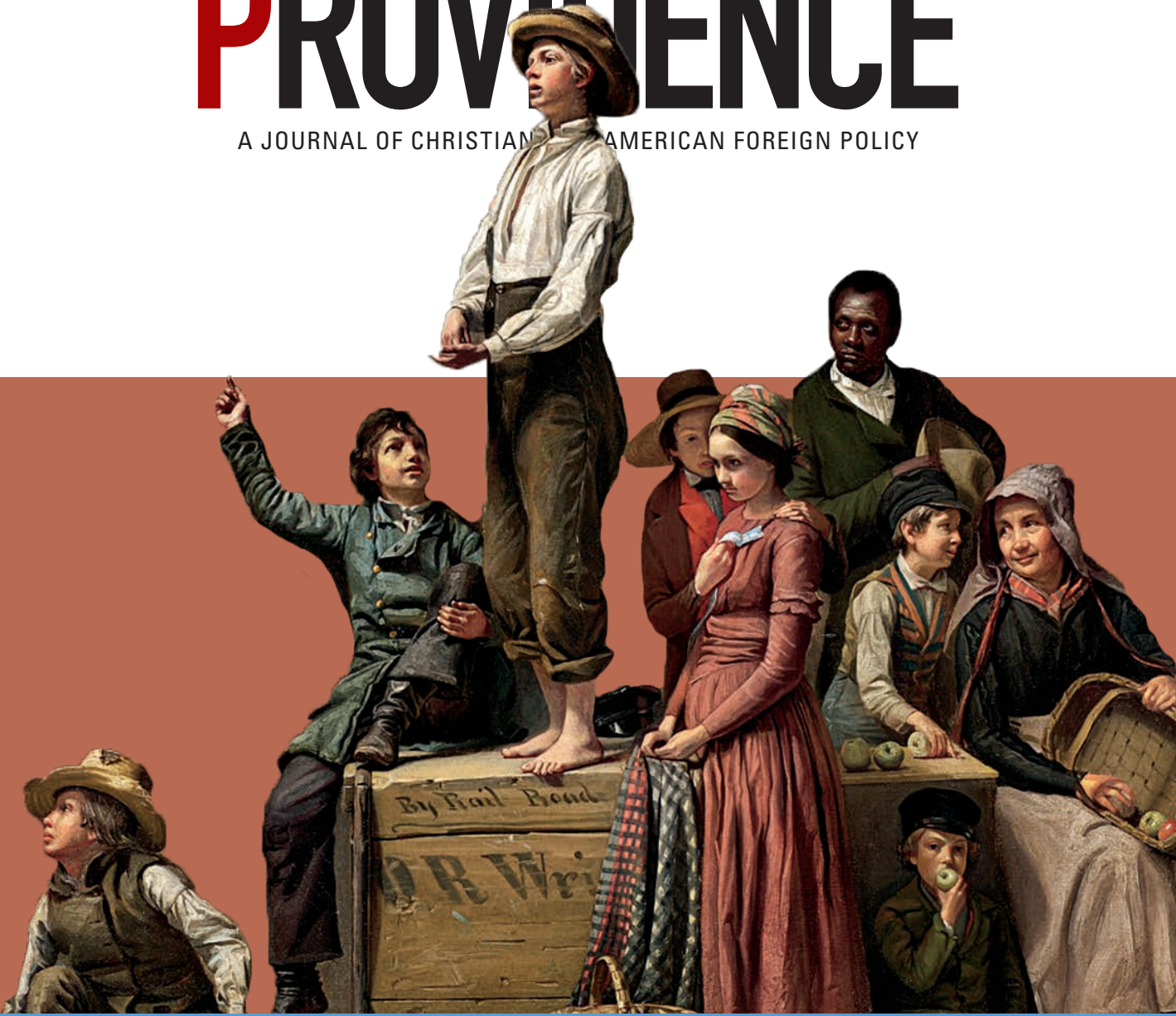


SPRING-SUMMER 2018 • ISSUE 11

PROVIDENCE

A JOURNAL OF CHRISTIAN AMERICAN FOREIGN POLICY



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THANK YOU, "JOZ"

For his years of service to the journal and its mission, *Providence* wishes to extend its gratitude and heartfelt appreciation to Joseph Avakian. As founding designer, "Joz" has harnessed his talent and artistry to bring our words to life. Over the inaugural three years, he has proved that design elements can help make an argument in ways that text alone cannot. Crucially, he has been a stalwart opponent of "Christian shoddy." For Joz, "good enough" simply wasn't. It had to be good, unqualified. Joz—thank you for being a part of this. Thank you for sharing your passion with us, our readers, and for the kingdom. "Later!"*

*For more of Joz check out www.josephavakian.com

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In his circa 1863 painting *Young America*, Thomas Le Clear alludes to the racial, labor, political, and financial problems surrounding the Civil War through the children depicted. Source: Gandalf's Gallery, via Flickr.

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LEGITIMATE AUTHORITY & JUST WAR

JOSH CRADDOCK



Children gather around a US tactical vehicle during an independent, coordinated patrol with Turkish military forces along the demarcation line outside Manbij, Syria, on July 14, 2018. By Staff Sgt. Timothy R. Koster. Source: US Army.

Last August, President Trump vowed to meet North Korean nuclear threats with “fire and fury like the world has never seen.” A year later—and depending on your assessment of the situation—one can question whether such “maximum pressure” verbal belligerence has yielded a political and diplomatic dividend. Nevertheless, in considering any such presidential action, a prior question should precede any consideration of effectiveness. Does a US president have the constitutional authority to launch “fire and fury” without first seeking congressional authorization? Though this question might

seem unduly procedural, the answer matters greatly for just war reflection.

Recent *Providence* online posts, including Matt Gobush’s “The Libya Intervention: A Just War Unjustly Disowned” and Daniel Strand’s “The Syrian Airstrike: Measured, Discriminate, and Just,” have focused more on the “just cause” and “right intention” prongs of *jus ad bellum* than on the “legitimate authority” prong. But this latter point deserves deeper analysis because the answer to our question depends in part upon domestic law. It should not be simply assumed that the executive

branch wields legitimate authority, independent from the other branches, to engage in armed conflict in Libya, Syria, or North Korea.

St. Thomas Aquinas, building on the just war tradition articulated by St. Augustine, argued that *jus ad bellum* is only satisfied when the proper sovereign authority declares war publicly.¹ Admittedly, in the medieval period, the sovereign appears easier to immediately identify. The prince was the temporal authority above whom there was no higher redress for the maintenance of public order and civic peace; the one who to

whom “the entire public authority is entrusted.”⁷² But not even the medieval king was above the law. Gregory Reichberg summarizes Aquinas’ view this way: “To be legitimate, princely power must be acquired and exercised in accordance with the rule of law.”⁷³

Contemporary state sovereignty is slightly more complicated. Justice Kennedy said that “the Framers split the atom of sovereignty.”⁷⁴ The United States Constitution divides sovereignty between the states and three co-equal branches of government, each of which is assigned particular duties. In the American system, foreign affairs powers are clearly entrusted to the federal government. But which branch is the proper authority to declare and wage war, or engage in armed hostilities?

The Constitution explicitly entrusts the power to declare war with Congress in Article I.⁵ The Founders were wary of creating a new King George and worried about entrusting any one individual with the power to send the entire nation to war. This safeguard wisely helps to ensure popular support for military engagements before they are initiated. Article I also gives Congress the power to “grant letters of marque and reprisal,” “make rules concerning captures on land and water,” “raise and support armies” through financial appropriations, “provide and maintain a navy,” regulate “land and naval forces,” and organize, arm, discipline, and call the militia to repel invasions.⁶ All of these war powers are buttressed by the Necessary and Proper Clause.

Nevertheless, the Founders recognized the functional advantages that the unitary executive possesses—to use Hamilton’s

words from *Federalist* No. 70—the advantages of “decision, activity, secrecy, and dispatch,”⁷⁷ all of which are essential to the effective direction of troops during wartime. Battle tactics cannot be decided in joint session. Thus, Article II vests the president with “the Executive Power” (a somewhat vague designation) and names him “commander in chief of the Army and Navy of the United States.”⁷⁸ The former is thought to enable limited policing powers, while the latter entrusts military command. In other words, the branches created by Articles I and II do not strictly *separate* war powers, but *marble* them between the branches so that each can check the other.

Marbling is nice in theory, but the exact line between congressional and executive war powers has been contested in practice from the very beginning. Even the Founders did not agree on precisely how much power had been given to the executive.⁹ Despite these disagreements, there can be no doubt that Congress was expected to play the leading role. President Washington believed that he could not initiate offensive hostilities against the Indian tribes without congressional consent, writing privately that “no offensive expedition of importance can be undertaken until after [Congress] shall have deliberated upon the subject, and authorized such a measure.”¹⁰ Presidents Adams and Jefferson expressed similar views.¹¹ Even Hamilton, one of the most vociferous proponents of robust executive power, acknowledged that Congress had the sole right to declare war.¹²

Congress could also authorize conflict short of war, as part of the long tradition of “limited” or “imperfect” warfare.¹³ It

was this form of conflict that was employed during the 1798–1800 Quasi-War with France. Congress did not formally declare war against France, which would have invoked the law of nations, but rather appropriated money for troops and military supplies and authorized the president to capture ships and commission privateers. All instances of combat since the conclusion of World War II have been instances of implicit congressional authorization through the appropriation of monies.

The president is not entirely without his own powers, however. It is generally agreed that his broad but vague Article II power includes the authority to “repel sudden attacks”¹⁴ and to protect United States persons and property abroad.¹⁵ As a matter of historical practice, executive power has grown as congressional power has waned. The reasons for this are complex. First, courts are loath to review executive decisions involving war and foreign affairs, and are likely to invoke prudential doctrines to dismiss such cases at an early stage. Thus, the executive branch has little judicial check on its action and may construe the law in its own interest. Second, members of Congress are reluctant to be held accountable for sending America’s youth to war through a formal declaration of war. Implicitly endorsing executive military interventions through the appropriation of monies is a far easier course. Typically, with these appropriations Congress does not even specify which interventions they are meant to fund; in practice, the legislative branch through appropriations delegates the decision entirely by simply paying for whatever the president desires.

A small reversal occurred when Congress passed the War Powers Resolution of 1973 (WPR),¹⁶ designed to “insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”¹⁷ Its provisions reiterate that the commander in chief can only introduce American forces into hostilities pursuant to a declaration of war, specific statutory authorization, or a national emergency created by a sudden attack on the United States.

But no matter how well-intentioned the WPR might have been, it has been largely ineffective. Creative executive branch lawyers have taken full advantage of perceived loopholes. For example, the WPR seems to assume 60–90 days *carte blanche* for the president

to introduce troops into hostilities without prior authorization of Congress.¹⁸ Even though the WPR states that appropriations may not be construed to imply authorization beyond that period,¹⁹ appropriation for military engagements *has* been interpreted as implying authorization to engage in conflicts, such as in Kosovo.²⁰ Finally, the meaning of “hostilities” has been construed narrowly to permit the president wide latitude in military engagements, most notably in Libya. Although presidents have largely complied with the WPR, none have accepted its constitutionality.

Using the Constitution and WPR as a framework, does the president have “legitimate authority” for purposes of just war to conduct military interventions in Libya, Syria, or North

Korea? Let’s take each conflict in turn.

1. Libya. The president’s constitutional war-making powers are strongest when they align with the will of Congress.²¹ It’s unlikely that President Obama’s military intervention in Libya was consistent with Congress’ expressed or implied will, though interpreting Congress’ “implied will” is always a thorny business. Thus, the question is whether the president’s own powers, independent of Congress, justify the action.

Opinions developed by President Obama’s Office of Legal Counsel (OLC) for the Libyan strikes argued that the president only has authority to militarily intervene independently of congressional authorization when a sufficiently important “national interest” is



Airmen of the Twenty-Eighth Maintenance Squadron at Ellsworth Air Force Base, SD, prepare a B-1B Lancer to support of Operations Odyssey Dawn (America’s military operations in Libya). By Staff Sgt. Marc I. Lane, March 27, 2011. Source: US Air Force.

at stake and the “anticipated nature, scope, and duration of the planned military operations” are limited. OLC identified two significant national interests as justifying the exercise of the president’s constitutional authority to intervene independent of Congress: (1) “preventing regional instability” and (2) “preserving the credibility and effectiveness of the United Nations Security Council” (UNSC).²² Both of these assertions are controversial as applied to Libya, but let’s assume the first one is valid and turn to the second prong—the limited nature and scope of operations.

President Obama’s legal advisors argued that significant US deployment in Libya—eleven ships (including submarines), intelligence and logistical aircraft, stealth bombers, fighter jets, and unmanned drones that conducted 801 strike sorties—did not rise to the level of “hostilities” under the War Powers Resolution or war under the Declare War Clause because the military means, risk of escalation, exposure, and mission purpose were “limited.”²³ Even though there were no American boots on the ground, it stretches credulity to reach that conclusion given the scale of the operation. Purely as a matter of domestic law, the president did not have sufficient constitutional authority to intervene in Libya as he did, independent of congressional approval.

2. Syria. President Trump’s strikes against Syria are likewise deficient. Under the Libyan precedent, OLC at least pointed to the UNSC’s resolution on Libya as justifying America’s significant interest in military intervention. The 2017 bombing of al-Shayrat Airbase was supported by no such resolution, leaving only the flimsy “regional



US Army Gen. Vincent K. Brooks briefs Vice President Mike Pence at the Demilitarized Zone between North and South Korea on April 17, 2017. By D. Myles Cullen. Source: White House.

stability” justification. But regional instability somewhere in the world is too low a bar: it will *always* justify independent executive military intervention. If that is the only legal limit for acting independently of congressional approval, *then there is no practical limit.*²⁴ The OLC opinion justifying the April 2018 strikes on Syria added two additional justifications: humanitarian catastrophe and deterrence against the use and proliferation of chemical weapons.²⁵

This result is inconsistent with the structure and text of the Constitution. It would make little sense to entrust Congress with the power to declare war if “instability” or “humanitarian catastrophe” in any part of the world gives the president independent authority to initiate acts of war there. Even judicial precedent recognizing the president’s independent authority to defend US persons and property abroad does not apply here. The strikes against Syria were naked exercises of executive power, unauthorized by Congress, and disconnected from any of the traditional justifications for presidential war-making.

3. North Korea. Defense Secretary James Mattis candidly acknowledged that military conflict with North Korea “would lead to the end of its regime and destruction of its people”²⁶ and that it “would be probably the worst kind of fighting in most people’s lifetimes.”²⁷ One cannot argue sincerely that such a conflict would not be “hostilities” under the War Powers Resolution or “war” under the Declare War Clause. Without Congressional authorization, President Trump has no legitimate authority to initiate conflict with North Korea. In the event of a North Korean strike on the United States, however, the president would be able to respond with military force to “repel sudden attack” and to defend American persons and property. Congress would no doubt ratify and extend such action, as it did after President Lincoln responded with military force to the attack on Fort Sumter.²⁸

* * *

Analysts of just war must not only examine the substantive considerations of just cause and right intention, but also the



The guided-missile destroyer USS Porter conducts strike operations against a target in Syria while in the Mediterranean Sea on April 7, 2017. By Mass Communication Specialist Third Class Ford Williams. Source: US Navy.

prong of legitimate authority. That inquiry raises procedural questions about who may initiate hostilities and requires careful consideration of the powers that each branch of the federal government possesses.

For a host of practical and moral reasons, some may find the legal and constitutional encumbrances on the executive's use of force normatively unappealing. Strict compliance with limitations on executive power may lead to slower and less effective responses to global crises, humanitarian catastrophes, and acts of political evil. Indeed, allowing for the diverse moral commitments and political interests of members of Congress, strict adherence to legal procedures may lead to

fewer military interventions altogether. As noted in the introductory comments above, *Providence* contributors were generally supportive of the strikes on Syria. Arguing from normative grounds for the criticality of protecting innocent civilians from a regime responsible for the gassing of its own people, editors offered a rhetorically powerful justification for the use of American power in support of the common good. Indeed, *Providence* articles have argued that the pursuit of a foreign policy sometimes characterized by acts of other-centered self-donation is itself a national interest in that it leads to the acquisition of, and a reputation for, a kind of national virtue. Among much else, the cultivation of a moral national

character, this journal insists, aids in making American power more sufferable to those underneath it.

Nevertheless, however one assesses the *Providence* claim, one ought also to consider strong legal and constitutional restrictions on the president's use of military force to be a prudent restraint against ill-considered warfare, pitting ambition against ambition and allowing for the counsel of the many to check the passions or miscalculations of the one. Indeed, even some within the wide camp of Christian realists would celebrate fewer military interventions.

My argument against an expansive interpretation of the

executive's independent constitutional power to wage war makes no judgment about the moral justifications for or praiseworthiness of military intervention; it only addresses whether such interventions meet the legitimate authority prong of just war.

And this is the heart of it. Whatever one's normative view, just war theorists should agree that war must be waged according to the rule of law if it is to be considered an exercise of "legitimate authority." The American system, with its marbling of war powers between the executive and legislative branches, usually requires authorization based on the deliberative consent of the popular will expressed through the people's representatives in Congress.

Josh Craddock is a recent graduate of Harvard Law School and the former editor in chief of the *Harvard Journal of Law & Public Policy*.

Endnotes

- 1 See St. Thomas Aquinas, *Summa Theologica*, trans. and ed. Fathers of the English Dominican Province (New York: Benziger Bros., 1947), Pt. II-II, q. 40, a. 1, 1359.
- 2 Ibid., Pt. II-II, q. 67, a. 4, 1485.
- 3 Gregory M. Reichberg, *Thomas Aquinas on War and Peace* (Cambridge, UK: Cambridge University Press, 2017), 115; see also Richard J. Regan, *Just War* (Washington, DC: Catholic University Press, 2013), 20: "Just-war theory requires that decisions to wage war be made by those who are legally authorized to do so."
- 4 *US Term Limits, Inc. v. Thornton*, 514 US 779, 838 (1995) (Kennedy, J., concurring).
- 5 US Constitution, Article I, Section 8. One might object that the adoption of the United Nations Charter abolished the legal category of "war" under international law, and that this innovation renders the Constitution's Declare War Clause

superfluous. But Congress' power to declare war entails not only the ability to invoke the laws of war under international law, but also was intended to serve as a protective shield against allowing a single individual to throw the nation into large-scale conflict. Thus, the Declare War Clause includes significant armed conflicts not technically deemed "war" for purposes of international law.

6 Ibid.

7 Alexander Hamilton, *The Federalist* No. 70, ed. Clinton Rossiter (New York: Penguin, 1961), 424.

8 US Constitution, Article II, Section 1-2.

9 See generally Alexander Hamilton & James Madison, *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis, IN: Liberty Fund, 2007): debating the extent of the president's power to proclaim neutrality.

10 Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review* 118, no. 33 (2005): 2047, 2058. Quoting letter from George Washington to Governor William Multrie, Aug. 28, 1793, in *The Writings of George Washington*, ed. John C. Fitzpatrick (Washington, DC: US Government Printing Office, 1940), 73.

11 Ibid. President Adams wrote that it was Congress' duty to "to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations." Ibid., quoting *Annals of Congress* (1797), 57. President Jefferson acknowledged during the First Barbary War that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense." Thomas Jefferson, State of the Union Address, December 18, 1801, quoted in Brian R. Dirck, *The Executive Branch of Federal Government* (Santa Barbara, CA: ABC-CLIO, 2007), 400.

12 See Alexander Hamilton, *Pacificus* No. 1, June 29, 1793, in Hamilton and Madison, *supra* note 9, at 16: "The Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War."

13 *Bas v. Tingy*, 4 US (4 Dall.) 37, 43 (1800) (Chase, J., concurring): "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time."

14 Madison's notes from the Constitutional Convention record that Congress' proposed power "make War" was amended to be the power to "declare War" to reserve "to the Executive the power to repel sudden attacks." James Madison, *Notes of Debates in the Federal Convention of 1787* (New

York: Norton, 1966), 476.

15 *Durand v. Hollins*, 8 F. Cas. 111, 112 (US Circuit Court for the Southern District of New York, 1860): "The question whether it was the duty of the president to interpose for the protection of citizens at Greytown [Nicaragua] against an irresponsible and marauding community that had established itself there, was a public political question, in which the government as well as the citizens whose interests were involved, was concerned, and which belonged to the executive to determine; and his decision is final and conclusive, and justified the defendant in the execution of his orders given through the secretary of the navy."

16 50 US Code, Section 1541-48.

17 Ibid. at Section 1541.

18 See Deployment of United States Armed Forces into Haiti, 18 Op. OLC 173, 175-76 (1994).

19 See 50 US Code, Section 1547(a)(1).

20 Authorization for Continuing Hostilities in Kosovo, 24 Op. OLC 327 (2000).

21 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 635-39 (1952) (Jackson, J., concurring).

22 Authority to Use Military Force in Libya, 35 Op. OLC 1 (2011).

23 See Harold Koh, Libya and War Powers: Hearing Before the Senate Committee on Foreign Relations, 112th Congress 7-40 (2011).

24 See Jack Goldsmith, "The Constitutionality of the Syria Strike Through the Eyes of OLC (and the Obama Administration)," *Lawfare*, Apr. 7, 2017, lawfareblog.com.

25 See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. OLC (slip op. at 11) (2018).

26 Zachary Cohen and Barbara Starr, "Mattis to North Korea: Stop actions that could lead to 'destruction of its people,'" CNN, Aug. 10, 2017, cnn.com.

27 Kathryn Watson, "War with North Korea would be 'catastrophic,' Defense Secretary Mattis says," CBS News, May 28, 2017, cbsnews.com.

28 See Bradley and Goldsmith, *supra* note 10, at 2071. Congress authorized the use of force against the Confederacy "four months after Lincoln had already committed US troops to hostilities." Ibid. at 2119 n. 319, citing Act of Aug. 6, 1861, ch. 63, section 3, 12 Stat. 326, 326.