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Available at: https://repository.law.umich.edu/mlr/vol111/iss6/16

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A TIME FOR PRESIDENTIAL POWER?
WAR TIME AND THE CONSTRAINED EXECUTIVE

David Levine*


INTRODUCTION

Between 2002 and 2008 I served as an intelligence officer in the U.S. Air Force. Though I had been deployed overseas several times, my primary place of duty was in the United States. When I landed at Baghdad International Airport in June 2006, however, several things immediately changed for me as a result of military regulations. I had to carry my sidearm and dog tags at all times. I could not eat anywhere other than a U.S. military installation. I could not drink alcohol. My pay was a bit higher. Personally, I was more vigilant, more aware of my surroundings. In other words, I was at war.

Indeed, the U.S. government claimed wartime powers because thousands of others like me—members of the U.S. military—were stationed in Iraq: the United States deployed large numbers of troops to provisional bases on foreign soil, those troops used lethal force, and they detained individuals without trial for using force in return. And while there was a reasonably clear beginning point for the exercise of these powers—found in an Authorization for the Use of Military Force (“AUMF”) rather than a formal declaration of war1—from the vantage point of June 2006, it was unclear whether or when this authority would cease. There was no enemy that could surrender or sign a peace treaty, or give some other sign that “war” had ended; the forces that the United States was fighting—variously, Sunni tribesmen, Shia militias, and foreign extremists—had changed significantly since the 2003 invasion and would even change during my yearlong deployment. Although, as an officer in the U.S. military, it was very clear for me when I was at war and when I was not, the temporal bounds of this

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“wartime” were actually quite murky for the U.S. government. That murkiness increased significantly when considering not only the war in Iraq but also the “Global War on Terror” writ large.

Professor Mary L. Dudziak’s important new book *War Time*² confronts the murkiness between wartime and peacetime, investigating its history, present reality, and implications. Although the boundaries of the War on Terror are commonly perceived as shifting and uncertain, especially compared to relatively defined wars such as World War II, Dudziak argues that the murky boundaries of war are not a new phenomenon and highlights the corrosive effects that such uncertainty can have on the rule of law. She argues that this uncertainty will accelerate as the United States engages in increasingly amorphous armed conflicts. She likewise predicts that political leaders—particularly executive branch officials—will try to take advantage of wartime’s uncertain boundaries while using the terminology of a more certain past.

Dudziak contends that the increasing invocation of wartime as an argument for increased executive power runs counter to the conception of the United States as a nation of laws. She suggests that we need to understand the flawed rationale behind such invocations to effectively combat them. Part I of this Notice summarizes Dudziak’s work, tracing the development of the modern concept of “wartime” from World War II to the present day. Parts II and III evaluate Dudziak’s arguments in light of two of the most extraordinary powers that a state may claim in wartime—the power to detain and the power to project force. Part II argues that, for all of Dudziak’s concerns about the diminishing barriers between peacetime and wartime, there still exist some hard limits on the power that the executive may claim, as evidenced by U.S. detention policies in Iraq. But while some limits may still apply, Part III also finds truth in Dudziak’s premise that wartime’s boundaries are eroding, using the recent U.S. intervention in Libya as an example. Part III also examines the limits to Dudziak’s paradigm, under which wartime necessarily equals government power, against the backdrop of a president who has expanded his power by conspicuously avoiding “wartime.” While arguing that the relationship between war and executive power is more nuanced than *War Time* might let on, this Notice nonetheless concludes that Dudziak’s book is compelling and raises very real concerns about the future of executive power.

I. DOES WARTIME EXIST?

Dudziak argues that the idea of wartime has undergone a dramatic shift in the last century: American presidents have claimed war powers in an increasing variety of situations, while ignoring the traditional temporal limits that make such expansive powers palatable in the first place. *War Time*’s

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chapters track that evolution. Consequently, Part I of this Notice proceeds chronologically through various incarnations of "war" that have arisen over the last 100 years.

A. War as Time

During wartime, Dudziak writes, "we expect the rules to change," but we also expect that "by definition, wartime comes to an end" (p. 15). Wartime is a discrete period, one with finite boundaries, that dovetails almost precisely with its converse: peacetime (p. 16).

It is in this perceived stark divide between wartime and peacetime, according to Dudziak, that we find a rationale and reassurance for the legal changes that are seen as necessary during wartime. Law during wartime "afford[s] less protection to civil liberties and giv[es] more deference to executive power" (p. 16). However, because "we share a belief that this moment will end decisively," the shift toward a powerful executive is broadly accepted (p. 22).

Dudziak notes, though, that the view of wartime as temporary and exceptional is only accurate if one gerrymanders the definition, ignoring numerous smaller conflicts to which the United States has been a party. In particular, she notes a disconnect between the public perception of wartime—a temporary, limited affair—and the reality of military operations over the twentieth century. Dudziak uses a chart to illustrate just how filled with "wartime" the twentieth century was for the United States, and puts to rest the notion that wartime has been limited or temporary (p. 29). The boundary between wartime and peacetime, then, is more porous than the American public might believe. Even the apparently clear cases—wars with surrender ceremonies and parades—reveal, upon closer examination, a rather muddy divide between war and peace.

B. A Big War with Uncertain Boundaries

Dudziak observes that "World War II is thought of as having obvious starting and ending points: an abrupt beginning at Pearl Harbor and a clear end when the Japanese surrendered after the United States dropped atomic bombs." (pp. 35–36). She then identifies no fewer than six plausible choices for an "actual" end date.4

Identifying the proper start date for World War II (from the American perspective) is similarly troubling. Although the 1941 Japanese attack on Pearl Harbor and the subsequent declaration of war provide an easy marker, Dudziak points out that President Roosevelt began exercising what we

3. P. 26. Among others, these include conflicts in Bocas del Toro, Haiti, and Grenada.
4. Pp. 37–38. In chronological order, these are Germany’s surrender on May 8, 1945; Japan’s announcement of its decision to surrender on August 14, 1945; Japan’s signing of the surrender documents on September 2, 1945; President Truman’s declaration of the cessation of hostilities on December 31, 1946; the ending of the legal state of war with Germany in July of 1951; and the peace treaty with Japan that went into effect on April 28, 1952.
might consider "war powers" much earlier. Starting in 1938, Roosevelt bypassed Congress in order to implement several defense programs that he found necessary after Axis aggression became apparent (p. 41). Roosevelt, or more specifically, Robert Jackson, Roosevelt's attorney general (and a later Supreme Court justice), justified these actions under the president's commander-in-chief powers (pp. 42-43). Even when Roosevelt went to Congress, the result was a significant grant of power to the executive. For example, the 1941 Lend-Lease Act gave the president the power to provide war equipment and supplies to "any country whose defense the President deem[ed] vital to the defense of the United States." Seen in this light, the actual beginning of World War II is less clear.

The upshot of all of this murkiness for Dudziak is that the legal consequences of "wartime" extended beyond what might traditionally be thought of as the temporal boundaries of World War II. In 

Lee v. Madigan, a murder case, the legal issue before the Supreme Court hinged on whether the country was still at war in 1949, the year during which the murder occurred. In 1948 the Court had stated, "War does not cease with a cease-fire order, and power to be exercised by the President ... is a process which begins when war is declared but is not exhausted when the shooting stops." The government argued in Lee that that executive power still had life in 1949. By the time the Court decided Lee in 1959, it was "common sense" that the crime had been committed during peacetime (pp. 39-40), but Dudziak marshals many other instances of legal repercussions stretching out on either side of the 1941-1945 timeframe.

Among these examples, Dudziak describes myriad restrictions on civil liberties and the imposition of domestic surveillance programs by Congress and the executive in the late 1930s. She notes the Court's complicity in placing the country in a more warlike legal framework, citing the upholding of a compulsory flag-salute statute in Minersville School District v. Gobitis in 1940. Dudziak similarly finds traces of "wartime" post-1945 in the

7. Pp. 33-40. The defendant in Lee was an enlisted member of the army who was convicted by court-martial of murdering a fellow soldier. Simply put, if the crime had occurred during wartime, the death penalty was available; if the crime had occurred during peacetime, it was not.
9. P. 38 ("Because [Article 92] remained in effect, the government argued that the nation was 'not then in time of peace for the purpose of Article 92.'").
10. See pp. 44-45, 53-54 (discussing domestic surveillance), 54-58 (discussing the restriction of civil liberties).
12. See pp. 56-58. Dudziak also notes, however, that the Court came to a contrary conclusion—that compulsory flag saluting was unconstitutional—in a subsequent case decided after the declaration of war. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642
Court’s deference to executive detention power after “the shooting stops” in Ludecke v. Watkins, and its decision that Congress’s invocation of war powers in enacting a 1947 rent control statute was appropriate in Woods v. Cloyd W. Miller Co. Having debunked the myth of a clean beginning and end to World War II, Dudziak next sets her sights on the Cold War.

C. The Cold War as the Beginning of Permanent “Wartime”

Dudziak notes that the status of the Cold War as a proper “war” was (and is) deeply uncertain; many of the confrontations were certainly “not the sort of battle imagined by Clausewitz.” Despite the sources and scholars she surveys, Dudziak is unable to reach a conclusion about whether the Cold War was a war (pp. 72–76). Even Congress, she notes, is split on whether to implicitly recognize it by issuing campaign medals for heroism displayed during the Cold War (pp. 74–75).

The ambiguous status of the Cold War led to dubious contractions of civil liberties in the 1950s when the conflict was at its height. Dudziak offers as examples the red-baiting of McCarthyism and the prosecution of individuals for what were essentially “thought crimes” under the Smith Act (pp. 77–78). She notes the prevailing sentiment among scholars that the Cold War was a low point for First Amendment protections (p. 80). But she also recognizes the countervailing forces at play: that international condemnation of racial segregation led to the integration of the military and public schools (pp. 84–85).

For Dudziak, the Korean War—an undeclared, never formally ended war that brought about a significant expansion of executive power—is a better parallel for the current, ambiguous War on Terror. The Korean War ushered in “the national security state” (pp. 92–93), a development more important to the modern wartime legal framework than any individual statute or case. The military budget, notes Dudziak, went from $14 billion in 1949 to $53 billion in 1953 (p. 89). By invoking a war without end, she argues, America’s political leaders put the country on a “permanent war footing” (p. 93) and consolidated executive branch power through budgetary might (p. 89). Dudziak finds in the Korean War an important precursor to this century’s War on Terror.

(1943). She explains this, as well as Justice Jackson’s antitotalitarian rhetoric in the case, as a reaction to wartime in its own right. P. 60.


15. P. 65. Carl von Clausewitz was a nineteenth-century Prussian military theorist known for developing a philosophy of war as it existed in the Napoleonic era. See generally CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1832).
As with the Cold War, the legal status of the War on Terror is deeply confusing and ambiguous; as Dudziak observes, “[T]he words ‘terrorism’ and ‘war’ had not been conflated” previously (p. 100). But, she argues, President Bush harnessed familiarity during highly uncertain times by using traditional terminology: in the immediate aftermath of September 11, he declared the conflict a war, albeit “a new kind of war” (pp. 100–01; internal quotation marks omitted). Dudziak notes too President Bush’s very early recognition that traditional temporal boundaries would not apply to this new war. The effect of this recognition was “a lack of fit between the conceptual categories of wartime and peacetime” (p. 113).

The traditional wartime gloss President Bush put on the War on Terror led to a slackening of legal constraints, despite the war’s lack of temporal boundaries. The result was a virtually unbound executive. Vice President Cheney asked the government, in Dudziak’s words, to operate on “the dark side” (p. 104; internal quotation marks omitted). John Yoo invoked wartime as a rationale for allowing President Bush to approve coercive, perhaps torturous, interrogations (p. 106). President Bush claimed the power to hold foreign nationals, without charge, for an indefinite period of time at Guantanamo Bay. Because “the basic temporal structure (normal times, ruptured by nonnormal times) largely remained in place in legal thought” (p. 114), these invocations of wartime served both legal and normative arguments. Wartime detention is not punishment, and so constraints we might normally put on criminal incarcerations do not apply, for instance. And because wartime is so extraordinary and the stakes are so high, the public should not want the constraints to apply.

Not even the Supreme Court was immune from this logic, Dudziak argues. In the first major case to test post–September 11 limits on executive power—Hamdi v. Rumsfeld—a plurality of the Court held that the president could detain individuals determined to be “enemy combatants.” He had this power, the Court reasoned, precisely because of the wartime framework, which the Court considered appropriate (p. 121). The Court’s understanding of the wartime at issue was a manifestly conventional one: these were exceptional circumstances that would undoubtedly pass.

When the circumstances had not passed four years later, the Court seemingly reconsidered the wisdom of an unbound commander-in-chief. In Boumediene v. Bush, the Court seemed intensely skeptical of executive power and gave the Guantanamo detainees access to habeas corpus proceedings in U.S. courts. Justice Kennedy’s majority opinion for a divided Court

See p. 103 (“‘We are at war,’ he told them, ‘and we will stay at war until this is done.’”).


Pp. 121–22. The Court portentously noted, however, that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.” Hamdi, 542 U.S. at 521.

took particular notice of the lack of temporal constraints, reasoning that habeas was necessary because of the potentially dire consequences for individuals detained "for the duration of [the] conflict."20

Dudziak concludes her brief survey of the Court's War on Terror jurisprudence by analyzing the return of deference to the executive. In Holder v. Humanitarian Law Project, the Court upheld a statute criminalizing material support to groups categorized as "terrorist."21 And though Dudziak notes that "the term 'war on terror' does not appear in the opinions" (p. 125), concerns over national security and wartime objectives certainly animated the decision.22 Indeed, she suggests, the Court looked past the concept of "wartime" altogether and recognized war or conflict (necessitating broader powers) as a now-permanent feature of modern life (p. 127).

Dudziak's arguments crystalize in her conclusion. She identifies "wartime" as a rhetorical device useful for those who would impose extreme measures, rather than an objective description of the world (p. 136). And she prescribes "a citizenry attentive to the exercise of military power" in order to "[k]eep[] the war powers in check" (p. 136).

Implicit in that prescription is the notion that the American polity has so far failed at that task—that, by and large, the president is currently unrestrained in his exercise of war powers. Indeed, in a recent New York Times op-ed, Dudziak says almost exactly that: "[President Obama's] expansive definition of war leaves in place the executive power to detain without charges, and to exercise war powers in any region where Al Qaeda has a presence."23 The remainder of this Notice explores that charge: whether the modern president is unconstrained in his exercise of war powers, and whether the outmoded, conventional understanding of "wartime" is to blame.

II. D AQ DUQ AND THE POWER TO DETAIN

This Part argues that the law continues to constrain the modern executive even while it exercises a core wartime function—detention—using the case of Ali Musa Daqduq as an illustration. Daqduq, a Lebanese national thought to be a senior operative in Lebanese Hizb'allah, was captured by U.S. forces in Iraq in March 2007 and accused of planning a 2007 kidnapping operation during which five U.S. soldiers were killed.24 Consistently referred to as the "highest profile" U.S. detainee in Iraq,25 Daqduq served as

20. See Boumediene, 553 U.S. at 771.
22. See p. 126.
a public link between international terror groups and the Shia insurgency that flourished during the middle years of the decade.

Daqduq was also, however, a consistent source of tension between the United States, Iran, Lebanon, and the Shia-dominated Iraqi government. This was never more true than during the final drawdown of troops at the end of 2011. As President Obama pushed to meet a pullout deadline set by his predecessor, Iraq demanded that Daqduq be turned over, while congressional Republicans argued strenuously that Daqduq should remain in U.S. custody, preferably at Guantanamo Bay. Although much of the official analysis that eventually led the United States to hand Daqduq over to Iraq remains beyond public view, an examination of the forces that influenced this decision provides insight into Dudziak’s central thesis.

The Status of Forces Agreement (“SOFA”) concluded in late 2008 between the United States and Iraq, sets out clear, if limited, guidance on the status of detainees. Pursuant to Article Four of the Agreement, the United States could not detain any person except “in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.”

This broad category included Daqduq. Even when U.S. detention was authorized, “such persons must be handed over to competent Iraqi authorities within 24 hours” of their capture. Iraq, however, was allowed to “request assistance from the United States Forces in detaining or arresting wanted individuals.” Further, the Agreement provided that “[a]ll the United States Forces shall withdraw from all Iraqi territory no later than December 31, 2011.”

The combined force of these provisions left three alternatives for detainees, such as Daqduq, whom the United States still held at the end of 2011. Such individuals could have been turned over to the government of Iraq to be charged and sentenced in accordance with Iraqi law; Iraq could have continued to request American detention assistance; or, provided the U.S. government could charge detainees with specific crimes, they could have been extradited and prosecuted in accordance with normal criminal procedures in U.S. courts.

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27. Id. art. 4, § 1.

28. Id. art. 22, § 2.

29. Id. art. 22, § 3. Since Daqduq remained in U.S. custody until the withdrawal, this was presumably the legal basis for that arrangement. Iraq would have been alerted to his presence under Article 22, § 4 of the SOFA, provided that the United States gave the Iraqi government “available information” on every detainee it held as of November 2008.

30. Id. art. 24, § 1.

31. Commentators have raised the possibility that Daqduq could have been tried by a U.S. military commission in Iraq prior to 2011, a theoretical fourth option. See, e.g., Robert Chesney, The Daqduq Mess: Apportion Blame Widely, LAWFARE (Dec. 20, 2011, 12:20 PM), http://www.lawfareblog.com/2011/12/the-daqduq-mess-apportion-blame-widely/. That was
Beyond the narrow question of whether Daqduq's detention was in accordance with SOFA, whether the United States would have had a legal basis for holding Daqduq following withdrawal was ambiguous. The AUMF, passed by Congress in 2002, gave the president the power "to use the Armed Forces of the United States as he determines to be necessary and appropriate" in response to threats in Iraq. Interpreting similar language in the AUMF enacted in the aftermath of September 11, the Hamdi Court found that "capture and detention" of combatants was a "fundamental and accepted... incident [of] war" and that such action must therefore be a "necessary and appropriate" use of force.

But in discussing the possible contours of this "fundamental incident of war," the Court stated that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." The "active hostilities" boundary called into question the United States' ability to detain Daqduq under AUMF authorization following the disengagement of U.S. forces from Iraq.

Despite these clear legal impediments, there were calls by American politicians and commentators for the United States to retain custody of Daqduq after all U.S. forces had withdrawn from Iraq. Most such arguments sounded in themes that resonate in Dudziak's book—that the United States would, despite withdrawing, still be at war and that the president should invoke those circumstances to maneuver around the law. Senator Lindsey Graham, during a Senate Judiciary Committee hearing, questioned Attorney General Eric Holder on the Daqduq situation and stressed his preference that the United States retain custody:

Mr. Attorney General, I have tried to be as supportive as I know how to be in creating flexibility for the executive branch and not micromanage the war . . . .

perhaps possible, though beyond the scope of this Notice, which focuses on President Obama's options in late 2011.


34. Id. at 520.

35. The applicability of Hamdi presumes that Daqduq was held pursuant to the Iraq AUMF. One could make an argument that the United States was actually holding Daqduq pursuant to the Global War on Terror AUMF, and that therefore his continued detention was authorized. However, substantial links between al-Qaeda and Lebanese Hizb'allah are not well established, and the likelihood that a court would have accepted this argument, given that Daqduq was detained during a use of force authorized by the Iraq AUMF, is low.

Separately, the conclusion that Daqduq was held pursuant to the Iraq AUMF presumes that there was not some other rationale for holding Daqduq (i.e., Daqduq committing an offense for which he could be punished). Although that particular debate is beyond the scope of this Notice, there is a strong argument that he could have been categorized as an unprivileged combatant and held liable for his crimes (assuming a way around the SOFA-based arguments).

If we turn him over to the Iraqis, that is just like letting him go. I think this would be a huge mistake. It would be a national disgrace to allow this guy to escape justice.

Submit to this Committee or me individually a plan that would be reasonable, sound, and has political support to confine future captures and to move people out of Iraq and Afghanistan who are too dangerous to let go.

Some conservative commentators went a step further and argued that, if Iraq would not agree to Daqduq remaining in U.S. custody, President Obama should unilaterally transfer him to Guantanamo Bay. Implicit in both Senator Graham’s statement and these commentators’ views is that the country would remain at war and, as a result, the president would continue to have the power to detain Daqduq. This expansion of presidential power is the logical conclusion that War Time predicts: as wartime becomes normalized, the idea that temporal marking posts should constrain executive power seems quaint and impractical.

But President Obama did not claim unrestrained power in this instance. The United States gave up physical custody of Ali Musa Daqduq—as it had with every other detainee in Iraq—to the Iraqi government. Although there has been speculation that he may yet be extradited to face some form of military commission or civilian trial in the United States, during the summer of 2012, Daqduq was cleared in an Iraqi court of terrorism and forgery charges, and extradition requests by the United States were denied. Paying consideration to Dudziak’s thesis, it is worth reflecting on why the Daqduq situation has played out in this manner.

While Dudziak is, in some respects, accurate in characterizing the end of the Iraq War as unsatisfyingly ambiguous, in this instance “wartime” did


42. See pp. 127–32. She notes, for instance, that the Associated Press refused to acknowledge that combat operations had ended, and that the Department of Defense continued
have a concrete termination date, which itself had concrete legal effects. The Obama Administration took seriously the temporal boundary dictated by statute (SOFA) and broader international law concepts (the "active hostilities" boundary noted by the Hamdi Court). President Obama did not try to extend his authority to detain, one of his most important war powers, even in the face of calls to do so and domestic political opposition to his decision. And if we take the statements of President Obama's advisors seriously, attentiveness to the law and the constraints that the law imposes were primary reasons why this decision was made.

President Obama's actions imply that time and law are still bound up with one another, that they function as important constraints on presidential exercise of the war powers, and that we might still be able to distinguish "wartime" from "peacetime." President Obama did not try to invoke "wartime" as "an argument for extraordinary governance" (p. 136). This was true even given the myriad ambiguities of the Iraq situation. Law, in multiple forms and for multiple reasons, constrained executive power despite potential political costs.

A similar story, with law and time constraining executive power, is playing out in Afghanistan. With the United States planning to pull out of Afghanistan by 2014, most indicators point to the United States permanently handing over detention operations to the Afghan government, as it did in Iraq. To be sure, the Afghan situation will test this counternarrative to Dudziak far more than Iraq did: the Afghan government is less dependable than its Iraqi counterpart, and those detained in Afghanistan were detained under the post-September 11 AUMF, a potentially much broader authority.

Still, it is worth noting that, at least with respect to detention, the erosion of

to award combat pay and medals to soldiers deployed to Iraq even after the official pullout date.


44. Savage, supra note 39.

45. During the December 16, 2011 White House Daily Press Briefing, Jay Carney, the Press Secretary, for instance, made the point several times that the Administration was intent on dealing with the case "in accordance with both U.S. and Iraqi law." Press Briefing by Jay Carney, White House Press Sec'y (Dec. 16, 2011), available at http://www.whitehouse.gov/the-press-office/2011/12/16/press-briefing-press-secretary-jay-carney-12162011. That alone might be thin support, but I find the political calculus convincing. This decision invited potentially damaging conflict (with little in the way of reward), allowing opponents to use the episode as evidence of the president's weakness on national security, in a way a different decision would not have.


48. Those terms and authorities were recently re-ratified by Congress in the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), and it is even easier to argue that those authorities survive any specific military deployment (even to Afghanistan).
temporal boundaries that concerns Dudziak has not manifested itself in the complete destruction of constraints on executive war powers. President Obama has felt bound to act in accordance with a more "traditional" view of wartime, including relinquishing some powers when the switch flips back to "peacetime."

III. LIBYA AND THE POWER TO PROJECT MILITARY FORCE

Although the Obama Administration arguably feels the constraint of law in exercising the detention power, it is also trying to manipulate the definition of wartime. The Administration’s employment of rhetoric to justify the use of force abroad—particularly its attempt to redefine the word "hostilities" in the Libya context—is in many ways consistent with the narrative Dudziak presents. This rhetoric, however, also exposes the conceptual limits of Dudziak’s work. While previous presidents have attempted to expand wartime in the pursuit of increased power, President Obama has tried to limit wartime in order to increase his prerogative.

Both the Declare War Clause and the War Powers Resolution give Congress some control over exactly when "wartime" exists. While the U.S. military was deployed to Libya during the spring and summer of 2011, the Obama Administration advanced the argument that, under the circumstances, it was bound by neither clause. If Dudziak is worried about “war’s presence as an ongoing feature of American democracy” (p. 136), Libya is a potent case study with implications for the use of force over the coming decades.

Article I, Section 8 of the U.S. Constitution grants to Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” Although there is substantial debate on the precise scope of these powers, this clause at least provides some measure of congressional control over significant commitments of U.S. forces to battle. However, it has long been accepted that presidents, acting pursuant to the commander-in-chief power, may "introduce[] armed forces into situations in which they encounter[, or risk[] encountering, hostilities, but which [are] not ‘wars’ in either the common meaning or the

49. U.S. CONST. art. I, § 8, cl. 11.
52. U.S. CONST. art. I, § 8, cl. 11.
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Successive administrations have adopted some variant of that view and have invariably deployed U.S. forces abroad in a limited manner based on this inherent authority.53

The Obama Administration has adopted this position—that a president has inherent constitutional authority to deploy forces outside of war—and even sought to clarify it. In the Office of Legal Counsel’s (“OLC”) memo to President Obama on the authority to use military force in Libya,56 the Administration acknowledged that the Declare War Clause is a “possible constitutionally-based limit on . . . presidential authority to employ military force.”57 The memo reasoned that the Constitution speaks only to Congress’s ability to shape engagements that are “wars,” and that presidents have deployed forces in limited contexts from the earliest days of the Union.58 Acknowledging those facts, the memo concluded that the constitutional limit on congressional power must be the conceptual line between war and not war. In locating this boundary, the memo looked to the “anticipated nature, scope, and duration” of the conflict to which President Obama was introducing forces.59 OLC found that the “war” standard “will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.”60

The Obama Administration’s position was not out of sync with previous presidential practice—the Declare War Clause did not require congressional approval prior to executive deployment of troops. In analyzing the “nature, scope, and duration” questions, the memo looked first to the type of missions that U.S. forces would be engaged in. The air missions envisioned for the Libya operation did not pose the threat of withdrawal difficulty or escalation risk that might indicate “a greater need for approval [from Congress] at the outset.”61 The nature of the mission, then, was not similar to full “war.” Similarly, the scope of the intended operation was primarily limited, at the time the memo was written, to enforcing a no-fly zone.62 Consequent-


55. E.g., Authority to Use Military Force in Libya, supra note 51.

56. OLC often writes memoranda analyzing the constitutionality of potential presidential action. Despite its status as an executive branch office, it often acts as an independent, quasi-judicial check on the presidency, and its opinions are therefore accorded great weight within both the judicial system and academic literature. See, e.g., Walter E. Dellinger et al., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (Dec. 21, 2004), available at http://scholarship.law.duke.edu/faculty_scholarship/2302.

57. Authority to Use Military Force in Libya, supra note 51, at *8.

58. See id. (citing Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980)).

59. Id. at *8 (citation omitted) (internal quotation marks omitted).

60. Id.

61. Id. at *13 (alteration in original) (quoting Proposed Deployment of United States Armed Forces into Bosnia, supra note 54, at 333).

62. Id.
ly, the operation’s expected duration was not long. Thus, concluded OLC, "the use of force by the United States in Libya [did not rise] to the level of a ‘war’ in the constitutional sense." While this conclusion may have been uncontroversial, it highlights Dudziak’s concerns over the manipulation of the idea of “wartime,” concerns that were heightened by the Obama Administration’s War Powers Resolution analysis.

Congress passed the War Powers Resolution in 1973 in an attempt to rein in executive power in the wake of the Vietnam War. The resolution provides that the president shall “in every possible instance . . . consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” Additionally, when the president sends U.S. forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated,” the resolution requires him to submit a report to Congress describing the circumstances of the deployment and the expected involvement of U.S. troops in the “hostilities.” Within sixty days of receiving that report, Congress must either declare war or in some other way extend the deployment; in the absence of some ratifying action, the resolution requires that the president withdraw U.S. forces.

Though eschewing the plainly confrontational route of directly challenging Congress’s power under the War Powers Resolution, the Obama Administration implicitly challenged Congress’s ability to affect future operations. In declining to withdraw forces, despite Congress’s lack of approving legislation, President Obama claimed that the conflict in Libya could not be deemed “hostilities” as that term is used in the resolution. This argument was made both in a letter to Congress during the summer of 2011 and in congressional testimony given by Harold Koh, the State Department Legal Advisor under the Obama Administration.

63. Id.
64. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2006). Section 1541(a) states the following:

It is the purpose of this chapter 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, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

Id. § 1541(a); see also Harold H. Koh, The National Security Constitution 39 (1990) (“Congress passed the War Powers Resolution to prevent future Vietnams, undeclared creeping wars that start and build before Congress or the public are fully aware.”).
66. Id. § 1543.
67. Id. § 1544(b).
68. Letter from Joseph E. Macmanus, Acting Assistant Sec’y, Legis. Affairs, U.S. Dep’t of State, and Elizabeth L. King, Assistant Sec’y, Legis. Affairs, U.S. Dep’t of Def., to John Boehner, Speaker of the House of Representatives 25 (June 15, 2011), available at
Koh's testimony provides the most complete recitation of the Obama Administration's analysis and focuses on four factors that distinguish the fighting in Libya (or at least the United States' participation) from "hostilities": the scope of the mission, the exposure of U.S. forces, the risk of escalation, and the nature of the tactics to be used. First, "the mission is limited." That is, the objectives of the overall campaign led by the North American Treaty Organization ("NATO") were confined to a "civilian protection operation . . . implementing a U.N. Security Council resolution." Second, the "exposure" of the U.S. forces involved was narrow—the conflict did not "involve active exchanges of fire with hostile forces" in ways that would endanger U.S. service members' safety. Third, the fact that the "risk of escalation [was] limited" weighed in favor of not categorizing the conflict as "hostilities." Finally, the "military means" the United States used in Libya were limited in nature. The majority of missions were focused on "providing intelligence capabilities and refueling assets." Those American flights that were air-to-ground missions were a mix of suppression-of-enemy-air-defenses operations to enforce a no-fly zone and strikes by armed Predator drones. As a point of comparison, Koh noted that "the total number of U.S. munitions dropped has been a tiny fraction of the number dropped in Kosovo." With the exception of this final factor, these considerations are quite similar to the factors that define whether a conflict is a "war" for constitutional purposes.

The result of this reasoning is a substantially relaxed restraint on presidential authority to use force abroad going forward. As armed drones begin


69. Libya and War Powers Hearing, supra note 51, at 89 (statement of Harold Hongju Koh, Legal Advisor, U.S. Dep't of State).
70. Id. at 14.
71. Id.
72. Id.
73. Id. at 15.
74. Id.
75. Id. at 16.
76. Id.
77. Id. This is a particularly misleading comparison, as many of the munitions dropped in Kosovo were either of the "dumb" variety or very early versions of "smart" GPS-guided weapons, which required many more weapons per target to achieve a desired result than the more modern weapons used in Libya. See W.J. Fenrick, Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia, 12 EUR. J. Int'l L. 489, 489 (2001) (putting the number of precision weapons dropped at 35 percent of over 23,000 during the Kosovo operation).

Additionally, while the United States itself may not have dropped substantial numbers of munitions in Libya, the United States provided a substantial number of the munitions our NATO allies dropped. See Eric Schmitt, NATO Finds Crucial Flaws in Libya Action, N.Y. Times, Apr. 15, 2012, at A1.
78. See supra notes 53–54 and accompanying text.
to make up a larger portion of the United States’ arsenal, and as other protective technologies, such as standoff munitions and electronic warfare techniques, gain traction, it is far more likely that the “exposure” of U.S. forces will decrease substantially. The force used in Yemen and the Horn of Africa is illustrative of this new paradigm where U.S. service members are not “involve[d] [in] active exchanges of fire with hostile forces,” but rather machines use force by acting as human proxies. To the same point, if the “military means” used in Libya are markers of something short of “hostilities,” the United States is only likely to see the use of those means increase in the coming decades. Pressing the logic of Koh’s testimony, leeway for unilateral executive action will increase as the makeup of our arsenal continues to modernize.

Dudziak worries about the invocation of “wartime” as an argument for the perpetual exercise of extraordinary powers. The Libya scenario, of course, is somewhat different—the president has argued that the absence of “war” leaves him a residuum of power such that he may use force abroad without congressional input. The two positions are of a piece, though. Dudziak argues that legacy conceptions of “wartime” and “peacetime” have left us vulnerable to the former’s use, in and of itself, as a reason for increased executive power. Such literal thinking—that “war” is something specific or that the word “hostilities” has certain limits—also opens the door to the Obama Administration’s defense of its position on Libya. And looking at the substance of that position leaves much to be desired.

Both Koh’s testimony and the OLC memo pay lip service to the idea that the policy considerations underlying their position are consistent with the policy considerations of the Framers with respect to the Declare War Clause and Congress with respect to the War Powers Resolution. But the primary, if not the only, consideration mentioned is the loss of U.S. forces. That concern is front and center when analyzing the “exposure” of service

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82. See Charlie Savage & Mark Landler, White House Defends Continuing U.S. Role in Libya Operation, N.Y. TIMES, June 16, 2011, at A16. Savage and Landler note that Jack L. Goldsmith, who led the Justice Department’s Office of Legal Counsel during the Bush administration, said the Obama theory would set a precedent expanding future presidents’ unauthorized war-making powers, especially given the rise of remote-controlled combat technology. “The administration’s theory implies that the president can wage war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution’s time limits,” Mr. Goldsmith said.

Id.
members, and it is also on display with respect to discussions about the nature and scope of an operation. This is not the only policy consideration that one might intuit from those two provisions, however. Using lethal force abroad is a very serious matter, and the U.S. polity might rationally want input from the more representative branch in deciding when, where, and how that force is used in its name. In that same vein, permitting one individual to embroil the nation in foreign conflicts—limited or otherwise—without the input of another coequal branch of government is potentially dangerous.

As Dudziak’s framework highlights the limits of the Obama Administration’s argument for expansive power, so does the Administration’s novel dissection of “hostilities” illustrate the limits of Dudziak’s analysis. Dudziak presents a narrative arc bending toward the expansion of wartime and, as a result, increased presidential power. That is not the case with Libya: the president finds power in “not war” rather than in “wartime.” If the American public is guilty, as Dudziak asserts, of using the outmoded and misleadingly concrete terminology of “wartime” to describe an increasingly complex phenomenon, Dudziak herself is guilty of operating within a paradigm where wartime necessarily equals more executive power (than does “not war”), a paradigm that has been supplanted by a more nuanced reality. Alt-

83. See, e.g., Libya and War Powers Hearing, supra note 51, at 15 (statement by Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State) (“The Congress that adopted the War Powers Resolution was principally concerned with the safety of U.S. forces . . .”).

84. See, e.g., Authority to Use Military Force in Libya, supra note 51, at *9. As part of its advisory opinion justifying the Obama Administration’s actions with regard to Libya, the Office of Legal Counsel noted that

“[i]n deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary,” we observed, “the President was entitled to take into account the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment.”

Id. (emphasis added) (quoting Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 179 (1994)).

85. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON, 1790–1802, at 312 (Gaillard Hunt ed., 1906) (“The constitution supposes, what the History of all [Governments] demonstrates, that the [Executive] is the branch of power most interested in war, [and] most prone to it. It has accordingly with studied care, vested the question of war in the [Legislature].”); The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 528 (Jonathan Elliot ed., 2d ed. 1891) (statement of James Wilson) (“This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature . . .”); THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES 1 (2005), available at http://www.constitutionproject.org/pdf/28.pdf (“The framers gave Congress the power to declare war to ensure that the decision to initiate hostilities would not be made by a single person, but instead collectively by a deliberative and politically accountable judgment of the legislature.”).
hough Dudziak identifies the dangers of manipulating the boundaries of wartime, her catalog of manipulations remains incomplete because of the inherent limits of her framework.

This realization does not detract from Dudziak’s warnings about the perils of endless wartime, however. Indeed, the powers that President Obama has claimed seem, perhaps, more palatable after a decade in which war has been invoked as an argument for many executive powers that would, in other eras, seem extraordinary. Though he has not explicitly invoked war during the Libya crisis, President Obama has certainly shown a willingness to manipulate its definition in the service of expanded executive power in ways that seem sure to increase “war’s presence as an ongoing feature of American democracy” (p. 136).

CONCLUSION

Dudziak presents a compelling argument and supports it well. War Time is potent as a rhetorical device and as a way to frame decisionmaking. This is especially so for the executive branch of the U.S. government, for which wartime has generally meant increased, and ever more expansive, power. As the United States continues to transit an era in which the lines between “war” and “peace” become increasingly blurred and violent adversaries are a constant, the temptation to claim wartime powers—to render the extraordinary ordinary—is significant.

This Notice has argued that, contrary to Dudziak’s concerns, the temptation is not absolute. Indeed, in some instances—notably, detention operations in Iraq and Afghanistan—we are still able to differentiate between “war” and “peace” in ways that have hard legal meaning for the actors involved. And, importantly, the executive still feels compelled to abide by these distinctions and act in accordance with the law rather than claim wartime exceptionalism.

That the temptation is not absolute, however, does not mean that it is not real or that Dudziak’s concerns have not manifested themselves. This detachment of expansive power from temporally bound periods has opened the door for, and in some ways incentivized, limiting wartime rather than expanding it. While President Obama has recognized the legal constraints that “war” imposes, he has also followed in the footsteps of executives who have attempted to manipulate the definition of “war” itself (and now the definition of “hostilities”) in order to evade those constraints as much as possible. To the extent he has succeeded in that evasion, he has confirmed what seems to be Dudziak’s greatest fear: that “[m]ilitary engagement no longer seem[s] to require the support of the American people, but instead their inattention” (p. 132).