying that Congress has the power to authorize limited war does not necessarily imply that it holds that power exclusively.”).

Congress must always approve hostilities, and the Law of War must always be obeyed to the extent it applies. And even if it is not readily apparent at the beginning of a conflict, when it becomes clear that there is a perfect war, either because of the large number of troops needed or the large amount of territory at issue, Congress has a duty to declare war.

Thus, imperfect wars and perfect wars differ in several important ways. Most importantly, they differ in the level of discretion that Congress grants the President to wage the war. In a perfect war the President's discretion is limited only by the Constitution and the Law of War, whereas in an imperfect war the President is strictly bound by the limits drawn by Congress. The difference in the level of discretion granted is connected to the legal status of the war. In an imperfect war, the regular U.S. municipal (that is, congressional) laws apply, but in a perfect war, only the Law of War governs. Finally, the scope of the war differs. An imperfect war targets the individuals who have wronged the United States and pursues limited objectives. In a perfect war, on the other hand, the goals of the conflict are large, such as control over large territories or control over a population or government.

IV. THE "IMPERFECT WAR" ON TERROR

Burlamaqui and the theory of imperfect war may seem far removed from the present day—a theory apt only for history or academia. Yet, this theory as it was embodied in the Constitution, remains crucial today in determining the appropriate constitutional role for Congress and the President in prosecuting military conflicts such as the War on Terror. On the evening of September 11, 2001, while the nation was still reeling from the terrorist attacks on the World Trade Center and the Pentagon earlier that day, the President declared the United States was in a “war against terrorism.”¹⁵⁴ Since that time, much has changed. The President authorized the capture and trial of terrorists in the name of the War on Terror and created the NSA wiretap program in the name of the War on Terror. However, the legal status of the War on Terror remains unclear. Many argue that the War on Terror is not a “real” war, as no country is a clear enemy, there is no “precise geographical location” and most of the targets are not military personnel, but civilians.¹⁵⁵ Some commentators, such as Professor Ackerman of Yale University, have argued that the “‘war on terrorism’ is merely a metaphor without decisive legal significance . . . like the ‘war on drugs’ or the ‘war on crime.’”¹⁵⁶ Others, such as Professors Bradley and Goldsmith of Harvard University, have firmly disagreed, claiming that the War on Terror is really the equivalent of a declared war, whereby Congress delegated to the

154. See President George W. Bush, Statement by the President in His Address to the Nation (Sept. 11, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

155. See Bradley & Goldsmith, *supra* note 5, at 2049.

156. Ackerman, *supra* note 4, at 1034. Professor David Cole of Georgetown University Law Center expressed a similar sentiment. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958 (2002).

President the full panoply of war powers.¹⁵⁷

This Part argues that the War on Terror is really an imperfect war; therefore, the President can only act pursuant to a direct, affirmative grant of authority by Congress. As the President did not receive an affirmative grant regarding the NSA wiretap program until August 5, 2007, the program was unconstitutional on separation-of-powers grounds until that date.¹⁵⁸ This Part first asks whether war can be declared on non-state actors at all, answering in the affirmative. Second, although war can be declared against non-state actors, this Part finds that Congress did not declare the War on Terror. Third, this Part argues that the War on Terror does not fit the profile of a perfect war in any event, and that the War on Terror is an imperfect war that is similar to a series of reprisals. Fourth, this Part argues that because the War on Terror is an imperfect war, Congress must grant the President definite, affirmative authority to act. Finally, this Part analyzes the NSA wiretap program under the *Youngstown* and imperfect war frameworks and concludes that the imperfect war framework is more satisfactory than the *Youngstown* framework. Under the imperfect war framework, it must be concluded that the NSA wiretap program was unconstitutional.

A. CAN WAR BE DECLARED AGAINST NON-STATE ACTORS?

In determining the level of discretion that the President may exercise pursuant to a congressional delegation of authority, the first question that arises is whether it is possible to declare war against non-state actors at all.¹⁵⁹ Traditionally, only nation-states engaged in perfect war. Yet, it seems probable that perfect war could be declared against non-state actors. The function of war is not to alert the foreign state as much as it is to announce to one's own citizens the status of war, to declare that the cause of war is just to the world in general, and to create the legal status of perfect war.¹⁶⁰ Professors Bradley and Goldsmith argue that the equivalent of a declared war can be fought against non-state actors, and that such wars have been fought in the past.¹⁶¹ Indeed, in *The Washington Post* on September 12, 2001, Robert Kagan, a well-known foreign-relations scholar, beseeched Congress and the American people to declare war against the terrorists: "Congress, in fact, should immediately declare war. It

157. See Bradley & Goldsmith, *supra* note 5, at 2056–62; see also *id.* at 2057 (“[A] declaration of war is not required in order for Congress to provide its full authorization for the President to prosecute a war.”).

158. See Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (amending 50 U.S.C. §§ 1801, 1803, 1805(a)–(c) (2000)). For a discussion of the NSA program, court cases discussing the program, and the importance of the new Protect America Act, see *infra* notes 204–220 and accompanying text.

159. See Cole, *supra* note 156, at 958 (arguing that the War on Terror is not similar to a conventional war in part because “we have declared war on *no nation*”) (emphasis added).

160. See BURLAMAQUI, *supra* note 14, at 484; Eagleton, *supra* note 10, at 21 (“The declaration of war creates the legal status of war.”). For a discussion of the function of a declaration of war, see *supra* notes III.A.1 and III.B.1 and accompanying text.

161. See Bradley & Goldsmith, *supra* note 5, at 2066–67.

does not have to name a country.”¹⁶² He argued that this declaration “would not be pure symbolism.”¹⁶³

B. CONGRESS DID NOT DECLARE WAR

Despite the fact that Congress could have declared war, and despite the cries that it do so, Congress did not declare war on the terrorists that committed the atrocities on September 11, 2001. Although Congress passed the Authorization for the Use of Military Force (AUMF), authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” this joint resolution did not constitute a declaration of war.¹⁶⁴ The AUMF was “[not] even close” to the form or function of past formal declarations of war.¹⁶⁵ The AUMF only authorized the President to use force against nations, organizations, or persons involved with the terrorist attacks and *only to prevent future terrorist attacks*.¹⁶⁶ This vague, but limited, authorization did not create the legal status of war, triggering the President’s full war powers. The AUMF “does not purport to be a declaration of war,” and the “word ‘war’ is absent” from the AUMF except in the War Powers Resolution section.¹⁶⁷

Indeed, Congress understood quite clearly that it was not declaring war. The vast majority of Representatives that spoke in the debate on the AUMF admitted this. Representative Conyers applauded that there was no declaration of war: “By not declaring war, the resolution preserves our precious civil liberties. This is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the President to apprehend ‘alien enemies.’”¹⁶⁸ Representative Barr from Georgia put it perhaps most simply:

[W]e ought to be here this evening debating a declaration of war. Somebody once said that if it walks like a duck, if it quacks like a duck, if it looks like a duck, then it is a duck. This is war. The President has said it is war The American people know it is war. There is one way and one way only, Mr. Speaker, to respond to acts

162. Kagan, *supra* note 3, at A31. Robert Kagan is a member of the Carnegie Endowment for International Peace and has written extensively in the foreign relations field. See Robert Kagan—Carnegie Endowment for International Peace, http://www.carnegieendowment.org/experts/index.cfm?fa=expert_view&expert_id=16&more=1#articles (last visited Jan. 29, 2008).

163. *Id.*

164. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter 2001 AUMF]; see Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L.J.* 1259, 1284 (2002).

165. Katyal & Tribe, *supra* note 164, at 1284 (noting that “[n]othing even close” to the World War II declaration of war “is present today”).

166. *Id.* at 1284–85.

167. *Cf.* Sidak, *supra* note 7, at 46 (using these words to describe the 1991 Iraq Resolution passed by Congress before the Gulf War, Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) [hereinafter 1991 AUMF], the wording of which is similar to the AUMF).

168. 147 *CONG. REC.* H5638, H5680 (daily ed. Sept. 14, 2001) (statement of Rep. Conyers).

of war, and that is to declare war. Give the President the tools, the absolute flexibility he needs under international law . . . to ferret these people out wherever they are, however he finds them, and get it done as quickly as possible . . . I urge my colleagues to keep that in mind and to support a declaration of war above and beyond this power that we will give the President this evening.¹⁶⁹

And although some Representatives did maintain that Congress was declaring war,¹⁷⁰ it is revealing that the words “declare war” or “declaration of war” were used twenty-six times by representatives in the debates, including the Representatives that argued that the resolution had declared war, but those words are conspicuously missing from the resolution itself.¹⁷¹ Congress knew how to declare war and grant the President full authority if it wanted to. Congress’s limited grant of authority to the President to act and the Representatives’ own words confirm that the AUMF was not a declaration of war.

C. THE WAR ON TERROR LOOKS LIKE AN IMPERFECT WAR, NOT A PERFECT WAR

Even yielding to the argument made by Professor Koh that there is nothing talismanic about the words “declare war,”¹⁷² the War on Terror does not fit the profile of a perfect war. The AUMF limited hostilities specifically to the prevention of terrorist attacks, and Congress resisted granting the President too much authority to prosecute the hostilities.¹⁷³ Moreover, the War on Terror is targeted at the specific terrorist organizations that mounted the terrorist attacks, aiming at bringing these terrorists to justice and dismantling these organizations.¹⁷⁴ Even though the wars in Iraq and Afghanistan were perfect wars, the War on Terror in itself does not involve control over a country’s territory or government, nor does it involve the large numbers of troops characteristic of

169. *Id.* at H5653 (statement of Rep. Barr); *see also id.* at H5672 (statement of Rep. Lee) (arguing that Congress should not abdicate its duty by “subverting and circumventing the Constitution of the United States”); *id.* at H5674 (statement of Rep. Oxley) (“While it is not a technical declaration of war . . .”); *id.* at H5662 (statement of Rep. Davis) (“Although S.J. Res. 23 is not a formal declaration of war . . .”).

170. For instance, Rep. Tanner argued that “[w]e are declaring war against . . . terrorism,” *id.* at H5653, and Rep. Nadler said that “[t]he Constitution gives Congress the awesome power to declare war Tonight we do just that,” *id.* at H5671.

171. *See generally* 147 CONG. REC. H5638 (daily ed. Sept. 14, 2001) (various representatives using the words “declare war” or “declaration of war” twenty-six times). It is possible that in a document fully functioning as a declaration of war and granting the President full war powers, the words “declare war” could be absent. In fact, the Declaration of Independence could be such a document—it does not use the words “declare war” anywhere in the text. However, the fact that these words are absent in the AUMF is one factor showing that the AUMF was not a declaration of war, *see Sidak, supra* note 7, at 46.

172. *See* Koh, *supra* note 7, at 125–32. Professor Koh, in a *reductio ad absurdum* argument, says that “[t]o argue that Congress may only approve war by formal declaration makes about as much sense these days as a claim that Congress may only approve an international commitment by a treaty ratified by two-thirds of the Senate.” *Id.* at 126. Query whether it is actually so absurd that these commitments should be ratified by two-thirds of the Senate as required by Article II.

173. *See* 2001 AUMF, *supra* note 164; Katyal & Tribe, *supra* note 164, at 1284–85.

174. *See* 2001 AUMF, *supra* note 164 (“[T]he 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 . . .”).

perfect wars.¹⁷⁵

Rather than being a perfect war, the War on Terror is an imperfect war. Indeed, in many ways the war seems to fall into the classic category of imperfect war—reprisals. Burlamaqui defined reprisals:

By reprisals then we mean that imperfect kind of war, or those acts of hostility which sovereigns exercise against each other, or, with their consent, their subjects, *by seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice; with a view to obtain security, and to recover our right, and in case of refusal, to do justice to ourselves, without any other interruption of the public tranquillity.*¹⁷⁶

175. For a discussion of the “telltale signs” of perfect wars, see *supra* section III.B.2.

One could object to the fact that I exclude from my definition of the War on Terror the two actions that do not fit my definition—Iraq and Afghanistan. However, this is done for analytical purposes. First, Afghanistan and Iraq are perfect wars, and Congress should have declared war for both of these “traditional war” operations. Second, Iraq probably does not fit within the broader War on Terror at all. Congress separately authorized the War in Iraq, implying that Iraq did not fall within the AUMF. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002). And although one of the President’s main justifications for the War in Iraq was to fight al Qaeda and terrorism, *see, e.g., id.*, it is generally agreed that Iraq and the Hussein regime were not connected with al Qaeda and the terrorist networks that carried out the attacks on the World Trade Center—the objects of the War on Terror. *See, e.g.,* R. Jeffrey Smith, *Hussein’s Prewar Ties to Al-Qaeda Discounted; Pentagon Report Says Contacts Were Limited*, WASH. POST, Apr. 6, 2007, at A1. And although Afghanistan is rightly included in the broader War on Terror, the scope of the effort, the large number of troops sent, and the goals of securing control over a country and change in government convince me that the War in Afghanistan is of a different nature than the rest of the War on Terror; it is a perfect war and should have been declared.

Thus, perhaps the War on Terror in its broadest definition is not entirely an imperfect war as it is a conglomeration of actions worldwide. However, in this Note, I use the term “War on Terror” to encompass the range of actions outside the traditional war context—the range of actions that have prompted scholars to say that the War on Terror is not a real war. *See* discussion of sources notes 155–56 and accompanying text. These scholars also implicitly exclude Iraq and Afghanistan when they define the War on Terror this way. *See, e.g.,* David Cole, *supra* note 156, at 958 (“This war [on terrorism] . . . is more akin to the metaphorical (and indefinite) ‘war on drugs’ or ‘war on crime’ than to a conventional war. As yet, it finds no nation on the other side. We are fighting an international criminal organization, Al Qaeda, and those who aid it . . .”).

Although I focus on the NSA wiretap program as an example of a facet of the War on Terror, this War encompasses many more actions that make studying the NSA program vital. The military commissions and detentions, especially of prisoners not caught in Iraq or Afghanistan, would be part of the pure War on Terror. Although we do not know how many prisoners were caught in other countries, many prisoners were from countries with which we are at peace. *See* *Boumediene v. Bush*, 476 F.3d 981, 1007 (D.C. Cir. 2007) (Rogers, J., dissenting) (“These detainees are citizens of friendly nations—Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and Yemen—who were seized in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia.”). Finally, we do not know many of the actions taken in the War on Terror because many of these actions are secret; we also do not know which of these secret actions have been authorized by Congress. This is why the NSA wiretap program functions as a good example—it is not inherently tied to the perfect wars in Iraq and Afghanistan, it is connected to the goals of the War on Terror, and some of the information about the program is public knowledge because of the *New York Times* leak. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16 2005, at A1, and the discussion of the leak *infra* notes 204–08 and accompanying text.

176. BURLAMAQUI, *supra* note 14, at 475 (emphasis deleted).

The similarities between reprisals and the United States' actions after the terrorist attacks of September 11th are apparent. The terrorist attacks on the World Trade Center and the Pentagon were no doubt a grievous injury inflicted "during time of peace."¹⁷⁷ Following this injury, the United States issued an ultimatum to the Taliban government in Afghanistan to "hand over" the terrorists for justice.¹⁷⁸ President Bush stated this demand in front of a joint session of Congress:

[T]onight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land . . . Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist . . . Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion.¹⁷⁹

In that "case of refusal,"¹⁸⁰ the United States began to systematically pursue and "seiz[e] the persons"¹⁸¹—the terrorists—who had caused this injury, both in order "to do us justice"¹⁸² and try the terrorists for their crimes, and "to obtain security"¹⁸³ by preventing these people from attacking the United States again.¹⁸⁴ And for most of the battlegrounds of the War on Terror, the United States sought to achieve these goals "without any other interruption of the public tranquility"¹⁸⁵ by seizing the people in countries where they were found, but without

177. Michael J. Kelly, *Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 31 (2003) (quoting ANTHONY CLARK & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 17 (1993), who define reprisals as redress for hostilities during times of peace).

178. George W. Bush, Address to a Joint Session of Congress and the American People: Freedom at War with Fear (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>.

179. *See id.*

180. *See* BURLAMAQUI, *supra* note 14, at 475.

181. *See id.*

182. *See id.*

183. *See id.*

184. Indeed, it was clear that this would be what the United States would do. President Bush said: "[M]y administration is determined to find, to get them running and to hunt them down, those who did this to America . . . [T]he prime suspect's organization is in a lot of countries . . ." George W. Bush, Address on the South Lawn upon Arrival: Today We Mourned, Tomorrow We Work (Sept. 16, 2001), <http://www.whitehouse.gov/news/releases/2001/09/print/20010916-2.html>; *see also* Kelly, *supra* note 177, at 21 (quoting same). Professor Kelly argues that the Administration "carefully complied with all of the rules of reprisal." *Id.* at 20. However, Kelly found that the reprisal at issue here was the War in Afghanistan. I respectfully disagree. Considering the fight over the entire territory of Afghanistan, the number of troops, and the goal of completely defeating the Taliban regime, it seems more likely that the War in Afghanistan is a perfect war. Likewise, I disagree with Kelly that this was a "proportional and necessary response" short of full war. This was war; it was just and necessary, but it was war. However, Kelly is correct to draw the connection between the attacks, the ultimatum on the Taliban, and reprisals.

185. BURLAMAQUI, *supra* note 14, at 475.

waging war on those countries.¹⁸⁶ Indeed, one of the administration's priorities was to encourage the American society and economy to return to normalcy as quickly as possible. On September 16th, President Bush opened his remarks, stating, "Today, millions of Americans mourned and prayed, and tomorrow we go back to work."¹⁸⁷ He stressed that although "this incident affected our economy,"¹⁸⁸ "[o]ur economy will come back."¹⁸⁹ And he urged that although New York City was suffering from the attacks, "[p]eople will be amazed at how quickly we rebuild New York."¹⁹⁰ The terrorist attacks and the United States' response mirror a classic case of grievous injury and reprisal—the United States sought those specific persons responsible for the attacks to bring them to justice, and to obtain security, without further disrupting the public tranquility.¹⁹¹

D. IN THE WAR ON TERROR—AN IMPERFECT WAR—THE PRESIDENT MUST OBEY CONGRESS

Using the framework of the Constitution and Burlamaqui's theory of perfect and imperfect war, it can be surmised that the War on Terror is similar to reprisals, a species of imperfect war.¹⁹² Unlike in a declared, perfect war, where Congress grants the President full discretion to conduct hostilities as he sees fit, in an imperfect war, the President must have affirmative authority from Congress to act—he cannot "go one step beyond what was authorized" by Congress.¹⁹³ The President's conduct in an imperfect war is governed by the "municipal laws"¹⁹⁴ of Congress, and the President has power over the military only as far as the instructions he gives are "strictly warranted by law."¹⁹⁵

But in the War on Terror, the AUMF provided insufficient guidance to the President. As the AUMF was neither a declaration of war, nor the equivalent of a declaration of war,¹⁹⁶ the AUMF was strictly a statute—municipal law—in an imperfect war. Congress needed to strictly define and limit what the President was authorized to do, but the AUMF did not do this. Rather, the language of the statute was broad and ambiguous. A statute authorizing the President to engage

186. As mentioned earlier, *see supra* note 175, the notable exceptions are Afghanistan and Iraq—these were perfect wars.

187. Bush, *supra* note 184.

188. *Id.*

189. *Id.*

190. *Id.*

191. *See* BURLAMAQUI, *supra* note 14, at 475.

192. *Id.* ("By reprisals, we mean *that imperfect kind of war . . .*").

193. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 17 (1801).

194. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J., writing *seriatim*) ("[B]ut if a partial war is waged, its extent and operation depend on our municipal laws.").

195. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804). Chief Justice Marshall, writing the opinion of the Court, stated: "A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution." *Id.* (emphasis deleted).

196. *See* discussion *supra* section IV.B. The AUMF was not a declaration of war because it limited the President's use of force to the prevention of "any future acts of international terrorism." *See* 2001 AUMF, *supra* note 164.

in limited war or to take steps within a limited war should “restrict the resources and methods of force that the President can employ, . . . restrict the targets of the authorization, . . . have narrowly defined purposes, . . . [and] have procedural or timing restrictions.”¹⁹⁷ While Congress has enacted many such statutes that were sufficiently definite and that granted the President appropriate authority—such as the Aviation and Transportation Security Act¹⁹⁸ and the PATRIOT Act¹⁹⁹—the AUMF fails this test.

The fact that the AUMF was neither a declaration of war nor a definite and limited statutory grant of authority to the President creates significant problems concerning the President’s authority vis-à-vis Congress during the War on Terror. The President has relied on the AUMF as authorization for questionable acts in the War on Terror, including: the detention of an American citizen captured in Afghanistan,²⁰⁰ the order for the creation of military tribunals to try suspected terrorists,²⁰¹ and more recently, the NSA wiretapping scandal.²⁰²

Among these acts, the NSA wiretap program provides a useful device to test the President’s authority to act in the “Imperfect War” on Terror. Unlike the detention of American citizens or the creation of military tribunals, the NSA

197. Bradley & Goldsmith, *supra* note 5, at 2072. Bradley and Goldsmith use this language to describe past limited authorizations to use force as opposed to declarations of war. *See id.*

198. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

199. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001); *cf.* Katyal & Tribe, *supra* note 164, at 1276 & n.66 (arguing that Congress enacted the Aviation and Transportation Security Act, the PATRIOT Act, and other legislation speedily and according to the President’s requests after September 11th).

200. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, the government argued that the AUMF provided explicit authorization to detain Hamdi, a U.S. citizen and “enemy combatant,” indefinitely, *id.* at 510, despite the language of 18 U.S.C. § 4001(a) (2000), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” *Id.* at 515.

201. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774–75 (2006). In *Hamdan*, the government argued that the Court should find “overriding authorization for the very commission that has been convened to try Hamdan.” *Id.* at 2775.

The Supreme Court dealt with the detention of U.S. citizen enemy combatants in *Hamdi*. There, the plurality and Justice Souter, writing the concurring opinion, disagreed over whether the AUMF authorized the detention of enemy combatants. *See Hamdi*, 542 U.S. at 547 (Souter, J., concurring) (“Next, there is the Government’s claim, accepted by the plurality, that the terms of the [AUMF] are adequate to authorize detention of an enemy combatant But . . . [the AUMF] never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power”). The Supreme Court heard argument over the use of military tribunals to try suspected terrorists in *Hamdan*, deciding that the military tribunals violated the law of war and the Uniform Code of Military Justice. The Court rejected that the AUMF extended the President’s powers, finding “nothing in the text or the legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.” *Hamdan*, 126 S. Ct. at 2775. Thus, the Supreme Court has not squarely addressed to what extent the AUMF extends the President’s power, but seems at least to reject that the AUMF functions similarly to a declaration of war, delegating large amounts of power to the President.

202. *See infra* notes 204–20 and accompanying text.

program is not centrally tied to the traditional war in Afghanistan.²⁰³ Instead, the NSA program is more representative of the amorphous battlefield of the War on Terror. Thus, the NSA program provides a useful study of presidential action during the War on Terror and how the War on Terror relates to the imperfect war scheme.

The NSA program was introduced to the American public abruptly on December 16, 2005. The *New York Times* informed America of a top-secret program whereby President Bush authorized the NSA to target certain phone numbers in the United States.²⁰⁴ Under this program, the NSA monitored international communications made from those phone numbers without obtaining a warrant issued by any court.²⁰⁵ This controversy was particularly heated because in response to wiretapping abuses during the Vietnam War, Congress had passed the Foreign Intelligence Surveillance Act (FISA). This Act created the Foreign Intelligence Surveillance Court (FISC), over which several federal district judges preside, in order to review classified information and issue secret warrants. Warrants are to be issued only if the judge finds that there is

probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power . . . and . . . each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.²⁰⁶

The standard of proof in the FISA courts is low, requiring only probable cause that the target is “an agent of a foreign power.” The court had only turned down a small number of applications in the past, and the court could grant emergency approval for wiretaps within hours.²⁰⁷ The fact that the NSA program seemed to be flouting the very scheme that Congress had enacted—a successful, efficient, pro-government scheme—outraged opponents of the program even more. Indeed, the information the *New York Times* article conveyed “roiled American politics ever since its publication,”²⁰⁸ culminating in a suit filed by the ACLU as representative of wronged journalists, lawyers, scholars, and others in the Eastern District of Michigan.²⁰⁹ The court found that the NSA program violated the First and Fourth Amendments and the Separation of Powers doctrine and issued a permanent

203. Both Hamdan and Hamdi were arrested during the war in Afghanistan. Thus, although detention of terrorists and combatants and the creation of military tribunals are key aspects in the War on Terror, the Supreme Court cases that have been handed down arose out of the traditional battlefield of a perfect war.

204. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

205. *Id.*

206. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1805(a)(3)(A)–(B) (2000).

207. Risen & Lichtblau, *supra* note 204, at A1.

208. Gabriel Schoenfeld, *Has the New York Times Violated the Espionage Act?*, COMMENTARY, Mar. 2006, at 23, 23.

209. *ACLU v. NSA*, 438 F. Supp. 2d 754, 767 (E.D. Mich. 2006).

injunction ordering the President to immediately terminate the program.²¹⁰

However, the issue remained hotly contested and unresolved after the Eastern District of Michigan's opinion. In October 2006, shortly after the Eastern District's opinion issued, the Sixth Circuit granted the government's motion for a stay pending appeal.²¹¹ But in early January, the Bush administration announced that it would submit electronic surveillance that was previously conducted under the NSA program to the FISC.²¹² Because of the administration's announcement, in its appeal to the Sixth Circuit, the government encouraged the court to dismiss the case for intervening mootness.²¹³ The Sixth Circuit declined that invitation, yet nevertheless reversed the Eastern District of Michigan.²¹⁴ It reached neither the question of the constitutionality of the program nor the question of mootness, but rather found that the plaintiffs lacked standing to bring the constitutional challenges.²¹⁵ But the essential go-ahead to the government from the Sixth Circuit was countered by secret rulings from the FISC in March and May 2007, which required the government to obtain warrants from the FISC for surveillances, overturning the NSA wiretap program on statutory grounds.²¹⁶

In July 2007, the surveillance court's orders became public, and the Bush Administration asked Congress to amend FISA to allow for statutory authority to conduct the warrantless surveillance program.²¹⁷ Congress yielded to White House pressures, and on August 5, 2007, the Protect America Act of 2007 became law,²¹⁸ possibly granting more authority to the President than the President claimed under the prior program.²¹⁹

The following discussion analyzes the NSA wiretap program as it was conducted without congressional authority prior to August 5, 2007. Although Congress passed the Protect America Act of 2007, the constitutional controversy is far from resolved, making the NSA program an improved case study of the Imperfect War on Terror. The President, while seeking congressional approval,

210. *Id.* at 780, 782.

211. *NSA v. ACLU*, 467 F.3d 590 (6th Cir. 2006).

212. *ACLU v. NSA*, 493 F.3d 644, 651 & n.4 (6th Cir. 2007), *cert. denied*, No. 07-468, 2008 WL 423556 (U.S. Feb. 19, 2008); Dan Eggen, *Court Will Oversee Wiretap Program; Change Does Not Settle Qualms About Privacy*, WASH. POST, Jan. 18, 2007, at A01.

213. *ACLU*, 493 F.3d at 651 n.4.

214. *Id.* at 651 n.4, 687-88.

215. *Id.* The Supreme Court denied the ACLU's petition for certiorari on February 19, 2008. See *ACLU v. NSA*, No. 07-468, 2008 WL 423556 (U.S. Feb. 19, 2008); see also Robert Barnes, *ACLU's Suit Against Wiretapping Is Declined*, WASH. POST, Feb. 20, 2008, at A03.

216. Joby Warrick & Walter Pincus, *How the Fight for Vast New Spying Powers Was Won*, WASH. POST, Aug. 12, 2007, at A01.

217. *Id.*

218. Pub. L. No. 110-55, 121 Stat. 552 (amending 50 U.S.C. §§ 1801, 1803, 1805(a)-(c)); see Ellen Nakashima & Joby Warrick, *House Approves Wiretap Measure; White House Bill Boosts Warrantless Surveillance*, WASH. POST, Aug. 5, 2007, at A01; Joby Warrick & Ellen Nakashima, *Senate Votes To Expand Warrantless Surveillance; White House Applauds; Changes Are Temporary*, WASH. POST, Aug. 4, 2007, at A01 [hereinafter Warrick & Nakashima, *Senate Expands Surveillance*].

219. Warrick & Nakashima, *Senate Expands Surveillance*, *supra* note 218.

has certainly never conceded that such approval was constitutionally *required* either to continue the program in August 2007 or, more importantly, before he initiated the program in 2001 or 2002. Moreover, the amendments to FISA authorized by Congress in August contained a 180-day sunset provision.²²⁰ Thus, it is unclear how the Administration will act if the FISA amendments are allowed to expire. Finally, and most importantly, the NSA program provides a useful example of a secret program in the War on Terror that was unilaterally initiated by the President and conducted for five years without congressional authorization. We do not know what other secret programs remain conducted by the President without the knowledge of Congress or the American people.

E. ANALYZING THE WAR ON TERROR: THE IMPERFECT WAR FRAMEWORK
VERSUS *YOUNGSTOWN*

The NSA wiretapping debate provides a useful example and underscores why the imperfect/perfect war theory provides the correct framework for analyzing the President's authority to take actions pursuant to hostilities. Likewise, as will be analyzed further, this NSA discussion shows why the bedrock case in the Supreme Court's separation-of-powers jurisprudence, *Youngstown Sheet & Tube Co. v. Sawyer*,²²¹ is an insufficient constitutional framework for initiation of hostilities.

Youngstown arose out of the undeclared Korean War.²²² A labor dispute between the steel companies and steel workers threatened to shut down the steel mills.²²³ President Truman, believing that a shortage of steel for armor and weapons threatened national security, directed the Secretary of Commerce to "take possession" of the steel mills to ensure their continued operation, and the Secretary obeyed.²²⁴ The companies brought suit to obtain an injunction against the President's order, and Justice Black, writing for the majority, found that Truman's seizure was unconstitutional.²²⁵

Although Justice Black wrote the opinion for the Court, most of today's jurisprudence and scholarship focuses on Justice Jackson's concurring opin-

220. Protect America Act § 6(c), 121 Stat. 552, at 557. The Senate has approved a bill backed by the White House to make the law permanent, but the House, as of the date of printing, has refused to pass the bill. See Dan Eggen & Michael Abramowitz, *House Defies Bush on Wiretaps; Expiring Law's Fate Is at Issue*, WASH. POST, Feb. 15, 2008, at A01.

221. 343 U.S. 579 (1952).

222. For a discussion of the importance of the fact that the Korean War was undeclared, see *infra* notes 244–47.

223. See *Youngstown*, 343 U.S. at 582–83.

224. See *id.* at 583.

225. See *id.* at 588–89. Justice Black stated that "[t]he President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself." *Id.* at 585. He found that Congress had not authorized the President's actions, but instead had implicitly forbid the settling of labor disputes by seizure when it rejected an amendment that would have allowed the President this authority in the Taft-Hartley Act. *Id.* at 586. And Black likewise rejected the argument that the power to seize the mills could be "implied from the aggregate of [the President's] powers under the Constitution." *Id.* at 587.

ion.²²⁶ Justice Jackson created a three-category system to determine whether a presidential action claimed under the presidential foreign-affairs power was valid. The first category, Jackson states, provides that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.”²²⁷ Next, Jackson creates a second category consisting of a “zone of twilight” where the President and Congress have “concurrent authority” or where the division of power is uncertain.²²⁸ There, “congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility.”²²⁹ Finally, under Jackson’s third category, if the President “takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb for then the President can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”²³⁰

Despite being the premier separation-of-powers analysis in the Court’s modern jurisprudence, Justice Jackson’s framework has several constitutional deficiencies. The imperfect war framework embodied in the Constitution answers these problems more satisfactorily.

1. *Youngstown* Is Inconclusive

First, Jackson’s analysis in *Youngstown* is insufficient because in nearly every separation-of-powers debate the President will be able to point to some statute that shows that he is acting “pursuant to an express or implied authorization of Congress” and that therefore, “his authority is at its maximum.”²³¹ In the same way, the opposing party will nearly always be able to point to another statute that purportedly forbids the President’s actions, and thus proves that the power of the President “is at its lowest ebb.”²³²

This defect is evident in the NSA debate. In the White Paper issued by the Department of Justice on the NSA program, the Department argued that “[t]he AUMF places the President at the zenith of his powers in authorizing NSA activities.”²³³ But of course, those arguing that the NSA program was unconstitutional countered that “[a]ny evaluation of the legality of the [NSA] Program must start from the recognition that the President’s power is at its lowest

226. See, e.g., Berger, *supra* note 104, at 75–81 (discussing Jackson’s concurring opinion in *Youngstown* and ignoring Black’s opinion); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 862–64 (1972) (same); cf. Thomas William France, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH. & LEE L. REV. 1481, 1498 (1994) (relying on Frankfurter’s concurring opinion in *Youngstown* and ignoring Black’s opinion).

227. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

228. *Id.* at 637.

229. *Id.*

230. *Id.*

231. *Id.* at 635.

232. *Id.* at 637.

233. U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 2 (2006) [hereinafter WHITE PAPER].

ebb By enacting FISA, Congress placed the President's authority to intercept the calls and e-mails of people in the United States squarely into Justice Jackson's third category."²³⁴ Judge Taylor, in *ACLU v. NSA*, sided with the plaintiffs, concluding that "FISA is the expressed statutory policy of our Congress. The presidential power, therefore, was exercised at its lowest ebb and cannot be sustained."²³⁵ The problem lies, however, in that here, as in most cases, *both sides'* claims are strong. Congress did authorize the President to "use all necessary and proper force" against those involved in the September 11th attacks, and such a broad statute does seem to lend support to the President's actions.²³⁶ However, FISA also "establish[ed] the *exclusive* United States law governing electronic surveillance in the United States for surveillance purposes."²³⁷ Where the AUMF did not specifically repeal or suspend FISA, it is difficult to determine which statute governs the President's actions.

2. *Youngstown* Is Inflexible

Second, Jackson's opinion, while stressing the flexibility of the President's powers with those of Congress, created too rigid a framework. His framework creates a one-size-fits-all scheme, granting the President too much power in an imperfect war during peace time, and too little power in a perfect war. Jackson states that: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."²³⁸ However, Justice Jackson's distinction depends only on whether Congress has passed any law on the subject, regardless of whether there is peace or whether war has been declared.

The imperfect war framework provides a better framework for a separation-of-powers analysis during hostilities. Under this framework, in an imperfect war, Congress must affirmatively pass a law granting the President authority to use force and must affirmatively pass laws that would allow the President to expand the scope of operations—the President's instructions must be "strictly warranted by law."²³⁹ The President must have affirmative, definite authority to act. But in *Youngstown*, the President has authority to take any action unless Congress has affirmatively passed a law *forbidding* the President to act. "[T]here is a zone of twilight in which . . . congressional inertia, indifference or quiescence may . . . enable, *if not invite*" presidential action.²⁴⁰ For instance, in the NSA debacle, those opposing the NSA program, in accord with *Youngstown*,

234. Plaintiffs' Motion for Partial Summary Judgment at 20, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-CV-10204) [hereinafter Plaintiffs' Motion].

235. *ACLU*, 438 F. Supp. 2d at 778.

236. WHITE PAPER, *supra* note 233, at 2.

237. See Plaintiffs' Motion, *supra* note 234, at 21 (citing S. REP. NO. 95-701, at 47 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 4016).

238. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

239. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804).

240. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (emphasis added).

pointed to FISA as prohibiting the President's actions.²⁴¹ However, assuming FISA had not been passed, the *Youngstown* framework would seem to provide that the NSA program was constitutionally permissible on separation-of-powers grounds. Assuming the NSA program was constitutional on other grounds (that is, that it did not violate the First or Fourth Amendments) the President could secretly create a program granting himself enormous amounts of power *during peace time*. Simply because Congress has not passed a law on every possible contingency upon which the President could act beyond his power, "zone[s] of twilight" inviting the President to act are not thereby created.

Conversely, Jackson accords the President *too little* authority in the event Congress has declared war. It has long been recognized that the President's authority increases even domestically in a declared war.²⁴² Of course, the President must still "faithfully execute the laws" during a time of war. In other words, if Congress specifically directs the President to take a certain action or affirmatively forbids the President to take certain measures in the war effort, the President must obey Congress. However, general legislation passed in peace time should not necessarily constrain the President's action. Jackson ignores this contingency when he says that if a President acts in contradiction to even the implied will of Congress, that the President's action can only be upheld by "disabling the Congress from acting upon the subject."²⁴³ He seems to say that whether in time of peace, *de facto* war, or a declared war, his analysis would not differ.

Justice Frankfurter's concurring opinion is much more satisfying than Justice Jackson's overly simplistic approach, but this opinion has received much less attention than the famous Jackson opinion.²⁴⁴ Frankfurter fleetingly notes the important point missed by Justice Jackson that the President may have more power to act in a declared war than in peace or in a *de facto* war.²⁴⁵ In fact, he distinguishes President Truman's seizure of the steel mills from other, past seizures noting that "[t]he only other instances of seizures are those during the periods of the first and second World Wars."²⁴⁶ He notes that six of Roosevelt's seizures transpired after Congress had declared war and that "reliance on the powers that flow from declared war has been commendably disclaimed by the

241. Plaintiffs' Motion, *supra* note 234, at 21.

242. See *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (noting that although the Secretary of State's regulations prohibiting the issuance of passports to communists were unconstitutional, the situation could be different in a time of war); *Quirin v. Cox (Ex parte Quirin)*, 317 U.S. 1, 25–26 (1942) (emphasizing the broad powers of the President "in time of war and of grave public danger" and of the President as "Commander in Chief with the power to wage war which Congress has declared").

243. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

244. See *ACLU v. NSA*, 438 F. Supp. 2d 754, 777 (E.D. Mich. 2006) ("Justice Jackson's concurring opinion in [*Youngstown*] has become historic.")

245. *Youngstown*, 343 U.S. at 612–613 (Frankfurter, J., concurring).

246. *Id.* at 611.

Solicitor General.”²⁴⁷

Justice Jackson’s opinion in *Youngstown* ignores the differing amounts of discretion that a President has when conducting an imperfect war as opposed to a perfect war properly declared by Congress. And although Justice Frankfurter recognizes this important difference, he gives it too little emphasis, and future courts have clung to Jackson’s description of the separation of powers instead. Jackson’s opinion correctly recognizes that the President’s powers fluctuate relative to actions of Congress; however, his analysis fails to account for whether the situation is one of peace, imperfect war, or a declared and perfect war.²⁴⁸ For Jackson, if Congress has spoken contrary to the President’s desired course of action, the President’s power is at its lowest ebb.

3. *Youngstown* Invites Congressional Punting

Youngstown’s final problem is that it seems to say that the President and Congress can collude to violate the Constitution. This is almost assuredly incorrect. The Separation of Powers doctrine was not designed to protect the spheres of the President’s or Congress’s powers in a vacuum, but rather was designed to protect the American people from tyranny. Madison memorably maintained: “Ambition must be made to counteract ambition . . . [T]he private interest of every individual may be a sentinel over the public rights.”²⁴⁹ The separation of powers between the President and Congress must be maintained so that the rights of the people are not infringed. The War Clause reflects a determination by the Framers that Congress *should* have control over hostilities as a matter of policy. Congressional control requires debate by the people’s representatives; it makes the nation slow to go to war and slow to deprive the people’s liberty. And when a war becomes difficult or a policy is unpopular, Congress as well as the President must defend the policy.

In the NSA program, for example, the President could secretly have asked Congress for authorization for the NSA program. Congress could have held a closed session and secretly have approved or defeated the program. Two things might have occurred. Congress may have decided that this program was bad policy or unconstitutional, refusing to grant the President authority. Or, if Congress had passed the statute, when the program became public (if it became public) Congress would have to defend the program as well, rather than allow the President to solely take the blame. In a democracy, the people’s representatives are in the best position to decide if the people should bear the burden of warrantless wiretapping in order to have the benefit of increased security. If Congress has no say on a program that fundamentally af-

247. *Id.* at 613.

248. As discussed previously, in an undeclared perfect war, the President would have sufficient flexibility, but the war would be unconstitutional on other separation-of-powers grounds, namely, that it violated the constitutional demand that Congress declare war. *See* U.S. CONST. art. I, § 8, cl. 11; *see also* discussion *supra* section III.A.

249. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

fects the rights of Americans, the President could act largely free of accountability. And with a secret program like the NSA program, there is the risk that no one would ever know about it. The imperfect war doctrine, unlike *Youngstown*, requires affirmative congressional permission in an imperfect war in order to protect the separation of powers, American rights, and congressional accountability.

4. The Imperfect War Theory Is Preferable

The theory of imperfect war is preferable to *Youngstown* because it is more consistent with the constitutional framework identified by the Framers and early Supreme Court cases. Under this construction, Congress is always tasked with waging hostilities, whether they are perfect or imperfect wars.

In the imperfect war structure, not only is it clear that Congress alone may authorize hostilities, but the separation of powers between Congress and the President can fluctuate more flexibly and logically. In a perfect war with vast numbers of troops and extended action, the President must have more discretion to wage the war—it would be impossible and inefficient for Congress to dictate the authority of every action in the war. Yet it is important that Congress declare the war—both to “commence” the war and to formally declare it—precisely because perfect wars can be of tragic scope.

On the other hand, in an imperfect war, such as the War on Terror, it is important that Congress strictly define and affirmatively give the President authority to take action in order to protect the liberties of Americans and to ensure that the conflict does not escalate without congressional authorization. The President’s constitutional power goes no further than the “authority to repel force by force *Any thing beyond this* must fall under the idea of reprisals and requires the sanction of that Department which is to declare or make war.”²⁵⁰ Yet, under *Youngstown*, the President has authority to take action in an imperfect war during time of peace unless Congress has passed a statute explicitly or implicitly forbidding the President’s actions. This grants the President too much power and allows Congress and the President to collude to take unconstitutional actions.

The War on Terror strikingly illustrates these problems. In the War on Terror, the President and his opponents focused the debate on the constitutionality of the NSA program on *Youngstown* separation-of-powers grounds. The President argued that Congress had authorized the President’s actions with the AUMF, and the President’s opponents maintained that Congress had forbidden the President’s actions with FISA. However, it is questionable that the President would have the authority to create the NSA program under a separation-of-powers analysis even if FISA had never been passed. With the imperfect war framework, Congress would have to affirmatively pass a statute authorizing the

250. Letter from Alexander Hamilton to James McHenry (May 17, 1798), *reprinted in* 21 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 35, at 461–62 (emphasis altered).

NSA program; congressional silence would not “invite” presidential action.²⁵¹ This is due to the fact that under the perfect/imperfect war framework, in an imperfect war the President’s actions are governed by municipal law and must be “strictly warranted” by that law.²⁵² Indeed, the Commander-in-Chief power amounts “to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy.”²⁵³ Finally, the imperfect war framework reflects the policy embraced by the Framers that in a republic, the people should strongly influence decisions about war through their congressional representatives, and that the United States should be slow to go to war.

The War on Terror is an imperfect, undeclared war, and as Congress had not explicitly authorized the NSA program by statute, it was unconstitutional. The President cannot rely on the vague language of the AUMF for affirmative authority as “the AUMF says nothing whatsoever of intelligence or surveillance.”²⁵⁴ The President would have to ask Congress for statutory authorization or the NSA program would have to cease—it’s that simple. The theory embraced by the Constitution is clear, and it ensures that hostilities will not be quickly waged nor the people’s rights unduly infringed.

CONCLUSION

Although the War on Terror seems to present an entirely new type of hostility, appearances can be deceiving. The War on Terror is simply an imperfect war, and the separation of powers in this conflict should be dictated by the same constitutional principles that the Founders developed. Because the War on Terror is an imperfect war, Congress must affirmatively authorize the President to take action by statute—the President cannot take “one step beyond” what is authorized by Congress.²⁵⁵

The separation-of-powers framework embodied in the Constitution is designed to protect the rights and liberties of Americans from tyranny. “Ambition must be made to counteract ambition [so that] . . . the private interest of every individual may be a sentinel over the public rights.”²⁵⁶ The original design of the separation-of-powers framework was delicately crafted; we should not attempt to create a new model. The NSA wiretap program and the War on Terror provide a warning that liberties are too easily lost. We cannot reject the Constitution or our liberties as just one more “anachronism to be discarded.”²⁵⁷

251. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

252. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804).

253. THE FEDERALIST NO. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

254. *ACLU v. NSA*, 438 F. Supp. 2d 754, 779 (E.D. Mich. 2006).

255. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 16–17 (1801).

256. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

257. *Eagleton*, *supra* note 10, at 19.