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Cover Page Footnote

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A FOURTHEENTH CENTURY SOLUTION TO A TWENTY-FIRST CENTURY PROBLEM: USING QUI TAM LEGISLATION TO LIMIT EXECUTIVE WAR POWER

Nicholas R. Lewis[*]

The United States was founded on the principle that Congress alone has the power to take the nation to war. This founding principle has failed. In its place now stands the modern principle that the Executive holds the power to initiate, wage, and conclude warfare. This modern principle, which is irreconcilable with the intent of America's Founders, is a problem that must be remedied. And while this problem may be most pronounced in the twenty-first century, a possible solution comes from the most unlikely of places: fourteenth century England. In the 1300s, England developed qui tam legislation, a novel legal system of holding government officials accountable. This Note argues that this system, which enabled private citizens to sue officials on behalf of the public, should be used to limit expansive executive war power. Tracing the development of executive war power and the history of qui tam legislation, this Note offers a framework in which presidential war power can be limited through existing qui tam laws or through passing new legislation.

[*] J.D. Candidate, 2023, University of Georgia School of Law; B.A., 2020, University of Georgia. I thank Professor Randy Beck for his guidance and assistance; my study group (Hanna Dunnavant, Emily Johnson, and Carson Masenthin); and my parents, for their never-ending support.

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I. INTRODUCTION

"When Alexander saw the breadth of his domain he wept, for there were no more worlds to conquer."—Hans Gruber[1]

In the winter of 1777, as the war for American independence raged, the highest ranking British officer in American custody, Sir Archibald Campbell, wrote a letter addressing his imprisonment to General George Washington, Commander in Chief of the Continental Army.[2] In his letter, Campbell implored Washington to use "the powers which I have lately understood [have] been reposed in [your Excellency] as dictator" to improve Campbell's situation in captivity, where he received "a treatment more notoriously dishonorable [and] inhuman than has ever existed in the annals of modern war."[3] The dishonorable and inhumane treatment Campbell complained of was his confinement to a common jail cell covered in cobwebs where the walls were "black with the grease and litter of successive criminals" and where he was denied "the attendance of a single servant."[4] In Washington's response, he made clear to Campbell that "I [Washington] am not invested with the powers you suppose; and it is incompatible with my authority, as my inclination, to contravene any determination Congress may make."[5] Washington refused to act, or otherwise order others, to improve Campbell's treatment without congressional approval.[6]

234 years later, in the spring of 2011, a different war raged. President Barack Obama was confronted with a deteriorating situation in Libya where a civil war had erupted between a revolutionary movement known as the Arab Spring and Libyan

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[1] DIE HARD (20th Century Fox 1988).

[2] *See* DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 11–12 (Simon & Schuster 2016) (describing Sir Archibald Campbell's actions during the Revolutionary War and his interactions with George Washington).

[3] CHARLES H. WALCOTT, SIR ARCHIBALD CAMPBELL OF INVERNEILL: SOMETIME PRISONER OF WAR IN THE JAIL AT CONCORD, MASSACHUSETTS 31 (1898).

[4] *Id.* at 32–33.

[5] *Id.* at 37.

[6] *See* BARRON, *supra* note 2, at 12 (noting Washington's hesitancy to act without congressional approval).

dictator Muammar Gaddafi.[7] Without a declaration of war or authorization from Congress, President Obama ordered air strikes and deployed troops to Libya.[8] After President Obama failed to receive congressional authorization for the troop deployment within the ninety-day period prescribed by the War Powers Resolution (WPR), members of Congress challenged the legality of the President's actions.[9] In response, the Obama Administration stated that the President could direct military operations in Libya "without prior congressional approval,"[10] continuing the military operations in Libya.[11]

These two divergent wartime scenarios, one involving then-General Washington's actions during the Revolutionary War and the other President Obama's actions during the 2011 Libya conflict, depict the irreconcilable views on the scope of war power held by two American presidents. How did the breadth of executive war power evolve from a situation where the Commander in Chief, without congressional approval, refused to relocate a prisoner of war from a jail cell to a situation where the Commander in Chief, also without congressional authorization, deployed American forces to wage war in a foreign country and disregarded the restrictions of the WPR?[12]

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[7] *See* Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375, 459 (2013) (explaining the origins of American military involvement in the Libyan Civil War).

[8] *See* MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 1–2 (2013) (describing constitutional and statutory prerequisites for introducing American armed forces into hostilities and President Obama's deployment of troops to Libya with "none of these conditions in place"); Garrison, *supra* note 7, at 460 ("On March 19, 2011, President Obama authorized the launching of air strikes on various Libyan targets . . . .").

[9] *See* ZEISBERG, *supra* note 8, at 2 ("When US military operations continued past the time horizons of the WPR, still without legislative authorization, members of Congress challenged the president's constitutional and statutory faithfulness.").

[10] *See* Auth. to Use Mil. Force in Libya, 35 OP. O.L.C. 20, 39 (2011) ("[W]e conclude that President Obama could rely on his constitutional power to safeguard the national interest by directing the anticipated military operations in Libya . . . without prior congressional authorization.").

[11] *See* DEP'T OF STATE & DEP'T OF DEF., UNITED STATES ACTIVITIES IN LIBYA 8–9 (2011), https://man.fas.org/eprint/wh-libya.pdf (describing American military operations in Libya occurring after surpassing the WPR's time limits).

[12] *Compare* BARRON, *supra* note 2, at 12 (explaining that Washington "did not order anyone to do anything" in relation to Campbell's treatment and that "Washington wanted it known, Congress's word still controlled"), *with* ZEISBERG, *supra* note 8, at 1–2 (describing President

Since the Korean War, the breadth of presidential war power has included both the power to initiate and to wage war.[13] To date, the last time Congress declared war was in 1941 when the United States entered World War II.[14] Following World War II, however, the "period of congressional decisions to take the nation to war ended" and the modern "era of presidential wars" began.[15] The power to take the nation to war now rests with the President.[16] The period between the end of World War II and the present day, particularly the twenty years since the terrorist attacks on September 11, 2001, has also seen a dramatic expansion in the discretion given to presidents to determine who America's enemies are and the scope of wars.[17] This expansion provided recent administrations with "considerable discretion in engaging in new military conflicts across the globe without returning to Congress."[18]

Two central problems exist regarding the trend of "presidential wars" that has defined the twenty-first century. First, modern executive war power far oversteps the intentions of America's Founders that the president's powers as Commander in Chief "would amount to nothing more than the supreme command and direction of the military and naval forces," while the power to declare war, and to raise and regulate fleets and armies would remain with Congress.[19] Despite the Founders' intentions, recent exercises of executive war power seem to assert that "the power of

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Obama's deployment of American troops to Libya without Congress's authorization and how this operation extended beyond the requirements of the WPR).

[13] *See* Alfred W. Blumrosen & Steven M. Blumrosen, *Restoring the Congressional Duty to Declare War*, 63 RUTGERS L. REV. 407, 410–11 (2011) (noting the fundamental shift in executive war power that resulted from President Truman bringing the United States into the Korean War in 1950).

[14] *See id.* at 410 ("Congress has formally declared war in five situations, ending with World War II in 1941.").

[15] *Id.* at 410–11.

[16] *See id.* at 412 ("For more than half a century, Congress has allowed the President to do the work of taking the nation to war, 'as he determines to be necessary and appropriate,' instead of following the Constitution." (footnote omitted) (quoting H.R.J. Res 1145, 88th Congress (1964))).

[17] *See* Adam Mendel, *The First AUMF: The Northwest Indian War, 1790–1795, and the War on Terror*, 18 U. PA. J. CONST. L. 1309, 1341–42 (2016) (noting that the Authorization for the Use of Military Force (AUMF) gives the President broad discretion within the context of the War on Terror).

[18] *Id.* at 1342.

[19] THE FEDERALIST NO. 69, at 507 (Alexander Hamilton) (The Floating Press ed., 2011).

Congress to 'declare war' really means the opposite of what it says—that the Framers intended to share these powers between Congress and the President."[20]

Second, despite statutory restrictions that limit abuses of executive war power, namely the WPR, these restrictions have failed to constrain expansive presidential action in practice.[21] Each of President Joe Biden's recent predecessors—Presidents Trump, Obama, Bush, and Clinton—has been accused of violating the WPR.[22] Further, litigants seeking to use the judicial system to enforce the WPR against presidents have found that the federal courts are hesitant in adjudicating or even hearing their claims arising under the WPR.[23]

Aside from the question of the origins and development over time of the executive's expansive war powers, a more pressing question lies in how presidential behavior that disregards constitutional and statutory restrictions can be limited.

This Note argues that qui tam legislation—a method of enforcing laws against government officials—provides a potential solution to America's increasingly unconstrained executive war power problem. Originating in fourteenth-century England, qui tam legislation allows a citizen to file a lawsuit as a "public prosecutor" against government officials for violating a legal duty.[24] If successful, a qui tam litigant is entitled to collect a portion of the proceeds forfeited by the wrongdoing official.[25]

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[20] Blumrosen & Blumrosen, *supra* note 13, at 517.

[21] *See* Luis Leon Arzich, *Anatomy of a Failure: The War Powers Resolution as Law on the Books and Law in Action*, 42 U. ARK. LITTLE ROCK L. REV. 425, 426 (2020) ("[I]n practice, neither the Constitution nor the WPR has served as a constraint on the President.").

[22] *See id.* at 426–27 (listing the author's accusations of WPR violations against Presidents Trump, Obama, Bush, and Clinton). The Biden Administration has also been criticized for conducting air strikes against Iranian-backed militias in the Middle East. *See* Karen J. Greenberg, *Biden's War Powers Without Limits*, THE AM. PROSPECT (June 30, 2021), https://prospect.org/world/bidens-war-powers-without-limits/ (discussing air strikes ordered by the Biden Administration and criticism from multiple Senators invoking the WPR).

[23] *See* Randy Beck, *Promoting Executive Accountability Through Qui Tam Legislation*, 21 CHAP. L. REV. 41, 50 (2018) [hereinafter Beck, *Promoting Executive Accountability*] (explaining that many federal courts have invoked a standing barrier under Article III to avoid adjudication of WPR claims).

[24] *See* Beck, *Promoting Executive Accountability*, *supra* note 23, at 44 (describing the use of qui tam in England to "enforce specified duties of government officials").

[25] *See id.* (explaining forfeitures and collections under qui tam legislation).

Applying qui tam legislation to the problem of executive war power would function as a strong counterweight against excessive use of this power. Simultaneously, this application would avoid the risk of hindering national security interests by unduly burdening the President in times of military crisis.[26] Part II of this Note examines the growth and expansion of executive war powers, as well as existing legal limitations. Part III examines the history of qui tam legislation and the development of qui tam statutes in the United States, including the False Claims Act. Part IV explains why qui tam legislation is particularly well suited to address the problem of expansive executive war power and how qui tam legislation might be used to limit this power under the existing False Claims Act or through passing new legislation.

II. THE BREADTH OF THE DOMAIN: THE RISE OF EXECUTIVE WAR POWER AND EXISTING LIMITATIONS

A. THE FOUNDING

The United States's founding period not only adds context to the words and phrases used by the Founders in the Constitution, but also illuminates what the Founders envisioned in establishing the presidency and executive war powers. The Founders' monumental decision to bestow upon the president the title "Commander in Chief" was no accident.[27] The delegates to the Constitutional Convention of 1787 were well aware of the history and connotations of the title and deliberately chose it to reflect their desires for the Chief Executive.[28] The term "Commander in Chief" originated in

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[26] *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 367 (1989) (arguing that qui tam suits do not pose any great threat to national security or foreign policy objectives); *see also* Michael Lawrence Kolis, *Settling for Less: The Department of Justice's Command Performance Under The 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409, 436 n.124 (1993) (noting that the qui tam litigant "is concerned with one thing only: money").

[27] *See* U.S. CONST. art II., § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."); *see also* BARRON, *supra* note 2, at 24 (noting that it is an undeniable fact that the Constitution's drafters chose the particular title of "Commander in Chief" to bestow upon the president).

[28] *See* BARRON, *supra* note 2, at 24 (discussing the Founders' awareness of the history of the "Commander in Chief" title).

seventeenth-century England during the reign of King Charles I and "denoted a purely military post under the command of political superiors," meaning Parliament.[29] For example, in the English Civil War, as Charles I was pitted against Parliament, Parliament appointed a "Commander-in-Chief" of its forces, "subject to such orders and directions as he shall receive from both Houses [of Parliament]."[30] This created a Commander in Chief without "a right to wage war on terms Parliament ruled out"[31] and with "very little, if any, discretion to act in contravention of Parliament."[32]

During the Revolutionary War, George Washington, as Commander in Chief, acted in full accord with the title's original meaning as given by Parliament.[33] He never asserted a right to wage war on his own terms and showed a willingness to obey Congress, even with regard to military tactics.[34] Considering the events of the English Civil War and American Revolutionary War, "[t]he use of the well-worn title 'commander in chief,' then, would have been a most indirect way for the delegates to signal their desire to depart from this history and to free the President from all checks when it came to the conduct of war."[35]

Steadfast adherence to the will of Congress in times of military crisis was not a characteristic unique to America's first President. Washington's immediate successors were keenly aware that departing from Washington's example could be viewed as an attempt to vest monarchical power in the presidency.[36] Ultimately, the predominant view taken by the Founders at the Constitutional Convention and presidential administrations up to the Civil War was that Congress's war power was "unlimited in every matter" and

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[29] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 772 (2008).

[30] CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES I, 1644–1645, at 305 (William Douglas Hamilton ed., 1890).

[31] BARRON, *supra* note 2, at 24.

[32] Barron & Lederman, *supra* note 29, at 773.

[33] *See* BARRON, *supra* note 2, at 24 (comparing the English Commander in Chief role with Washington's role as head of American forces).

[34] *See id.* ("Washington himself never enjoyed—or asserted—such a right [to wage war on terms Congress ruled out] when serving as commander in chief during the Revolutionary War.").

[35] *Id.*

[36] *See id.* at 79 (describing President Jefferson's hesitancy to express a view of presidential war power contrary to that of George Washington).

extended to the "formation, direction, and support of the national forces."[37]

In drafting the Constitution, the Framers established that Congress alone held the power to declare war.[38] In the debate on war power at the Convention of 1787, the delegates rejected the position that favored "vesting the [war] power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it."[39] Instead, the argument that "[t]he Executive [should] be able to repel [sudden attacks] and not to commence war" prevailed.[40] As one delegate explained, he had "never expected to hear in a republic a motion to empower the Executive alone to declare war."[41] Charles Pinckney espoused a similar view when he stated that he was "for a vigorous Executive but was afraid the Executive powers . . . might extend to peace & war & [other similar things] which would render the Executive a Monarchy, of the worst kind."[42] Rather, as Alexander Hamilton explained, the President should only "have the direction of war when authorized or begun" by Congress.[43] Simply put, the Founders chose to give the power to declare war to Congress over the President because the President was "not (safely) to be trusted with it."[44]

While the Framers established Congress's control over declaring war, they also created several checks which limited Congress's power over the President. This was done by denying the legislature the power to appoint and remove the Commander in Chief, as Parliament had been permitted, and by giving the President the power to veto legislation, which included congressional directives in

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[37] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 68 (1833).

[38] *See* U.S. CONST. art I, § 8, cl. 11 ("[The Congress shall have Power] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . .").

[39] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318 (Max Farrand ed., 1911).

[40] *Id.*

[41] *Id.*

[42] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 64–65 (Max Farrand ed.,1911).

[43] *Id.* at 292.

[44] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 39, at 319 (debating the delegation of the power to declare war to the Executive).

times of war.[45] Despite this, the understanding in the Founding era was that Congress "possessed the power to subject the Executive to control over all matters pertaining to warmaking."[46] The powers vested in the Chief Executive, then, were seen as ensuring civilian control of the military and establishing the President as the "superintendent" of America's armed forces.[47]

A prime example of this understanding can be seen in President John Adams's interactions with Congress during the United States' Quasi War with France.[48] Following the French Revolution, France began seizing American ships and disrupting commerce.[49] As fears of an invasion or a French-led insurrection grew, Adams put forth a plan to Congress, requesting authorization to establish a naval fleet.[50] Although Congress had not declared war when Adams made his petition, and never declared war throughout the crisis, it passed multiple statutes authorizing military preparations for maritime war.[51]

Though Congress seemingly complied with Adams's requests, the statute it passed to establish and equip a navy demonstrated the prevailing understanding that Congress possessed complete power

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[45] *See* Barron & Lederman, *supra* note 29, at 800 ("The Framers dramatically cabined Congress's power of control by withdrawing from the legislature the powers to appoint and freely remove the Commander in Chief and, most importantly, by giving the President a provisional veto over legislative directives."); U.S. CONST. art II, § 2, cl. 1 (establishing the role of the President as Commander in Chief without the need for congressional appointment); *see also id.* art I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

[46] Barron & Lederman, *supra* note 29, at 800.

[47] *See id.* ("The textual and historical evidence we have reviewed demonstrates that the Commander in Chief Clause was understood to establish the hierarchical superiority of the President in the military chain of command, thereby both ensuring civilian control over the armed forces and establishing a 'superintendence prerogative' with respect to at least some military operations.").

[48] *See* BARRON, *supra* note 2, at 38 (observing that "Adams accepted a stunning degree of congressional control over his conduct" during the Quasi War with France).

[49] *See id.* at 44 (discussing French predations on the United States).

[50] *See id.* at 45 (explaining Adams's military requests to Congress during the Quasi War).

[51] *See* Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT'L SEC. L. & POL'Y 319, 329 (2012) [hereinafter Fisher, *Basic Principles*] (describing Congress's actions during Quasi War).

during times of war—power that extended to the actions and commands of the Commander in Chief.[52] In the Act Providing for Naval Armament of 1797, Congress not only authorized the assembly of a small fleet of armed frigates,[53] but also specified the minute details of who would man the ships and how the daily operations of the ships would be carried out.[54] The statute even went so far as to instruct President Adams as to how the seamen manning the frigates would be fed, requiring sailors to be given "one pound of bread, two ounces of butter, or . . . six ounces of molasses, four ounces of cheese, and half a pint of rice" every Wednesday.[55] The exacting restrictions Congress placed on the Commander in Chief firmly established that war "would be waged on Congress's terms" and that Congress, not the President, had the final word in war.[56]

During this period, several Supreme Court decisions further bolstered the undisputed supremacy of Congress's power in times of war. In *Bas v. Tingy*, the Court recognized that "Congress was fully empowered by the Constitution to set statutory limits" that could control "the scope of the war power carried out by the Commander in Chief."[57] Next, in *Talbot v. Seeman*, Chief Justice Marshall reiterated Congress's primacy in times of war, stating that "[t]he whole powers of war [are], by the constitution of the United States, vested in congress."[58] Finally, in *Little v. Berreme*, the Court decided that President Adams could not, acting within his powers as

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[52] *See* Act Providing a Naval Armament, ch. 7, § 1, 1 Stat. 523–24 (1797) (approving President Adams's requests to establish a naval fleet while also ensuring that Congress would remain in control).

[53] *See id.* (authorizing the President "to cause the frigates United States, Constitution and Constellation, to be manned and employed").

[54] *See id.* §§ 2–6 (specifying the exact number of captains, boatswains, gunners, carpenters, petty officers, midshipmen, and seamen a frigate was required to employ, as well as the pay and rations each individual would receive).

[55] *See id.* § 7. ("*And be it further enacted*, That the ration shall consist of as follows: Sunday, one pound of bread, one pound and a half of beef, and half a pint of rice; Monday, one pound of bread, one pound of pork, half a pint of peas or beans, and four ounces of cheese; Tuesday; one pound of bread, one pound and a half of beef, and one pound of potatoes, or turnips and pudding; Wednesday, one pound of bread, two ounces of butter, or in lieu thereof six ounces of molasses, four ounces of cheese, and half a pint of rice . . . .").

[56] *See* BARRON, *supra* note 2, at 49 (noting that Congress's restrictions placed on Adams established that the Quasi War "would be waged on Congress's terms").

[57] Fisher, *Basic Principles*, *supra* note 51, at 330; *see also* Bas v. Tingy 4 U.S. (4 Dall.) 37, 43 (1800) (holding that Congress has a choice when it initiates wars).

[58] 5 U.S. (1 Cranch) 1, 28 (1801).

Commander in Chief, supersede Congress's directive under a statute authorizing military action against vessels sailing to French ports.[59]

The Court repeatedly recognized Congress's power to initiate war and to define the scope of warfare, as well as the superiority of congressional enactments over contradictory presidential directives.[60] This power was recognized by each branch of government from the Constitutional Convention[61] through the Quasi War,[62] the War of 1812,[63] and the presidential administrations up to the Civil War.[64]

B. THE EXPANSION OF EXECUTIVE WAR POWER FROM THE CIVIL WAR THROUGH WORLD WAR II

The Civil War fundamentally changed the relationship between the President and Congress in times of war, resulting in a far more powerful and emboldened Commander in Chief. The primary driver of this change was President Abraham Lincoln, who realized that "he might accomplish more by treating the war power as a shared one" rather than as a power held exclusively by one branch.[65] President Lincoln's actions during the Civil War marked the beginning of a new era where the notion of executive war power

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[59] *See* Little v. Berreme, 6 U.S. (2 Cranch) 170, 178–79 (1804) (holding that President Adams's military orders "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass" against Congress); *see also* Fisher, *Basic Principles*, *supra* note 51, at 330 (explaining that although "Congress had authorized President Adams to seize vessels sailing *to* French ports, the President had issued a proclamation directing American ships to capture vessels sailing *to or from* French ports[,]" which the Court held Adams lacked the power to do).

[60] *See* Fisher, *Basic Principles*, *supra* note 51, at 330 ("The policy decided by Congress in a statute necessarily prevailed over conflicting presidential orders. Congress not only initiated wars but through statutory action could define their scope and purpose.").

[61] *See id.* at 325–26 (discussing the reverence given to the power to initiate war during the Constitutional Convention and the concern of allowing a single individual to hold such an ability).

[62] *See id.* at 330 (explaining that the new Constitution still required Congress to initiate any military action beyond defensive maneuvers, even in the face of actual conflict).

[63] *See* BARRON, *supra* note 2, at 208 (describing how the War of 1812 made it clear that war alone did not "automatically imbue the presidency with strength").

[64] *See* Fisher, *Basic Principles*, *supra* note 51, at 331–32 (explaining the initial shift that occurred during the Civil War from the position that Congress controls the entire power of war making to the position that the President controls some instances of war making).

[65] BARRON, *supra* note 2, at 133.

moved further away from the views expressed in the Founding era and toward the approach to presidential war power we now see in the twenty-first century.[66]

Upon becoming Commander in Chief, President Lincoln faced the greatest challenge any president had yet encountered: a nation at war with itself.[67] Following the opening salvo of the Civil War with the attack on Fort Sumter, President Lincoln had to chart a course for responding to the attack, protecting the nation's capital, and preventing more states from joining the Confederacy without the assistance of Congress, which was not in session and would not be returning to Washington for months.[68] In the months it would take for Congress to return to Washington to begin the next legislative session, President Lincoln would exercise "more unilateral power in war than any President before him."[69]

President Lincoln carried out multiple drastic acts of war making by fiat, something no President had even attempted in the absence of congressional approval.[70] While Congress was in recess, President Lincoln ordered the blockade of Southern ports, authorized war supplies transactions, suspended habeas corpus, established military trials, and mustered tens of thousands of troops

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[66] *See* Fisher, *Basic Principles*, *supra* note 51, at 331 (explaining that the Supreme Court's upholding of Lincoln's military action during the Civil War "is often cited as recognizing an independent and inherent presidential power over war" and that this view has been used by twenty-first century administrations "as support for independent presidential authority to use military force").

[67] *See* Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1862–63 (2010) (explaining that after President Lincoln's election in November 1860, multiple Southern states seceded from the Union and established the Confederate States of America, which was soon followed by the April 1861 Confederate bombardment of Fort Sumter that began the Civil War).

[68] *See* BARRON, *supra* note 2, at 133–35 (tracing President Lincoln's decision making following the attack on Fort Sumter while Congress was not in session); *see also* Daniel A. Farber, *Lincoln, Presidential Power, and the Rule of Law*, 113 NW. U. L. REV. 667, 681–82 (2018) (describing the threats of further state secessions from the union near the beginning of the Civil War and the potential fall of Washington).

[69] BARRON, *supra* note 2, at 136.

[70] *See* Farber, *supra* note 68, at 668 ("Lincoln's use of the war power overshadowed that of his successors. He not only went to war without even consulting Congress; he also relied on the war power to justify the Emancipation Proclamation . . . . With a stroke of the pen [and without congressional authorization], he smashed the core institution of Southern society . . . .").

and sailors without the consent or awareness of Congress.[71] President Lincoln defended his actions as necessary, stating:

> Nevertheless, the legality and propriety of what has been done . . . are questioned, and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed" should not himself violate them. . . . The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. . . . To state the question more directly, [a]re all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?[72]

President Lincoln also stated that "nothing has been done beyond the constitutional competency of Congress," but acknowledged the limits of his own power and deferred "to the better judgment of Congress."[73]

President Lincoln ultimately took the approach that an action in war required "the hand of legislation to give it legal sanction and the hand of the Executive to give it practical shape and efficiency."[74] Congress took this approach as well and passed broad legislation providing:

> That all the acts, proclamations, and orders of the President of the United States . . . respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are

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[71] *See id.* ("President Lincoln took many extraordinary measures, such as mustering the military, suspending habeas corpus, and instituting military trials, all without the support of Congress."); *see also* BARRON, *supra* note 2, at 135–36 (explaining the actions President Lincoln took to prepare and take the country to war before Congress returned from its recess).

[72] President Abraham Lincoln, July 4th Message to Congress (July 4, 1861) (transcript available at https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress).

[73] *Id.*

[74] *Id.*

> hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.[75]

Congress's deferential approach to President Lincoln's unilateral actions during the Civil War—allowing him to first act, and then validating his action through legislation—was a stark departure from the prevailing view of the Founding era that the Commander in Chief was nothing more than a superintendent who was to be directed and controlled by the dictates of Congress.[76] This deference set a powerful precedent that President Lincoln's successors would repeatedly use in attempts to expand executive power and legitimize presidential actions during times of war that lacked congressional authorization.[77]

This deference was particularly tested during the age of imperialism when presidents, chiefly Theodore Roosevelt, shifted the focus of executive war power to presidential uses of military force abroad.[78] Supporters of expansive executive war power during this period advocated "for a newly aggressive executive, one less interested in keeping America out of war than in ensuring America would win wars of its choosing" and were less interested in deferring to the judgement of Congress before engaging in acts of war.[79] President Theodore Roosevelt was particularly supportive of this expansive view.[80] Two instances which occurred during the Roosevelt Administration specifically reflect this approach.

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[75] Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326, 326 (granting the President broad authority over the army, navy, and state militias).

[76] *Compare id.* (authorizing all acts and orders made by President Lincoln while Congress was out of session), *with* Act Providing a Naval Armament, ch. 7, § 1, 1 Stat. 523–24 (1797) (authorizing a single request made by President Adams and implementing provisions that reinforced Congress's supremacy in directing war making).

[77] *See, e.g.*, Fisher, *Basic Principles*, *supra* note 51, at 332 ("After World War II, Presidents began going to war without ever coming to Congress for authority.").

[78] *See* BARRON, *supra* note 2, at 184–85 (noting that during the era of imperialism, the United States began to focus on the right of presidents "to use military force abroad and not for—strictly speaking—defensive purposes but to claim foreign territory").

[79] *Id.* at 185.

[80] *See id.* (detailing President Roosevelt's role in expanding America's role in the world through imperialism).

First, "[i]n 1903, the government of Colombia refused to . . . allow the United States to build a canal across the isthmus of Panama, which was then a province of Colombia."[81] In response, Roosevelt helped facilitate a Panamanian revolt against Colombia and sent American warships to prevent Colombia from responding militarily.[82] This resulted in Panamanian independence from Colombia and gave the United States freedom to build a canal protected by American forces.[83] Throughout this episode, President Roosevelt received no authorizations from Congress and later boasted that he "took the canal zone and let Congress debate, and while the debate [went] on the canal [did] also."[84]

Second, in 1905, President Roosevelt sent troops to the Dominican Republic without congressional approval after the Dominican government could no longer repay its debts and progress on a new treaty with the United States had stalled in the Senate.[85] After American forces occupied the Dominican Republic's capital, the two countries settled their disputes and "Roosevelt's military intervention was effectively ratified by congressional silence."[86]

Another of President Roosevelt's successors, President Woodrow Wilson, shared a similar view of a more empowered executive who should be the center of policy-making power in the United States rather than Congress.[87] As President Wilson saw it, the functioning of government "is accountable to Darwin, not to Newton."[88] Thus, the evolution of the United States from the Founding to its status as a great power in the early twentieth century necessitated a shift

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[81] PETER IRONS, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION 97 (2005).

[82] *See id.* (describing President Roosevelt's actions to eliminate Colombia's control over Panama).

[83] *See id.* (documenting subsequent treaties between Panama and the United States permitting the building of the Panama Canal).

[84] *Id.*

[85] *See id.* at 97–98 (detailing President Roosevelt's intervention in the Dominican Republic).

[86] *Id.* at 98.

[87] *See* BARRON, *supra* note 2, at 208 (explaining President Wilson's view that "America could no longer afford for the legislative branch to be the locus of policy-making power" and instead needed a system in which "the president would take the lead role in giving direction to the nation's affairs").

[88] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908).

in power from Congress to the President.[89] Given this shift, President Wilson believed that the United States could "never hide our President again as a mere domestic officer" or "see him [as] the mere executive he was" in the early nineteenth century.[90] Instead, President Wilson held, the Commander in Chief and not Congress "must stand always at the front of our affairs, and the office will be as big and as influential as the man who occupies it."[91]

During World War I itself, President Wilson embarked on a policy of drafting bills and sending them to Congress expecting approval.[92] This occurred with the Espionage Act of 1917, export controls, censorship programs, and a number of authorizations that expanded President Wilson's power to conduct war as he pleased.[93] Despite serious concerns expressed by both Democrat and Republican members of Congress, Congress complied with President Wilson's requests.[94] Additionally, Congress delegated the President the authority to redistribute functions among executive agencies in waging war, empowering President Wilson to restructure the executive branch and its approach to conducting the war.[95]

The precedent set by Presidents Lincoln, Roosevelt, and Wilson in their approach to executive war power came to full fruition under President Franklin D. Roosevelt before and during World War II. Before World War II, President Roosevelt took a number of actions without Congress's approval that likely pushed the United States closer to the brink of war.[96] President Roosevelt's pre-war actions included trading fifty American destroyers for a lease of British bases in the Atlantic Ocean, sending troops to occupy Greenland

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[89] *See id.* at 77–81 (describing the shift in foreign affairs powers towards the presidency as the United States became a great power).

[90] *Id.* at 78–79.

[91] *Id.* at 79.

[92] *See* BARRON, *supra* note 2, at 214–15 (describing President Wilson's strategy of drafting bills for congressional approval and the subjects covered by these bills).

[93] *See id.* (listing the bills which President Wilson drafted and sent to Congress for approval).

[94] *See id.* at 222–23 (explaining Congress's acquiescence to President Wilson).

[95] *See* Overman Act, Pub. L. No. 65-152, § 1, 40 Stat. 556, 556 (1918) (authorizing President Wilson to restructure executive agencies to more efficiently conduct war).

[96] *See* John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 248 (2004) (noting President Roosevelt's actions that pushed the United States closer to war).

under an executive agreement with Denmark, taking Iceland under American military protection through an executive agreement with Iceland, authorizing American forces to occupy Dutch Guinea, and issuing an order that authorized the Navy to sink German and Italian vessels.[97] After the attack on Pearl Harbor and Congress's formal declaration of war on December 11, 1941, however, President Roosevelt and Congress arrived at a "bipartisan consensus" that allowed each of them to produce policies in fighting the war that both branches endorsed.[98]

From the Civil War to World War II, the expansion of executive war power during this period might best be described by President William Howard Taft:

> Congress in making law and achieving the object of the law through the action of the Executive may properly prescribe the form and method in which the law shall be carried out . . . . But when in respect to the particular subject matter, the President is given direct power by the Constitution so that he can act without legislation, or if he is given in the Constitution, particular means with which to execute the laws and make his constitutional power effective, Congress cannot prevent exercise of the power in the former case, nor can it prevent in the latter case his use of the constitutional means for the performance of any of his constitutional duties to which it would be appropriate.[99]

President Taft further recognized:

> Of course the President may so use the army and navy as to involve the country in actual war and force a

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[97] *See id.* (overviewing the actions taken by President Roosevelt before World War II without congressional authorization); *see also* Franklin Delano Roosevelt, *Fireside Chat to the Nation (Sept. 11, 1941)*, *in* 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 384, 390 (Samuel I. Rosenman ed., 1950) ("But let this warning be clear. From now on, if German or Italian vessels of war enter the waters, the protection of which is necessary for American defense, they do so at their own peril.").

[98] *See* ZEISBERG, *supra* note 8, at 90 (describing the bipartisan consensus between President Roosevelt and Congress during World War II).

[99] William Howard Taft, *Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 611 (1916).

> declaration of war by Congress. Such a use of the army and navy, however, is a usurpation of power on his part. It is likely to awaken such popular support as to compel Congress to acquiesce and [authorize] the declaration.[100]

The United States entered this period of its history from the Civil War through World War II with a nearly universal understanding that Congress held unlimited power over the formation, direction, and support of the armed forces under command of the President. The nation left this period with the understanding that the President could conduct acts of war and deploy troops without congressional approval and that, in times of war, it is the Commander in Chief rather than Congress "who is to determine the movements of the army and or the navy."[101] "Congress could not take away from him that discretion . . . nor could they themselves, as the people of Athens attempted to, carry on campaigns by votes in the market-place."[102]

C. MODERN EXECUTIVE WAR POWER

The period of American history from the end of World War II to the modern day witnessed both the peak of executive war power and a resurgence by Congress as it attempted to reclaim its war power. Despite several seemingly powerful limitations placed on executive war powers in the modern era, presidents remain largely unfettered by congressional constraints and may initiate, conduct, and define the scope of war as they see fit.

The Korean War upended the longstanding view that had persisted from the Founding era to World War II that while the Commander in Chief had the discretion to move troops and conduct acts of war as needed, presidents were still required to work with Congress and receive authorization to take the nation to war.[103] The Korean War began when President Harry Truman deployed tens of

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[100] *Id.*

[101] WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 129 (1925).

[102] *Id.*

[103] *See* BARRON, *supra* note 2, at 291 ("In Korea, Truman even went so far as to start, for the first time in the country's history, a full-blown foreign war. He did so on the basis of nothing more than his own say-so . . . .").

thousands of troops into combat on the Korean Peninsula without seeking authorization or a declaration of war from Congress.[104] Instead, President Truman seemingly relied on his inherent authority as Commander in Chief, framing his actions as defending the nation against the Communist forces that posed a "direct threat to the security of the Pacific area and to United States forces performing their lawful and necessary functions in that area."[105] Throughout the conflict, President Truman never sought the approval of Congress,[106] going so far as to comment "I don't ask [Congress's] permission—I just consult them."[107] President Truman's actions not only went further than any of his predecessors in initiating and conducting a war without congressional authorization, but his actions also violated existing legislation which prohibited the President from committing troops into military action on behalf of the United Nations without approval from Congress.[108] Ultimately, it was not Congress that limited the President's power and ended the Korean War, but rather the voters who elected Dwight D. Eisenhower to the presidency with hopes of putting an end to the war.[109]

The Korean War set a "dangerous precedent because of its scope and the acquiescence of Congress."[110] This precedent was used again during the Vietnam War, but this conflict did not involve a Congress that was as willing to submit to the powers of the presidency.[111] Following years of war in Southeast Asia and the resulting war weariness in the United States, Congress passed the War Powers

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[104] *See* Scott S. Barker, *Reforming the War Powers Relationship Between Congress and the President in the Post-Trump Era*, 98 DENV. L. REV. F. 1, 5–6 (2021) (explaining President Truman's actions in initiating the Korean War).

[105] Harry Truman, Statement Issued by the President (June 27, 1950) (transcript available at https://history.state.gov/historicaldocuments/frus1950v07/d119).

[106] *See* Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 33 (1995) [hereinafter Fisher, *The Korean War*] ("President Truman did not seek the approval of members of Congress for his military actions in Korea.").

[107] Barker, *supra* note 104, at 6.

[108] *See* Fisher, *The Korean War*, *supra* note 106, at 32 ("In fact, Truman violated the unambiguous statutory language and legislative history of the UN Participation Act.").

[109] *See id.* at 34–35 (explaining Congress's acquiescence to President Truman during the Korean War, which led voters to elect Eisenhower, who campaigned on ending the war).

[110] *Id.* at 38.

[111] *See* Barker, *supra* note 104, at 6 (describing Congress's rationale in creating the WPR).

Resolution (WPR) over the veto of President Richard Nixon.[112] The WPR established a "scheme that would reassert [Congress's] constitutional role in the decisions regarding commencement and continuation of war, while giving the President flexibility to respond to crises around the globe that required the immediate use of U.S. military force."[113] As stated by Congress in the WPR, the law's purpose was to "fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."[114]

The WPR fulfills this purpose by first requiring the President to consult with Congress "in every possible instance" before introducing American troops into hostilities.[115] Regardless of consultation, where the President has deployed troops into hostilities, he must report these deployments to Congress within 48 hours.[116] After reporting the deployment of troops to Congress, the President then has sixty days to terminate the use of American forces in hostilities "unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States."[117] This termination period may also be extended up to thirty days if the President determines that "unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."[118] Finally, absent a declaration or specific statutory authorization, the WPR reserves Congress's power to direct the President to remove American forces from hostilities at any time.[119]

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[112] *See id.* ("By 1973, Americans had become weary of the war in Southeast Asia . . . . result[ing in] the War Powers Resolution, passed by Congress, over President Richard Nixon's veto, on November 7, 1973.").

[113] *Id.*

[114] 50 U.S.C. § 1541(a).

[115] *Id.* § 1542.

[116] *See id.* § 1543(a) (implementing reporting requirements).

[117] *Id.* § 1544(b).

[118] *Id.*

[119] *See id.* § 1544(c) ("[A]t any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possession and territories without a

Despite the powerful language of the WPR, Congress's control over war powers has continued to erode since the WPR's passage.[120] This is primarily due to three reasons. First, the rise of the United States as a superpower altered views that the United States should avoid foreign entanglements or maintain a standing military presence, which the Founders believed inherently increased the power of the President.[121] As a superpower engaged in a global game of "whack a mole" against constantly changing threats—the Soviet Union, Saddam Hussein, the Taliban, Libya, ISIS, and numerous other state and non-state actors—the United States requires leadership that possesses the tools and powers to conduct warfare decisively, efficiently, and quickly.[122] The term "leadership" has come to mean the President, who can act swiftly and unilaterally, rather than Congress, which acts slowly through deliberation and debate.

Second, beginning with President Truman, presidents have asserted an aggressive view of executive war power that the Constitution "vests power [in the President] to do anything, anywhere, that can be done with an army or navy."[123] Consistent with this view, administrations in the twenty-first century have taken the position that the Founders' decision to make the President the Commander in Chief "confirms that by vesting that power in the President, they granted him the broad powers necessary to the proper functioning of the government and to the security of the nation," which "included the power to use force domestically as well as abroad" in responding to the threat of attack without congressional approval.[124] The Obama Administration even

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declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.").

[120] *See* Barker, *supra* note 104, at 8 ("Although there has been some resistance from Congress—most prominently, the 1973 War Powers Resolution—it has largely acquiesced in this presidential power grab.").

[121] *See id.* (explaining that America's post-World War II superpower status changed people's attitudes towards standing armies and the role of the modern military).

[122] *See id.* at 4–5 (describing why the President is best equipped to face threats to the United States).

[123] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

[124] *See e.g.*, Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Couns., to Alberto Gonzales, Couns. to the President, Authority for Use of Military Force to Combat Terrorist Activities Within the United States 6–7 (Oct. 23, 2001),

went so far as to argue that the "President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest."[125]

Third, Congress has repeatedly failed to assert its constitutional war powers.[126] This is largely due to the role of political parties in government and the fact that the President is both the Commander in Chief and leader of his political party.[127] Members of Congress loyal to the President are especially hesitant to advocate for Congress to rein in executive war powers during times of military conflict.[128] It is also difficult for members of both parties in Congress to withdraw support for American troops in combat or vote to restrict the war powers of the President because these members may suffer politically for withdrawing their support and benefit politically by supporting the President during times of war.[129]

As a result, commentators have noted that the WPR has "failed to fulfill the hopes of its congressional sponsors. It has had no real substantive impact on the war-powers relationship between Congress and the President."[130] For example, of the 195 non-covert uses of force abroad that occurred from the passage of the WPR to the end of President Obama's term, only 130 were reported to Congress.[131] The failure to report uses of force abroad was especially prevalent during the Obama Administration, where only fifteen of

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https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memomilitaryforcecombatus10232001.pdf.

[125] Auth. to Use Mil. Force in Libya, *supra* note 10, at 1.

[126] *See* Barker, *supra* note 104, at 8 (explaining one reason Congress has lost war powers to the President is "the failure of Congress to assert its constitutional war-making role").

[127] *See id.* at 13 ("Congress's failure to protect the war powers granted it by the Constitution has resulted largely from the central role played by political parties in the U.S. governmental system and the dual role of the President as chief executive and party leader.").

[128] *See id.* at 14 ("Party loyalty also hamstrings Congress's ability to exercise the power of the purse to rein in a President after a war has begun.").

[129] *See* Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1005 (2006) ("Members of Congress not only face possible [political losses] if they try to resist the President's war agenda at the initiation of a conflict, but also enjoy positive political benefits for supporting the President in an international crisis: the 'rally-around-the-flag' effect. The rally-around-the-flag-effect suggests that in the context of an international crisis, the public will rally around the President and strive to present a unified front towards the foreign adversary.").

[130] Barker, *supra* note 104, at 16.

[131] Arzich, *supra* note 21, at 431.

fifty-one instances were reported to Congress.[132] Beyond the lack of reporting, presidents have not complied with the sixty-day deadline to terminate the deployment of troops abroad.[133] Further, when presidents have violated the WPR, Congress has been unable to impose any real consequences through legislation or litigation.[134]

With this in mind, presidents have operated in the twenty-first century with a vast array of war powers they have attained and established over a period of two-hundred years.[135] In the meantime, it seems the Founders' intention that the President would remain accountable and controllable by the broad powers of Congress[136] has fallen to the wayside, despite Congress's repeated attempts to re-establish control.[137] The modern president's view towards cooperating with Congress is best captured in the words of Napoleon Bonaparte, who once said:

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[132] *See id.* at 432 ("President George W. Bush reported to Congress on thirty-eight different occasions out of the thirty-nine instances of use of the armed forces abroad; and President Barack Obama partially reversed the trend, with fifteen reports out of fifty-one instances of uses of the armed forces abroad.").

[133] *See* Beck, *Promoting Executive Accountability*, *supra* note 23, at 49 ("President Clinton continued U.S. participation in the NATO bombing of Kosovo beyond the sixty day limit of the WPR based on the theory that Congress authorized the action through an appropriation provision, even though the statute rejects authorization by that means. President Obama claimed that extended participation in the NATO operation in Libya was not subject to the WPR because our drone and bombing attacks did not amount to 'hostilities.'" (footnote omitted)).

[134] *See* Arzich, *supra* note 21, at 482–83 ("The reasons for Congress's inability to play a substantial role are structural. Briefly, reelection is critical to members of Congress and unlike most foreign affairs issues, '[v]otes on whether to go to war or to continue to support a particular military operation are often seen as having a significant impact on reelection prospects.' Even when Congress has the tools to rein in the Executive—for example, it could prevent military operations by cutting short appropriations—experience has shown it is not wont to use them. Given how little they will benefit from the outcome, 'each individual member has relatively little incentive to expend resources trying to increase or defend congressional power, since he or she will not be able to capture most of the gains,' so criticizing the President if he fails and joining in praise if he succeeds appears as the optimal strategy for Congresspersons.").

[135] *See supra* notes 122–124 and accompanying text.

[136] *See* Barker, *supra* note 104, at 3 ("The debates at the Constitutional Convention in the summer of 1787, and during the ratification process that followed, make it clear that the founders did not want a single person, namely the president, to have the power to commit the nation to war.").

[137] *See* Arzich, *supra* note 21, at 428, 481 (observing that the WPR, Congress's attempt to re-establish control over war power, "has been nothing short of a failure, and its most salient feature is how strikingly useless it has been in constraining the President's power").

> The effect of discussing, making a show of talent, and calling councils of war, will be what the effect of these things has been in every age: they will end in the adoption of the most pusillanimous, or (if the expression be preferred) the most *prudent* measures, which in war are almost uniformly the worst that can be adopted.[138]

Rather than discuss and allow Congress to adopt the dreaded "most prudent measures," the modern President has instead abided by Napoleon's maxim that "[n]othing is more important in war than unity in command,"[139] and this unity in command—to initiate, wage, and conclude war—must reside solely in the executive.

III. THE WORLD OF QUI TAM

A. THE ORIGIN AND DEVELOPMENT OF QUI TAM LEGISLATION

The term qui tam comes from the phrase *qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur*,[140] which means "who as well for the king as for himself sues in this matter."[141] A qui tam provision "allows a private person to sue for a penalty, part of which the government or some specified public institution will receive."[142] Qui tam legislation finds its origins in English law, as it became a common feature in England during the fourteenth century[143] and remained so until the mid-twentieth century.[144]

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[138] NAPOLEON BONAPARTE, MILITARY MAXIMS OF NAPOLEON 54–55 (J. Akerly trans., Wiley & Putnam 1845) (1830).

[139] *Id.* (emphasis omitted).

[140] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (Oxford, Clarendon Press 1768) ("Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a qui tam action, because it is brought by a person 'qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur.'").

[141] *Qui Tam Action,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[142] *Id.*

[143] *See* CHARLES DOYLE, CONG. RSCH. SERV., R40786, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 2 (2021) ("During the fourteenth, fifteenth, and sixteenth centuries, qui tam statutes became a common feature of English law.").

[144] *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 601 (2000) [hereinafter Beck, *The False Claims Act*] ("Halfway through the twentieth century, Parliament moved to eliminate the remaining

Analyzing the centuries long development of qui tam legislation is critical to understanding the history of qui tam legislation in the United States and the potential applicability of qui tam causes of action to solving the problem of executive war power in the twenty-first century.

The oldest known qui tam provision comes from seventh century England.[145] Dated to AD 695, the provision functioned much like the modern qui tam action, imposing a penalty upon a laborer who worked during a forbidden time, such as the Sabbath, and providing half the penalty to the person who informed on the wrongdoings of the worker.[146] Another formational piece of qui tam legislation came during the reign of King Edward II with the passage of the Statute of York in 1318.[147] One provision in the Statute of York required that public officials charged with maintaining the "Assizes of Wine and Victuals" could not "merchandize for Wines nor Victuals, neither in Gross, nor by [retail]."[148] Officials who had sold the regulated products and violated the statute forfeited the merchandise to the King, and a third of the merchandise was given to the party or informer who initiated the suit against the official.[149]

In the fourteenth and fifteenth centuries, "what began as a trickle of *qui tam* statutes gradually became a flood."[150] Qui tam

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English *qui tam* statutes, decisively preferring public enforcement of legislation designed to protect interests of the public as a whole.").

[145] *See* DOYLE, *supra* note 143, at 2 ("The earliest cited example of a qui tam provision is the 695 declaration of King Wihtred of Kent.").

[146] *See id.* ("If a freeman works during the forbidden time [*i.e.*, the Sabbath], he shall forfeit his *healsfang*, and the man who informs against him shall have half the fine, and [the profits arising] from the labour." (alteration in original) (quoting F.L. ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 27 (1963))).

[147] *See* Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1260 (2018) [hereinafter Beck, *Qui Tam Litigation Against Government Officials*] ("In the twelfth year of King Edward II, Parliament adopted [the Statute of York,] designed to address problems in the English legal system.").

[148] Statute of York, 1318, 12 Edw. 2, c. 6 (Eng.); *see also Assize,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("A law enacted by such [a session of a court or council], usu[ally] one setting the measure, weight, or price of a thing.").

[149] *See* Statute of York, 1318, 12 Edw. 2, c. 6 (Eng.) ("[N]o Officer in City or in Borough, that by Reason of his Office ought to keep Assizes of Wines and Victuals . . . shall not merchandize for Wines nor Victuals . . . and if any do, and be thereof convict[ed], the Merchandize . . . shall be forfeit[ed] to the King, and the third Part thereof shall be delivered to the Party that sued the Offender . . . .").

[150] Beck, *The False Claims Act*, *supra* note 144, at 570.

statutes were increasingly used to regulate public functions and curtail wrongdoing by public officials.[151] Among these statutes was a 1442 English law providing that "no [customs official], controller of the custom, clerks, deputies, ministers, nor their servants . . . shall have any ships of their own . . . nor they shall not meddle with freighting of ships . . . upon the pain . . . to be forfeit . . . one half to the King, and the other half to him that will sue in this case."[152] Another statute from 1444 required that any sheriff who failed to hold an election of knights "shall forfeit to the King an hundred pounds, and also shall incur the pain of an hundred pounds, to be paid to him that will sue against [the sheriff]."[153]

These and other fourteenth and fifteenth century qui tam laws are early examples of what Blackstone described as "acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted" by the statute.[154] As Blackstone explained, "[t]he party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires."[155] Under this view, there is "an implied original contract to submit to the rules of the community, whereof we are members," and when these rules are violated and a forfeiture imposed on the wrongdoer, the forfeiture satisfies "a debt in the eye of the law" to the injured party and the public in general.[156]

Qui tam legislation originated from the social contract and ensured that the social contract would be upheld and enforced.[157] As Blackstone explained:

> [U]sually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because

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[151] *See id.* at 572–73 (describing the "use of *qui tam* provisions to regulate the performance of public functions").

[152] 20 Hen. 6, c. 5 (1442).

[153] 23 Hen. 6, c. 15 (1444).

[154] BLACKSTONE, *supra* note 140, at 159.

[155] *Id.*

[156] *Id.* at 159–60.

[157] *See id.* at 160 (explaining qui tam's origins in social contract theory and that imposing forfeitures through qui tam legislation reinvigorates the social contract when it has been breached).

> they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person [who as well for the king as for himself sues in this matter].[158]

The common informer in a qui tam action thus upholds the social contract, acting as an "advocate for public interests that would otherwise be advanced by public officials."[159] The informer also functions as a public prosecutor "statutorily empowered to enforce the social contract in place of public officials."[160]

Acting in the capacity of a public prosecutor, a qui tam informer was permitted to file suit without alleging a particularized injury, "because every Offence, for which such action is brought, is supposed to be a general Grievance to every Body" in the community.[161] As William Hawkins explained in *A Treatise of the Pleas of the Crown*, it "cannot be said in any Popular Action" that "some Damage [has] been done to the Demandant [qui tam plaintiff] in particular."[162]

Tracing the development of qui tam statutes in England, it becomes clear that these statutes established certain offenses that, if committed by public officials or others, breached a social contract to obey the rules of the community as enacted by the legislature. When the social contract was breached through this behavior, the public as a whole was injured.[163] Filing suit under a qui tam statute then allowed a member of the public, acting on behalf of the members of the community, to obtain a remedy for the injury

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[158] *Id.*

[159] Beck, *The False Claims Act*, *supra* note 144, at 551.

[160] *Id.*

[161] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 267 (London, Eliz. Nutt & R. Gosling 1721) ("Also it hath been adjudged, That a Popular Action may conclude *ad grave damnum*, without adding, *of the Plaintiff*; because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body."); *see also Ad Damnum Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the ad damnum clause as a "clause in a prayer for relief stating the amount of damages claimed").

[162] HAWKINS, *supra* note 161, at 273.

[163] *See id.* at 267 (explaining that when certain offenses established by qui tam legislation are committed, each member of the community is wronged).

suffered by the public and receive a reward for initiating this "popular action."[164]

B. QUI TAM LEGISLATION IN THE UNITED STATES

During the colonial period, qui tam actions were "as prevalent in America as in England."[165] An example includes the Act for Restraining and Punishing Privateers & Pirates from New York in 1693.[166] Much like English qui tam statutes from the fourteenth and fifteenth centuries, this law imposed a duty upon public officials in New York, requiring that officers "raise and levy such a number of well armed Men . . . for the seizing, apprehending, and carrying to [jail] all and every [privateer or pirate]; and in case of any Resistance . . . to kill or destroy such Person or Persons."[167] The statute went on to state that "every such Officer that shall omit or neglect his Duty herein, shall forfeit Fifty Pounds . . . one moiety thereof to be to their Majestys . . . for and towards the Support of the Government of this Province . . . and the other moiety to the Informer."[168]

During the Founding era itself, Congress passed a number of qui tam statutes directed at public officials.[169] Two statutes targeting executive branch officials are especially informative. First, in the Act of September 2, 1789, Congress created the Treasury Department.[170] In doing so, Congress required that no Treasury official "shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase . . . any public lands or other public property."[171] The Act went on to state that "if any person shall offend against any of the prohibitions of this act, he shall . . . forfeit

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[164] *See* BLACKSTONE, *supra* note 140, at 160 (emphasis omitted) (noting that qui tam actions may be referred to as "*popular* actions, because they are given to the people in general").

[165] Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 776 (2000).

[166] *See* ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF NEW-YORK, FROM 1691, TO 1725, at 15–16 (London, J. Baskett) (1726) (enacting an Act for Restraining and Punishing Privateers & Pirates).

[167] *Id.* at 16 (emphasis omitted)

[168] *Id.* (emphasis omitted)

[169] *See Vt. Agency of Nat. Res.*, 529 U.S. at 776–77 (overviewing qui tam statutes passed by the first Congress).

[170] *See* Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (establishing the Treasury Department).

[171] *Id.*

to the United States the penalty of three thousand dollars" and "one half the aforesaid penalty of three thousand dollars, when recovered, shall be for the use of the person giving such information" against the official.[172]

Second, in creating the Bank of the United States, Congress provided that any agents of the bank who improperly traded goods or lent bank funds would "forfeit and lose treble the value" of the goods or funds.[173] Of the forfeited goods or funds, one half would then be given to the informer and the other half given to the United States.[174]

Following the Founding period, the most significant expansion of qui tam legislation occurred during the Civil War with the passage of the False Claims Act (FCA).[175] The FCA was passed to prohibit fraudulent acts done to obtain money from the federal government[176] and applied to both military officials and civilians.[177] Over a century after its passage, Congress overhauled the FCA in 1986, amending the statute to encourage qui tam litigation from informers and expanding FCA enforcement against fraudulent acts.[178] Many of these provisions were further expanded by Congress in 2009 to include additional actions that fall within the FCA's prohibitions.[179]

Under the current provisions of the FCA, any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or

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[172] *Id.*

[173] *See* Act of Feb. 25, 1791, ch. 10 §§ 8–9, 1 Stat. 195–96 (establishing duties for officials of the Bank of the United States and forfeitures for breach of duty).

[174] *See id.* (providing the division of forfeitures among informers and the federal government).

[175] *See* Beck, *The False Claims Act*, *supra* note 144, at 555 ("Despite the availability of *qui tam* actions under [previous] statutory provisions, only the False Claims Act has generated a large number of federal *qui tam* cases.").

[176] *See id.* (explaining that Congress enacted the FCA "in response to frauds perpetrated in connection with Union military procurement," and that the FCA "prohibited various acts designed to fraudulently obtain money from the government").

[177] *See* DOYLE, *supra* note 143, at 6 ("[FCA] proscriptions applied to both military personnel and civilians.").

[178] Beck, *The False Claims Act*, *supra* note 144, at 562–65 (discussing Congress's 1986 expansion of the FCA to encourage litigation by guaranteeing informer litigant "costs, expenses, and attorneys' fees as well as 15% to 25% of the proceeds of the litigation when the Justice Department intervenes, and 25% to 30% if the Justice Department does not").

[179] *See* DOYLE, *supra* note 143, at 9 (noting the 2009 amendments to the FCA).

causes to be made or used, a false record or statement material to a false or fraudulent claim" is liable to the United States "for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person."[180] The FCA defines "knowingly" to mean "actual knowledge of the information," acting in "deliberate ignorance of the truth or falsity of the information," or acting in "reckless disregard of the truth or falsity of the information."[181] Further, the FCA "require[s] no proof of specific intent to defraud" to prove that a person acted knowingly.[182] Curiously, the FCA does not define the term "false," but courts have explained that a false claim under the FCA is one "for money or property to which a defendant is not entitled."[183]

Several limitations apply to FCA claims. First, actions against members of Congress, members of the judiciary, and senior executive branch officials are barred.[184] Second, claims by FCA informers who received their information from public sources, such as news media or public records, are barred unless the informer is the original source of the information.[185] Third, after filing a complaint under the FCA, the government may choose to intervene or decline to intervene in the case.[186] Regardless of whether the government intervenes, the qui tam informant may pursue the case himself on behalf of the government.[187] In most cases, the

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[180] 31 U.S.C. § 3729(a).

[181] *Id.* § 3729(b)(1).

[182] *Id.* § 3729(b)(1)(B).

[183] United States v. Southland Mgmt. Corp., 326 F.3d 669, 674–75 (5th Cir. 2003).

[184] *See* 31 U.S.C. § 3730(e)(2)(A) (limiting jurisdiction against certain government officials).

[185] *See id.* § 3730(e)(4)(A) ("The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.").

[186] *See id.* § 3730(b)(2) (establishing that the government may intervene in the case and proceed with the action on behalf of the informer); *see also* ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER: FROM IDENTIFYING A CASE TO FILING UNDER THE FALSE CLAIMS ACT 13 (2d ed. 2009) ("After the complaint is filed, the government has 60 days to intervene or decline to intervene, move for an extension of time to determine whether to intervene, seek dismissal of the action, or settle the case.").

[187] *See* WEST, *supra* note 186, at 14 ("Regardless of whether the government intervenes, though, the whistleblower . . . may pursue the case him- or herself on behalf of the government and is still entitled to a share of the recovery.").

government initially declines to intervene.[188] The government typically does this "to conserve its own resources by waiting until the end of the case to join, and thereby to devote minimal taxpayer resources to the litigation effort."[189]

If the government has intervened and the FCA claim succeeds, the qui tam informer is entitled to an award between fifteen and twenty-five percent of the proceeds paid by the wrongdoer, depending on the extent to which the informer contributed to the case.[190] If the government declines to intervene and the informer's claim succeeds, the informer is entitled to twenty-five to thirty percent of the proceeds.[191] While the informer's reward rate under the FCA is not as high as historic qui tam legislation, modern FCA claims often involve hundreds of millions of dollars in settlement and judgment penalties, providing substantial rewards for informers.[192] In 2020 alone, qui tam informers received over $309 million in rewards.[193]

IV. USING QUI TAM TO LIMIT THE DOMAIN OF EXECUTIVE WAR POWER

A. THE UNIQUE POSITION OF QUI TAM LEGISLATION TO LIMIT WAR POWER

As Blackstone observed, qui tam legislation exists to uphold the social contract by imposing penalties on those who break society's rules and by empowering the public to act as prosecutors to remedy the injuries caused by wrongdoers.[194] Thus, where public officials in

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[188] *See id.* (explaining that between 1986 and 2007, of 5,813 cases filed, the government declined to intervene in 3,752 cases).

[189] *Id.* at 15.

[190] 31 U.S.C. § 3730(d)(1).

[191] *Id.* § 3730(d)(2).

[192] *See* WEST, *supra* note 186, at 15 (describing massive FCA settlements and judgments, including a $650 million settlement involving drug manufacturer Merck, a $62 million lawsuit against Northrop Grumman, and a $334 million judgment against Amerigroup).

[193] *See* Press Release, U.S. Dep't of Just., Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 (announcing settlement and judgment penalties under the FCA during 2020).

[194] *See* BLACKSTONE, *supra* note 140, at 159–60 (applying social contract theory to qui tam legislation).

England and the United States once faced a risk of qui tam action if they breached their duties to the public, imposing a renewed threat of qui tam legislation may serve as a necessary check on the actions of modern executive branch officials, including the President, regarding war power.[195]

From the fourteenth century through America's founding, qui tam legislation was a common oversight tool used against public officials.[196] The United States Constitution was drafted and ratified in this period when legislatures in England and the United States used qui tam legislation to regulate public officials.[197] After the ratification of the Constitution, Congress passed numerous qui tam statutes regulating the actions of executive branch officials, including officials at the Treasury Department and the Bank of the United States.[198] With this in mind, there is "no doubt though that supervising the legality of executive branch conduct through qui tam litigation was understood as a permissible legislative option when the Constitution took effect."[199]

Although qui tam legislation has become less common in American law, the need for qui tam oversight has grown exponentially. As the powers of the President and the executive branch, particularly war powers, have drastically increased from the Founding to the modern day, Congress's ability to conduct oversight and regulation of the executive branch has only decreased.[200] Congressional reliance "on the executive branch to police its own members will often prove inadequate due to

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[195] *See* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 147, at 1316 ("[W]e can recognize qui tam legislation as another means of involving the public in law enforcement processes in a manner that served as a check on government officials.").

[196] *See* Beck, *Promoting Executive Accountability*, *supra* note 23, at 44 (explaining that early in its history, England's Parliament "deployed *qui tam* statutes to enforce specified duties of government officials," and that "[r]egulation of government officials through *qui tam* legislation was widely practiced in the American colonies and early states").

[197] *See id.* at 45 ("The United States Constitution was ratified against the backdrop of over four and a half centuries in which Anglo-American legislatures had often regulated government officials through *qui tam* legislation.").

[198] *See supra* notes 170–174 and accompanying text.

[199] Beck, *Promoting Executive Accountability*, *supra* note 23, at 45.

[200] *See id.* at 41–42 (observing that the federal government "has experienced a profound rebalancing of power over the past century as authority has shifted from the legislative branch to the executive branch," resulting in "many instances in which potentially illegal executive conduct goes unaddressed due to limitations of the standard options for ensuring executive branch legal compliance").

unavoidable conflicts of interest and the difficulty of managing a vast bureaucracy."[201] If Congress chooses the path of oversight, it can conduct hearings to inquire into executive action to place pressure on the President, but this process does not directly limit presidential power or strongly deter future executive misconduct.[202] If Congress chooses to directly respond to misconduct by the President, it can only resort to "cumbersome processes like lawmaking or impeachment."[203] Given Congress's repeated failures to limit presidential power through the WPR due to partisan loyalty to the President and bipartisan hesitancy to withdraw support from the military during times of war, presidents may often act with impunity in war without fear of limitation by Congress.[204]

Through the use of qui tam legislation, Congress could reclaim its regulatory power that has been lost as executive war powers have expanded.[205] Qui tam is a viable solution to Congress's problem of executive war power for four reasons. First, after enacting qui tam legislation, Congress could rely on members of the public or individual members of Congress to initiate qui tam suits.[206] This public power would allow Congress to indirectly conduct oversight and regulation without garnering enough votes to pass laws targeting the President or undertaking impeachment proceedings.[207] Second, qui tam litigation would prove to be politically expedient for Congress. Members would not have to cast public votes against the President or military action that could then be weaponized by opponents in future elections, relying instead on qui tam informers to ensure executive legal compliance during war.

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[201] *Id.* at 42.

[202] *See id.* (explaining that conducting oversight does not place Congress in a position to directly respond to executive action).

[203] *Id.*

[204] *See* Barker, *supra* note 104, at 14 (noting that partisan loyalty to the President limits Congress's ability to rein in executive power during war); *supra* note 129 and accompanying text.

[205] *See* Beck, *Promoting Executive Accountability*, *supra* note 23, at 48–49 (explaining that modern qui tam statutes could be used to reinforce Congress's powers that have been lost to the President).

[206] *See id.* at 53 ("A *qui tam* statute deputizes private citizens to represent the interests of the public in enforcing the law . . . .").

[207] *See id.* at 42–43 (arguing that "*qui tam* legislation has the capacity to fill gaps left by more common methods of enforcing the law," which, for Congress, include lawmaking and impeachment).

Third, qui tam legislation authorizing informer suits would not create national security concerns as might other legislation defunding military operations or requiring the President to withdraw from a conflict.[208] A successful qui tam suit imposes a forfeiture or a penalty, nothing more.[209] This means that if a qui tam suit against the President or another executive branch official were to succeed, the President or official would not be forced to withdraw troops, limit funding for the military, or take any action to weaken the national security capacities of the United States.[210] Instead, the wrongdoer would be forced to pay a monetary penalty and possibly a political penalty for breaking the law.

Fourth, qui tam suits satisfy constitutional standing requirements that have thwarted past lawsuits alleging breaches of executive war power against presidents.[211] For example, in *Kucinich v. Obama*, ten members of Congress sued President Obama, alleging that he violated the WPR by allowing American forces to remain in Libya past the WPR's deadline.[212] The U.S. District Court for D.C. dismissed the case, holding that the plaintiffs lacked standing under Article III of the Constitution's case or controversy requirement because they had not suffered an injury in fact.[213] As the Supreme Court held in *Vermont Agency of Natural Resources*, however, qui tam suits satisfy Article III requirements.[214]

In *Vermont Agency of Natural Resources*, the Court adopted an approach to qui tam litigation that strongly paralleled Blackstone's approach. The Court explained that a qui tam informer sues "to remedy an injury in fact suffered by the United States," in which the sovereignty of the United States has been injured due to the

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[208] *See* Caminker, *supra* note 26, at 367 (concluding that qui tam suits do not pose any great threat to national security).

[209] *See, e.g.*, United States *ex rel.* Maxwell v. Anham USA, Inc., No. 1:14-cv-156, 2020 WL 4460364, at *7–*8 (E.D. Va. Aug. 3, 2020) (imposing only financial penalties upon the defendants and upholding the payment of $27 million for claims brought under the FCA).

[210] *See* Kolis, *supra* note 26, at 436 n.124 ("[T]he *qui tam* relator is concerned with one thing only: money.").

[211] *See* Beck, *Promoting Executive Accountability*, *supra* note 23, at 46 (explaining that the Supreme Court "has found that *qui tam* litigation satisfies Article III requirements" because a "statute's *qui tam* provision act[s] as a partial assignment to the relator of the government's claim").

[212] 821 F. Supp. 2d 110, 112–14 (D.D.C. 2011).

[213] *See id.* at 125 (dismissing the plaintiffs' case for lack of standing under Article III).

[214] *See* Vt. Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (holding that a qui tam action meets Article III standing requirements).

violation of its laws.[215] Further, while a qui tam litigant has suffered no invasion of a legal right, the litigant acts on behalf of the United States as the assignee of the government's damages claim.[216] Thus, "the United States' injury in fact suffices to confer standing on" qui tam informers.[217]

Given its unique benefits, qui tam legislation would provide a politically advantageous avenue for Congress to limit executive war powers while simultaneously maintaining national security. Qui tam statutes targeting war powers would not only curb executive excess in times of conflict, but would also reinforce the social contract upon which American democracy was built.

B. THE FALSE CLAIMS ACT

Although the FCA cannot be used to initiate qui tam actions against the President or any other senior executive branch officials, the FCA can be used to initiate qui tam actions against contractors performing military contracts with the federal government.[218] In situations where the President has begun a conflict without congressional authorization or has violated the WPR, qui tam suits against military contractors could indirectly limit executive war power.[219]

Where there is an expenditure of money to a federal contractor that is contrary to law and the President "has not enforced the law that would have prohibited that payment of money," an FCA claim may accrue if other requirements of the FCA are met.[220] For an FCA claim to succeed, the contractor must submit a false claim to the federal government, meaning that the contractor requests money to

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[215] *Id.* at 771.

[216] *See id.* at 773–74 (explaining that a qui tam litigant has Article III standing under "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor" and that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim").

[217] *Id.* at 774.

[218] *See* DOYLE, *supra* note 143, at 10–11 (identifying who may be sued under the FCA).

[219] *Cf.* Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 585 (2017) (explaining that, for actions brought under the FCA, "qui tam cases indirectly vindicate congressional desire to enforce the False Claims Act expansively when the President does not choose to enforce it").

[220] *Id.* at 584–85.

which the contractor is not entitled.[221] Where the President acts contrary to a law that prohibits the payment of money to the contractor, the contractor is not entitled to the amount received from the government.[222] Further, the contractor must knowingly make the false claims, which requires actual knowledge that the expenditure was illegal, deliberate ignorance that the payment was illegal, or reckless disregard for the fact that the payment was contrary to law.[223] In sum, if a contractor knows that the President or executive branch official acted against a law prohibiting the payment of money to the contractor, but submits a claim or receives money to which the contractor is not entitled, the contractor may be liable under the FCA.

In the domain of war powers, the WPR is a law that could prohibit a payment of money to a contract. As the WPR dictates, after initiating hostilities, the President must comply with several requirements for the military action to remain legal, including reporting requirements and a mandated withdrawal deadline.[224] Where the President fails to comply with the WPR provisions, as President Obama did when he kept American forces in Libya beyond the mandated withdrawal deadline, the President has breached the WPR.[225] After breaching the WPR, it follows that any subsequent payments to contractors to sustain American hostilities in the conflict are made contrary to law. If a contractor engaged in the conflict is aware of the WPR breach but submits a claim or receives funding from the federal government, an FCA claim against the contractor is possible.[226]

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[221] *See* DOYLE, *supra* note 143, at 15–18 (discussing causes of action under the FCA and outlining the common elements of an FCA claim—namely, state of mind, falsity, and materiality).

[222] *See* Campbell, *supra* note 219, at 585 (explaining that when the President has not enforced a law that would prohibit an expenditure of money, a contractor who submits a claim or receives money which the President is forbidden to expend may be liable under the FCA).

[223] *See* 31 U.S.C. § 3729(b) (defining the terms "knowing" and "knowingly" under the FCA).

[224] *See* Beck, *Promoting Executive Accountability*, *supra* note 23, at 48–49 (overviewing the WPR's requirements).

[225] *See* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 147, at 1245 ("The Obama administration violated the WPR by ordering extensive Libya operations based on an implausible argument that U.S. forces were not engaged in 'hostilities.'").

[226] *See* 31 U.S.C. § 3729(a) ("[A]ny person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty . . . .").

Despite this possibility, several limitations apply. The FCA informer cannot base the claim against the contractor on publicly available information alone.[227] The informer must either be the original source of the information that became public or must possess some information implicating the contractor that is not yet public information.[228] The FCA informer would also likely be required to pursue the claim without government assistance, as it is doubtful the government would choose to intervene in an FCA claim alleging the President acted illegally.

Regardless of these limitations, successful FCA claims against military contractors could have serious implications. In 2019 alone, the Pentagon expended $370 billion in contracting, which was more than half of total defense-related discretionary spending.[229] Also in 2019, there were around 53,000 contractors in the Middle East, outnumbering the 35,000 troops stationed in the region.[230] Faced with a possibility of FCA claims that could result in multi-million dollar penalties, military contractors would likely hesitate to participate in conflicts where the President has acted in violation of the WPR. This reluctance, coupled with the possibility that many contractors might refuse to partake in legally questionable conflicts, could incentivize presidential compliance with the WPR or incentivize presidents to seek authority from Congress before initiating wars.

C. AMENDING THE WAR POWERS RESOLUTION AND AUTHORIZATION FOR USE OF MILITARY FORCE

In both England and the United States, qui tam provisions were typically included at the end of a statute that created a duty for a

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[227] *See id.* § 3730(e)(4) (barring FCA claims based solely on public information).

[228] *See id.* (allowing FCA claims where the litigant is the original source of the public information).

[229] *See* HEIDI PELTIER, THE GROWTH OF THE "CAMO ECONOMY" AND THE COMMERCIALIZATION OF THE POST-9/11 WARS, 20 YEARS OF WAR: A COSTS OF WAR RESEARCH SERIES (Jun. 30, 2020), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2020/Peltier%202020%20-%20Growth%20of%20Camo%20Economy%20-%20June%2030%202020%20-%20FINAL.pdf ("In 2019, the Pentagon spent $370 billion on contracting – more than half the total defense-related discretionary spending, $676 billion, and a whopping 164% higher than its spending on contractors in 2001.").

[230] *See id.* (comparing the number of contractors and American troops in the Middle East).

public official.[231] After establishing the public official's duty, the legislature would then provide a penalty or forfeiture to be paid by the official should he breach his duty that would be shared between the government and the qui tam informer.[232] The same can be accomplished today with the WPR and the Authorization of Use of Military Force of 2001 (AUMF).

While Congress could attempt to impeach or enact legislation against a President who has violated the requirements of the WPR or AUMF, Congress could also enact a qui tam provision to be included in the statutes themselves. Similar to the qui tam provisions included in the Act for Restraining and Punishing Privateers & Pirates of 1693 and the Act of September 2, 1789,[233] Congress could amend the WPR and AUMF to require that the President or any other member of the executive branch who fails to comply with the statute forfeit a certain sum of money, part of which would be paid back to the government with the other part going to the informer. Depending on the size of the penalty, Congress could split the forfeiture evenly between the government and the informer[234] or grant the informer a payout commensurate with the informer's contribution to the case as the FCA does now.[235]

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[231] *See* ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF NEW-YORK, FROM 1691, TO 1725, *supra* note 166, at 16 (placing the qui tam provision at the end of the statute); *see also* An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789) (placing the qui tam provision at the end of the Act for Restraining and Punishing Privateers & Pirates).

[232] *See* ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF NEW-YORK, FROM 1691, TO 1725, *supra* note 166, at 16 (requiring that officials "raise and levy such a number of well-armed Men" to apprehend and arrest privateers and pirates, and imposing a fifty pound penalty on wrongdoing officials that would be shared with the informer); *see also* An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789) (prohibiting Treasury Department officials from "carrying on the business of trade or commerce, or [owning] in whole or in part of any sea-vessel, or purchas[ing] . . . any public lands or other public property," and imposing a three thousand dollar fine on any official who breached this prohibition which would be shared with the informer).

[233] *See supra* notes 166, 170, 232 and accompanying text.

[234] *See* ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF NEW-YORK, FROM 1691, TO 1725, *supra* note 166, at 16 (dividing the qui tam forfeiture between the informer and the Crown); An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789) (dividing the three thousand dollar penalty evenly between the informer and the federal government)

[235] *See* 31 U.S.C. § 3730(d)(1) (basing an FCA informer's award "upon the extent to which the person substantially contributed to the prosecution of the action").

As noted, the WPR has largely failed to limit presidents from abusing their war powers.[236] Adding an enforcement mechanism in the form of a qui tam provision to the WPR would likely result in greater compliance from the President. Presidents could no longer simply ignore the WPR and rely on partisan loyalty or congressional hesitancy to act against the President in wartime.[237] Instead, presidents who fail to properly report military action, remove American forces from hostilities absent approval from Congress, or comply with any other WPR provision might face a suit filed by a member of the public or Congress whose case has Article III standing.

The AUMF—a scant two-page document—has governed the War on Terror for over twenty years.[238] The AUMF authorizes the President to:

> [U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[239]

The broad language of the AUMF "does little to provide checks on executive overreach in its response to . . . non-state actors and the threats they pose."[240] The Bush, Obama, and Trump Administrations each relied extensively on the AUMF to justify military actions around the world.[241] For example, the Obama

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[236] *See* Arzich, *supra* note 21, at 431 ("If the WPR is to be judged on whether it has prevented the unilateral use of force by the Executive, then it is an abject failure.").

[237] *See supra* text accompanying note 134.

[238] *See* Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541) (authorizing the President to use military force to prevent acts of terrorism from the date of enactment, September 18, 2001).

[239] *Id.*

[240] Steven B. Lowery, Note, *Reauthorizing the Long War: A New Legal Foundation for Counterterror Operations*, 57 U. LOUISVILLE L. REV. 385, 386 (2019).

[241] *See id.* at 394–99 (describing actions taken by the Bush, Obama, and Trump Administrations that were justified by the AUMF, including the invasion of Afghanistan and military action targeting the Taliban, al-Qaeda, and other terrorist organizations around the

Administration relied upon the AUMF to justify air strikes against the Islamic State (ISIS), despite ISIS's lack of involvement in the September 11th attacks, as well as air strikes targeting those who impeded Afghan government forces.[242] The Trump Administration also used the AUMF to justify air strikes directed against the Syrian government, which was the first time the AUMF had been used to validate military action against a sovereign country.[243] The Biden Administration has continued this trend, relying on the AUMF to justify air strikes in Somalia.[244]

As the WPR has not curtailed overreach by the President, neither has the AUMF.[245] For this reason, Congress could amend the 2001 AUMF to include a qui tam provision and include qui tam provisions in any future AUMFs to hold the President and any executive branch official accountable for violating the law. The risk of a qui tam suit may influence future presidents to strictly comply with the letter of the law in the AUMF or to seek revisions from Congress, which could update the AUMF or pass a new AUMF to give the President the necessary tools to combat terrorism.

It is also important to note that if a President or executive branch official were to be found liable under a qui tam provision included in the WPR or AUMF, military action would not necessarily cease.[246] The qui tam provision would only order the payment of a

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world during the Bush Administration, the expansion of American military airstrikes targeting the Islamic State (ISIS) and other terrorist organizations during the Obama Administration, and strikes against the Syrian government during the Trump Administration).

[242] *See id.* at 396–97 (noting the expansion of the AUMF under the Obama Administration).

[243] *See id.* at 399 ("[T]he Trump Administration deemed not only strikes against ISI[S] were justified under the AUMF, but also 'strikes taken . . . against the Syrian Government,' as the 'AUMF also provides authority to use force to defend U.S., Coalition, or partner forces engaged in the campaign to defeat ISIS.' This represents the first time the AUMF has been used to justify strikes against a sovereign state and could mark a turning point in the history of U.S. counterterror operations." (footnote omitted) (quoting Letter from Charles Faulkner, Bureau of Leg. Affs., U.S. Dep't of State, to Bob Corker, Chairman, Comm. on Foreign Rels. (Aug. 2, 2017), https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000)).

[244] *See* Press Release, Joseph R. Biden, Jr., President of the United States, Letter to the Speaker of the House and President Pro Tempore of the Senate regarding the War Powers Report (June 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/08/letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-regarding-the-war-powers-report-3/ (describing military operations conducted pursuant to the AUMF).

[245] *See id.* at 386 (outlining the failure of the AUMF to curb executive overreach).

[246] *See* Campbell, *supra* note 219, at 585 ("The executive's failure to act is not technically cured; a qui tam court does not order the executive branch to enforce the law . . . .").

penalty, not the withdrawal of troops or any other act that might impair national security interests. If found liable, the President could continue breaching the WPR or AUMF, but would likely face political blowback and increased public pressure to stop the military action or seek authorization from Congress.

Incentivizing the President to seek authorization from Congress by including qui tam provisions in the WPR and the AUMF would provide an aura of legitimacy to presidential military action. Presidents who break from the requirements of the WPR or expand the AUMF beyond its original meaning risk subjecting critical wartime operations to allegations of illegitimacy or illegality.[247] These breaches of law also fly in the face of the Founders' intent that the Commander in Chief would be subject to Congress's powers of directing war making.[248] Qui tam legislation could help Congress reclaim some of this power that has been lost during the continuous expansion of executive war power.[249]

V. CONCLUSION

Executive war power has expanded far beyond what America's Founders intended. Where the Founders intended the President to command America's military subject to the direction and regulation of Congress, the modern presidency has seized for itself the power to initiate, conduct, and terminate war without congressional input. Despite Congress's attempts to reassert its control, presidents have repeatedly evaded Congress and conducted war as they see fit. Although past attempts at regulation and oversight have failed, Congress's solution to the twenty-first-century problem of expansive executive war powers should come in the form of qui tam legislation. Using existing qui tam statutes, such as the FCA, and enacting provisions that would authorize qui tam suits under the WPR and AUMF, Congress can limit presidential war power in a manner that

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[247] *See* Lowery, *supra* note 240, at 410 (concluding that "counterterrorism operations without the express will of Congress will continuously be plagued by claims of illegitimacy, or worse, illegality").

[248] *See* THE FEDERALIST NO. 69, at 511 (Alexander Hamilton) (The Floating Press ed., 2011) (arguing that under the Constitution, the President "would have a right to command the military and naval forces of the nation," while Congress possesses the right of "declaring war, and of raising and regulating fleets and armies by his own authority"); *see also supra* note 37 and accompanying text.

[249] *See supra* note 205 and accompanying text.

is politically expedient, poses little—if any—risk to national security, and meets constitutional standing requirements. Finally, using qui tam legislation to limit executive war power would uphold America's social contract and help ensure that presidential action in times of war is both legitimate and legal.