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Behavioral War Powers

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BEHAVIORAL WAR POWERS

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A decade of war has meant a decade of writing on war powers. From the authority to start a war, to restrictions on fighting wars, to the authority to end a war, constitutional lawyers and scholars have explored the classic issues (war initiation, prosecution, and termination) through the classic prisms (text, history, and function) for a new generation of national security challenges. Despite the volume of writing on war powers and the urgency of the debates in the context of Iraq, Afghanistan, Libya, and Syria, war powers debates are widely seen as stagnant. We introduce a new set of perspectives into the war powers literature. Over the last four decades, behavioral psychologists have identified persistent biases in individual and group decisionmaking. The behavioral revolution has had a significant impact on legal scholarship—primarily in law and economics—and has also influenced scholars in international relations, who increasingly write about psychological biases and other decisionmaking challenges. These insights, however, have yet to be applied in the war powers context.

This Article brings the behavioral literature into the conversation on war powers, showing how lessons from behavioral psychology are relevant to decisions on war and peace. It outlines a variety of psychological biases that bear on decisions about war and peace, applies these lessons to a variety of war powers debates, and discusses broader institutional design strategies for debiasing decisionmaking. The lessons of psychology provide new functional perspectives on classic war powers debates: the authority of Congress versus the President to initiate wars, the scope of presidential authority to use force, the ability of Congress to restrict the conduct of war, the War Powers Resolution and the termination of wars, and the role of the United Nations. Some of the decisionmaking biases point in conflicting directions, so there are no simple answers or tidy solutions. But understanding where important decisions risk going wrong is the first step in figuring out how to make them go right.

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INTRODUCTION

Starting more than a decade ago, war powers debates reemerged as a prominent, ubiquitous, and critically important topic of analysis for constitutional lawyers, legal scholars, policymakers, and commentators. The September 11 attacks, concerns about nuclear weapons in Iraq and Iran, Libya's assault on its own citizens, Syria's use of chemical weapons, and the rise of the Islamic State in Iraq and the Levant (ISIL) have led to arguments about the authority of the President to initiate a war. Legal opinions on torture, concerns about civil liberties, and efforts to detain and interrogate enemy combatants have sparked debate about the Commander-in-Chief's authority to conduct wartime operations in light of congressional restrictions. Objections to the Iraq troop surge, as well as the duration of the "hostilities" in Libya, raised questions about Congress's authority to end a war. Some have even

suggested that it is time to go back to the drawing board and modernize the War Powers Resolution.[1] In the past decade, a flurry of scholarship has investigated these and related questions. A decade of war has meant a decade of thinking and writing on war powers.

Despite the importance of war powers, the timeliness of the topic, and the expansiveness of the literature, classic legal debates on war powers have largely reached a stalemate. Arguments from text and history have been thoroughly vetted and debated, with opposing views remaining.[2] Basic functional arguments about speed, secrecy, accountability, efficiency, and institutional competence have been discussed, with scholars drawing different conclusions.[3] Whether focused on text,

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[1] *See, e.g.*, War Powers Consultation Act of 2014, S. 1939, 113th Cong. (2014) (proposed revision of the War Powers Resolution); *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 2 (2011) [hereinafter *Libya and War Powers*] (statement of Sen. John F. Kerry, Chairman, S. Comm. on Foreign Relations), *available at* http://www.state.gov/s/l/releases/remarks/167250.htm ("As our military technology becomes more and more advanced, it may well be that the language that I just read needs further clarification. Maybe it is up to us now to redefine it in the context of this more modern and changed warfare and threat."); *id.* at 34 (statement of Sen. Christopher A. Coons, Member, S. Comm. on Foreign Relations) ("[H]ow might you suggest that we update the War Powers Resolution to reflect the reality of modern warfare . . . ?"); Chris Economou, *After Libya: The Need to Revise the War Powers Resolution*, INT'L AFF. REV. (Oct. 17, 2011), http://www.iar-gwu.org/node/353 (arguing that the President's failure to adequately consult Congress before initiating military action in Libya demonstrates the need for revisions to the War Powers Resolution).

[2] *See, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE 143–81 (2005) (arguing for robust presidential authority); 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 (2008) (exploring the limits of presidential power vis-à-vis Congress and arguing for extremely limited preclusive presidential war powers); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972) (arguing that Congress was intended to have the dominant role in initiating nondefensive wars); Saikrishna Bangalore Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021, 1023–42 (2008) (discussing original understandings of the limits on the President's war powers); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008) [hereinafter Prakash, *Separation and Overlap*] (arguing for congressional power over war and military matters); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (discussing Congress's expansive powers under the Declare War Clause); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002) (arguing for a flexible approach to war powers that empowers the President).

[3] *See, e.g.*, BRUCE ACKERMAN, BEFORE THE NEXT ATTACK (2006) (taking a functional approach to institutional design for emergency situations); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE (2007) (arguing based on functional considerations for balance between civil liberties and national security and criticizing theories that assume the pre-emergency balance as optimal); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006) (taking a functional approach relying on principal-agent theory, democratic peace theory, and signaling theories from political science); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009) (taking a functional approach and arguing that institutional competence cuts in favor of multi-branch participation).

history, or functional considerations, one camp typically advocates for expansive congressional authority,[4] the other for expansive presidential authority.[5]

In recent years, these debates have moved in two different directions. One group of scholars has recognized the reality of expansive presidential power and asked what kind of internal executive branch processes, as well as external factors—including public opinion, the media, and domestic politics—constrain wartime decisions.[6] Another group, primarily consisting of functionalist scholars, has increasingly drawn from modern political science, taking a rational choice (or positive) approach to war powers analysis.[7] Professor Nzelibe has used rationalist and positive analysis, including political science research on

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[4] *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); LOUIS FISHER, PRESIDENTIAL WAR POWER (3d ed., rev. 2013); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 71–87 (1990); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 33 (1990); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 158–61 (1990); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131 (1971); Lofgren, *supra* note 2; Prakash, *Separation and Overlap*, *supra* note 2; William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972).

[5] *See, e.g.*, Robert H. Bork, *Foreword* to THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH, at ix (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) [hereinafter Bork, *Foreword*]; YOO, *supra* note 2, at 143–81; Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath, 92 MICH. L. REV. 1364, 1370–88 (1994) (book review); Robert H. Bork, Address, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 698–701 (1990) [hereinafter Bork, *Erosion*]; Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. (SPECIAL ISSUE) 19 (1970); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999); Yoo, *supra* note 2; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996).

[6] *See* JACK GOLDSMITH, POWER AND CONSTRAINT 49–201 (2012) [hereinafter GOLDSMITH, POWER AND CONSTRAINT] (discussing constraints posed by journalism, leaks, institutional legal channels, and litigation); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 33–39, 54–70 (2007) (discussing legal constraints, media coverage, and public opinion); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 113–53 (2010) (arguing that political factors constrain the executive more than law); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (discussing internal checks).

[7] *See, e.g.*, Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907 (2007) [hereinafter Nzelibe, *Congressionally Authorized Wars*] (using positive approach to analyze division of war-making authority between the executive and legislative branches); Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993 (2006) [hereinafter Nzelibe, *Positive Theory*] (same); Nzelibe & Yoo, *supra* note 3 (same).

two-level games,[8] to assess the role of congressional authorization and presidential war powers.[9] And Professors Nzelibe and Yoo have relied on political science literature concerning "audience costs" to argue that the President should have the option—but not the obligation—to seek congressional authorization in order to send a signal to a foreign adversary.[10] In response, Professors Diehl and Ginsburg, largely adhering to the rationalist framework, take issue with Nzelibe and Yoo's use of the political science literature, pointing out principal-agent problems that might corrupt presidential decisionmaking.[11] Despite their diversity, these arguments all share a basic feature: they are rooted in a rationalist set of assumptions about decisionmaking.

This Article looks to an untapped resource to gain new traction on the functional dimension of these perennial debates. The common denominator of nettlesome war powers questions is who should make the difficult and freighted decisions about whether the nation goes to war, how it fights a war, and when it ends a war. Surprisingly, however, scholars have not considered how psychological research on decisionmaking impacts the constitutional design of war powers. In the last four decades, psychologists have demonstrated systematic biases in individual and group decisionmaking processes. This behavioral revolution has been no stranger to legal scholarship, particularly in the field of law and economics, where it has been used as a corrective to some of the oversights of the more rationalist approaches that preceded it.[12] The behavioral revolution has also provided important insights to scholars of international relations, where political scientists increasingly write in the subfield of political psychology and interna-

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[8] "Two-level games" refers to the insight that foreign policy decisionmakers must account for the constraints of both international and domestic politics, and that the international and domestic "games" are interrelated. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988).

[9] Nzelibe, *Positive Theory*, *supra* note 7.

[10] Nzelibe & Yoo, *supra* note 3, at 2530.

[11] Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT'L L. 1239, 1243–51 (2006).

[12] The literature is expansive, but classics include BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); and Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000). Scholars have also recently begun to integrate behavioral insights into the study of international law, treaties, and human rights. *See, e.g.*, UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012); Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT'L L. 309 (2013); Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L L.J. 51 (2010).

tional relations.[13] In fact, psychologist Daniel Kahneman and political scientist Jonathan Renshon have recently collaborated on an important article that argues that behavioral psychology has valuable lessons for decisionmaking on war and peace.[14]

Over time, psychologists and political scientists have identified a number of decisionmaking biases that are particularly relevant to decisions about war and peace. For example, positive illusion bias suggests that individuals unrealistically value their own abilities, leading to undue optimism and an illusion of control over how the future will play out.[15] In the foreign policy context, this illusion of control can lead countries to be overconfident about their ability to win a war—and therefore more likely to initiate one. Prospect theory suggests that individuals are more concerned with avoiding or recovering losses than with making or extending gains.[16] This loss aversion leads to the related problem of sunk costs, under which individuals will irrationally continue striving for an outcome instead of cutting their losses and moving on.[17] Psychic numbing holds that human beings are more morally attentive when actions appear to affect discrete individuals, rather than when confronted with abstract statistics.[18] Humanitarian interventions might therefore be less likely when leaders are given statistical information about the loss of life rather than seeing arresting images or meeting with suffering individuals. But despite their relevance to matters of war and peace, these lessons have yet to be incorporated into debates on war powers.

This Article introduces important lessons from behavioral psychology into constitutional debates on the doctrine, structure, and design of war powers. In doing so, we have three goals: First, we identify and explain a series of behavioral pathologies that might skew important decisions about war and peace so that legal scholars can be more attentive to them. Legal arguments in this area are frequently based on allocating war powers so as to promote better decisionmaking (e.g., favoring the President because of greater access to infor-

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[13] *See, e.g.*, ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS (1976); DOMINIC D.P. JOHNSON, OVERCONFIDENCE AND WAR: THE HAVOC AND GLORY OF POSITIVE ILLUSIONS (2004); ROSE MCDERMOTT, POLITICAL PSYCHOLOGY IN INTERNATIONAL RELATIONS (2004); JONATHAN RENSHON, WHY LEADERS CHOOSE WAR (2006).

[14] Daniel Kahneman & Jonathan Renshon, *Hawkish Biases*, *in* AMERICAN FOREIGN POLICY AND THE POLITICS OF FEAR: THREAT INFLATION SINCE 9/11, at 79, 79 (A. Trevor Thrall & Jane K. Cramer eds., 2009).

[15] *See infra* notes 31–33 and accompanying text.

[16] *See infra* notes 41–42 and accompanying text.

[17] *See infra* notes 43–48 and accompanying text.

[18] *See infra* notes 91–93 and accompanying text.

mation and expertise vis-à-vis Congress),[19] and proposals for law reform have that goal by necessity. If decisions about war can go off-track in systematic ways, it makes sense to at least consider these systematic problems as relevant factors in designing an optimal (or at least improved) allocation of powers.

Second, we explore how these behavioral lessons can be applied to contemporary doctrinal debates in war powers—debates about threatening wars, initiating wars, fighting wars, and ending wars. These debates include some of the most important from the last fifteen years, including the ability of the President to use force without prior congressional approval, as well as the scope of the Commander-in-Chief power in allowing the President to override congressional restrictions on war-fighting tactics.

Third, we identify broad insights and particular design strategies that, independent of contemporary debates or doctrinal constraints, are worth considering when assessing the design of war powers. Throughout, our goal is at once prescriptive and descriptive. Prescriptively, we identify particular types of behavioral biases that are most at risk of taking hold. For some readers, the interest will be in thinking about remedies and possible improvements to existing structures. Descriptively, our analysis identifies aspects of existing institutional structures that may already mitigate decisionmaking biases. Hence, for others, the interest will be in understanding current institutional features through a behavioral lens.

More broadly, the lessons of psychology have several important implications for war powers theory. First, these lessons help break through the conventional Madisonian approach to treating war powers solely as a separation of powers issue.[20] Instead of further hardening the debate into the conventional Congress-versus-the-President binary, some of these decisionmaking biases point in conflicting directions, and many of these biases operate within a single branch of government, regardless of whether another branch participates in wartime decisionmaking. As a result, our approach contributes to the growing interest in internal institutional design (without, of

[19] *See supra* note 3 and accompanying text (surveying functional arguments).

[20] In other arenas, constitutional law scholars have also recently taken aim at the assumptions underlying Madisonian separation of powers. *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, Essay, *Delegating to Enemies*, 112 COLUM. L. REV. 2193 (2012) (criticizing the Madisonian view that institutions will jealously guard their power and not delegate to enemies); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (criticizing the Madisonian separation of powers approach as inattentive to partisan political alignment).

course, ignoring interbranch design options).[21] Second, these lessons suggest a more textured and diverse approach to the war powers debate. Participants often cleave into pro-Congress and pro-President camps for all war powers issues. But behavioral insights suggest that different decisionmaking pathologies might apply to different types of situations. Thus, the constellation of powers, checks, and balances might be better designed if more sensitive to context. We may want different rules when the nature of the conflict differs, such as when waging war to preempt a possible threat versus stopping a humanitarian disaster. We may want different rules when the features of the conflict differ, such as when international support is present or absent. We may want different rules for the different stages of the conflict, such as threatening a war, starting a war, conducting a war, and deciding to end a war. These insights further break down the conventional, binary approach to war powers.

In exploring the insights of behavioral psychology for war powers debates, this Article proceeds in three Parts. Part I considers lessons from psychology. We explore seven of the most prominent decisionmaking biases that have been identified by psychologists, providing examples of their manifestation in foreign affairs and international relations. In addition to (as mentioned above) positive illusions, prospect theory, and psychic numbing, we consider the illusion of transparency, which holds that individuals consistently believe they have effectively communicated their beliefs to others, when in fact they have not.[22] This bias creates particular problems for high-stakes crisis negotiations and peace talks. We address the fundamental attribution error, under which individuals overvalue the dispositional factors that shape others' actions and undervalue the situational contexts that lead others to act.[23] We discuss reactive devaluation, which suggests that individuals will undervalue a proposal—particularly if offered by an adversary—simply because the proposal was made.[24] And finally, we address research on how group decisionmaking can lead to polarization, exacerbating biases.[25] Throughout, we incorporate real-world examples from foreign policy. Part I concludes with a discussion of methodological issues that arise in translating individual biases to the institutional level.

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[21] For discussions of internal checks and extralegal checks, see GOLDSMITH, POWER AND CONSTRAINT, *supra* note 6, at 49–201; POSNER & VERMEULE, *supra* note 6, at 113–53; and Katyal, *supra* note 6.

[22] *See infra* notes 62–63 and accompanying text.

[23] *See infra* notes 69–70 and accompanying text.

[24] *See infra* note 80 and accompanying text.

[25] *See infra* notes 104–06 and accompanying text.

Part II turns to contemporary legal debates on war powers, and shows how these lessons can influence debates on the authority to threaten, initiate, fight, and terminate wars. The power to threaten war is conventionally discussed as a presidential power, but behavioral research reveals that congressional actions—the appropriation of money for the development of weapons systems, for example—can have a similar effect. It also suggests that there is an increased risk of biased decisionmaking when a President issues a threat and then seeks to fulfill that threat to maintain her credibility. Thus, we might want expanded presidential power over disarmament, but additional checks on the President's potential bias toward following through on a threat she has issued. The power to initiate war is perhaps the most hotly debated topic within war powers. Behavioral insights suggest that many, though not all, decisionmaking errors are "hawkish biases"[26]—biases that consistently lead to an increased likelihood of conflict. We therefore pay particular attention to design strategies that mitigate these biases, including, but not limited to, congressional participation at the conflict initiation stage. Interestingly, the Office of Legal Counsel's (OLC) test for when the President can use force absent prior congressional authorization appears to enable decisions that are particularly susceptible to these biases, suggesting that either external constraints or internal decisionmaking processes could be better tailored to counteracting them. Finally, applying behavioral insights to the power to fight and terminate wars suggests that there are situations in which internal checks or congressional participation in wartime decisionmaking might be especially desirable. Throughout this Part, we show how a behavioral approach to war powers injects new insights and possibilities into contemporary legal debates.

Part III distills some of the themes and institutional design strategies from the foregoing analysis, incorporating psychological research on ways to debias decisionmaking. We first argue that behavioral insights suggest that war powers debates might do better to go beyond the Congress-versus-the-President dichotomy, and should instead consider the constellation of powers, checks, and balances that are appropriate to different types of decisions. Because decisionmaking biases apply differently in different situations, we suggest that legal scholars and policymakers would do well to take these contextual differences into account in debating war powers. Part III then discusses five institutional design strategies that are rooted in the debiasing literature or emerge as recurring themes from our doctrinal discussion: informa-

[26] Kahneman & Renshon, *supra* note 14, at 79 (introducing the term "hawkish biases" to describe how cognitive biases favor hawkish decisions in conflict situations).

tional strategies; vetogates; internal processes; independent third parties; and what we term the "Ellsworth-Mason Approach," named after two Framers of the Constitution who suggested that wars ought to be institutionally easier to end than to initiate. This is not an exhaustive list of design strategies that mitigate behavioral pathologies, but, given their prominence in psychology and salience in our doctrinal analysis, they are worthy of special treatment.

A few caveats and clarifications are in order at the outset. First, in suggesting that decisionmaking insights from psychology can inform war powers, we are operating under the common—but not universal—assumption that functional and policy considerations are relevant to these legal debates. Indeed, we seek to introduce a new set of functional and policy considerations into war powers debates in hopes of critically reassessing current assumptions. We do not anticipate convincing those for whom there is a clear answer to war powers questions, settled in 1789 (although some of our nonconstitutional institutional design suggestions may be relevant even to this audience).

Second, by introducing psychological concepts into war powers debates, we do not mean to displace the other functional considerations that are already part of the conversation. For example, one might be persuaded that certain decisionmaking biases will push unchecked Presidents toward unduly hawkish positions, but continue to maintain that the importance of swift and efficient action overrides any attempt to mitigate those biases through institutional constraints. In other words, one might think that pulling institutional levers to counteract biased decisionmaking will overcorrect and result in worse decisions overall. But the first step toward making (or rejecting) such judgments is to incorporate the full range of functional considerations into the analysis—and that means behavioral psychology should, at a minimum, be in the mix.[27]

Third, we are writing at the "tactical" level of how to optimize decisionmaking in the war powers context. We are not attempting in this Article to make heavily value-laden judgments: Should the United States be isolationist or aggressive abroad? What costs should Americans be willing to pay for additional security? How should Americans value the lives and interests of foreigners? These are all important issues, worthy of serious debate, and where relevant in this

[27] To put it differently, we do not mean to argue that behavioral phenomena are a second-order justification for precautionary constitutional rules, but rather that cognitive biases are simply another kind of risk that must be accounted for in any functional analysis. *See* ADRIAN VERMEULE, THE CONSTITUTION OF RISK 80–81 (2014) (criticizing "precautionary" constitutionalism).

Article we identify how substantive views on such debates might influence how, in light of the biases we identify, war powers could or should be structured. But our primary goal here is to discuss what the lessons of psychology suggest for designing a war powers structure that will avoid, or at least mitigate, persistent biases and decisionmaking errors. Thus, when we talk about "bad" decisions, we are generally referring to those in which a sober accounting of the costs and benefits, absent the skewing effect of various biases, would come out the other way.

Relatedly, when we say that many decisionmaking biases are hawkish in that they tend to unduly favor conflict—and more broadly when we say that these are "biases" or "pathologies"—we do not mean to minimize the possibility that hawkish policies may sometimes be sound. Our point throughout is not that peace (or war) is the right policy outcome, but rather that decisionmaking will tend to be distorted in systematic ways that can be recognized and perhaps accounted for.

Finally, behavioral psychology lessons applied to law can be criticized for anthropomorphizing institutions. Our argument is not that the institutions of Congress or the executive branch exhibit behavioral biases. Rather, we start from the premise that these institutions are composed of individuals and that the individuals within them exhibit these psychological biases. We discuss this and related methodological concerns extensively at the end of Part I.

This Article seeks to deepen our understanding of the real world of wartime decisionmaking by identifying the implications of decisionmaking errors, biases, and failures for some of the most hotly debated legal questions of the day, as well as for broader theoretical questions of institutional design. Our hope is that introducing these psychological considerations into the conversation will help us to better understand persistent problems affecting decisions on war and peace, and to identify ways of addressing them.

I
WAR POWERS LESSONS FROM PSYCHOLOGY

Psychologists have identified a number of behavioral biases leading individuals to deviate from purely rational calculations, and psychologists and scholars of international relations have applied these insights to foreign policy decisionmaking. This Part outlines seven of the most prominent and relevant behavioral biases. It describes the basic contours of each psychological insight and provides examples illustrating its application to foreign policy and international

relations. For each bias, we briefly note its potential relevance and application to war powers debates, while saving a fuller and more integrated discussion for subsequent Parts. Of course, the biases outlined here are not an exhaustive list of every psychological bias that might inform foreign policy decisionmaking; we have focused on some of the most prominent biases that have applications to foreign policy. We hope they will serve as a strong foundation for future work that brings additional psychological research into the war powers context.

A. Positive Illusions

Although almost too obvious to state, a critical judgment each party to an international conflict must make is: If I fight, will I win? Of course, making that judgment is easier said than done. While wars can start for a wide variety of reasons, international relations theory predicts that, in general, war will not happen if both sides accurately predict the results of the fighting; like civil litigants who settle a case, if there is an agreement as to the likely outcome, both sides are better off agreeing to a settlement.[28] As Winston Churchill admonished, "however sure you are that you can easily win, . . . there would not be a war if the other man did not think he also had a chance."[29] And yet, wars do happen, and not infrequently. A common (though not exclusive) reason is that both sides think they will win.[30]

Predicting the outcome of a hypothetical war is hard. But complicating these predictions is a well-recognized cognitive error: the tendency to have "positive illusions." These illusions cause the decisionmaker to unrealistically value her own abilities, inflate the importance of those abilities relative to those of her adversary (or relative to situational factors), and view probabilistic outcomes through the prism of an optimism bias.[31] Relatedly, individuals suffer from the illusion of control, under which they are overly optimistic about their ability to shape events. Numerous experiments back up these results.[32] For example, in a simulated conflict experiment in which participants

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[28] *See* GEOFFREY A. BLAINEY, THE CAUSES OF WAR 293 (3rd ed., The Free Press 1988) ("Wars usually begin when two nations disagree on their relative strength . . . .").

[29] WINSTON S. CHURCHILL, A ROVING COMMISSION: MY EARLY LIFE 232 (1930).

[30] *See* BLAINEY, *supra* note 28, at 53 ("This recurring optimism is a vital prelude to war."); Robert Jervis, *War and Misperception*, 18 J. INTERDISC. HIST. 675, 676 (1988) ("[E]xcessive military optimism is frequently associated with the outbreak of war.").

[31] Kahneman & Renshon, *supra* note 14, at 81.

[32] *See, e.g.*, Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311 (1975) (describing six studies on the illusion of control); Paul K. Presson & Victor A. Benassi, *Illusion of Control: A Meta-Analytic Review*, 11 J. SOC. BEHAV. & PERSONALITY 493 (1996) (reviewing fifty-three studies in twenty-nine articles on the illusion of control).

in a war game are promised monetary rewards if they win, participants tended to make unprovoked attacks out of overconfidence.[33]

Political scientists have found this result replicated in the real world. One systematic study found that "[a]t least some false optimism about relative power preceded every major war since 1740 . . . ."[34] Scholars have argued that overconfidence played a significant role in the 1904 Russo-Japanese War, the wars between India and Pakistan, the Korean War, and the 1973 Israeli-Arab Yom Kippur War.[35] And in a sustained study of positive illusions and wars, Professor Dominic Johnson has argued that this bias was a factor in World War I, the Munich Crisis, the Cuban Missile Crises, Vietnam, and the 2003 Iraq War.[36] Interestingly, Johnson argues that during the Cuban Missile Crisis, the Kennedy Administration's thorough internal decisionmaking processes through the Executive Committee helped dispel positive illusions over time.[37]

Johnson's discussion of the Munich case, in which British Prime Minister Neville Chamberlain infamously agreed to "appease" Germany by agreeing to the annexation of the Sudetenland from Czechoslovakia in 1938, is also noteworthy because it illustrates that positive illusions can apply not just to warfighting capacity, but also to the probability of international agreement. Johnson argues that, in 1938, Chamberlain held positive illusions about Adolph Hitler's intentions and the likelihood of agreement—even as he did *not* have positive illusions about Britain's warfighting capabilities.[38] Indeed, British policymakers believed that the balance of power was in Germany's favor and would, over time, shift toward Britain, thus suggesting that the time for fighting a war should be delayed.[39] Johnson concludes that the onset of war is a function of shifting positive illusions about warfighting capabilities: As Hitler's optimism about his warfighting capabilities increased, war became more likely.[40]

A President who is the Commander-in-Chief of the military will naturally be susceptible to positive illusions about her ability, and the ability of the military she commands, to achieve a positive result. Note that this suggests a possible tradeoff between expertise and minimizing the bias; those with actual control might know more, yet may

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[33] *See* Kahneman & Renshon, *supra* note 14, at 82 (describing the war game study).

[34] STEPHEN VAN EVERA, CAUSES OF WAR 16 (1999).

[35] *See* JOHNSON, *supra* note 13, at 31–33 (summarizing these arguments).

[36] *Id.* at 58–172, 191–218.

[37] *Id.* at 115–21.

[38] *Id.* at 87–94.

[39] *Id.* at 91–94.

[40] *Id.* at 102–07.

also be more likely to have an undue illusion about their ability to determine the outcome of situations. A more complicated question is whether Congress, if given a role in deciding whether to go to war, will exhibit similar biases. On the one hand, Congress is a branch of the United States government made up of Americans and, in making its judgment, can be expected to experience comparable positive illusions about the United States' capabilities. On the other hand, the bias may not be quite as acute as with respect to the President. Unlike the President, Congress will not execute the war; members of Congress may therefore not have the same feeling of control over the events that will follow their vote. As a result, the illusion of control bias may be more concerning in situations where the President has authority to act independently of Congress.

B. Prospect Theory, Loss Aversion, and the Problem of Sunk Costs

To the classical economist, losses are the same as gains: Losing $10 out of your original $100 is the same as starting with $80 and getting an additional $10. But prospect theory—a body of research in cognitive psychology and behavioral economics—explains that human decisionmakers do not treat these scenarios as identical.[41] Instead, "losses loom larger than gains."[42]

One consequence of this effect is that decisionmakers are biased toward preserving the status quo. Individuals are more averse to losing something rather than gaining something, even though the value of the good is the same.[43] In one famous experiment, partici-

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[41] *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279 (1979) ("The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount."); Jack S. Levy, *Prospect Theory and International Relations: Theoretical Applications and Analytical Problems*, 13 POL. PSYCHOL. 283 (1992) ("States seem to make greater efforts to preserve the status quo against a threatened loss than to improve their position by a comparable amount.").

[42] Kahneman & Tversky, *supra* note 41, at 279.

[43] The differential between the willingness to pay for a good and willingness to accept it is often described as the endowment effect, which explains this differential based on the prior possession or ownership of the good. Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay—Willingness to Accept Gap, the "Endowment Effect," Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530, 530–31 (2005). This theory has been called into question as recent studies have shown that the endowment effect does not emerge when controlling for other potential hypotheses that explain the divergence between a person's willingness to pay for a good and her willingness to accept the good. For an overview of the studies, see Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2, 30–53 (2013). As Professors Klass and Zeiler note, these findings do not undermine prospect theory more broadly, but only the narrower theory that the explanation for differentials between willingness to pay for a good and willingness to accept the good is a function of prior ownership. *Id.* at 4–7. Other explanations, such as

pants who were randomly selected to receive an object attached around twice as much value to it as participants who were instead given the opportunity to buy the object.[44] A common real-world example is the reaction of the owner of a slumping stock: Stock owners are hesitant to sell at a loss because of a feeling of "psychological entitlement" to the stock at its previous, higher price.[45]

A corollary of these insights is that people become more willing to take risks once there are "sunk costs."[46] To the rational decisionmaker, Time 1 costs that cannot be recovered are not relevant to Time 2 choices. Since those costs are sunk, the optimal strategy is to act on the basis of *future* predicted costs and benefits.[47] Yet when the decisionmaker's earlier moves resulted in losses at Time 1, she becomes more inclined to gamble on risky strategies at Time 2, even if that is not the utility-maximizing strategy.[48]

Political scientists have long recognized the explanatory power of this suite of psychological insights in international relations. For example, the United Kingdom's willingness to tolerate risk to recover the Falkland Islands has been explained as a possible exemplar of prospect theory.[49] Soviet leaders, although typically quite risk-averse, were found to exhibit more risk-taking behavior when "*defending* as opposed to *extending* Soviet gains."[50] In the United States, President Carter's failed mission to rescue hostages from Iran has been called "an almost classic example of a gamble with a high chance of failure and a low probability of success taken in the hope of recouping even larger losses."[51]

The Iran hostage case, in which President Carter controversially failed to consult with Congress as seemingly required by the War

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convenience, familiarity, and preferences, are still plausible theories that could account for these differentials. *Id.* at 54–55 (noting that these arguments, and others, "antedate endowment theory and survive its demise").

[44] Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193, 195–96.

[45] Levy, *supra* note 41, at 286.

[46] *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 345 (2011) (providing the example of a company that continues to invest money in a risky venture rather than pursuing new opportunities because a large amount of money has already been invested in the original venture).

[47] Kahneman & Renshon, *supra* note 14, at 90.

[48] *Id.*

[49] Levy, *supra* note 41, at 288.

[50] Dennis Ross, *Risk Aversion in Soviet Decisionmaking*, *in* SOVIET DECISIONMAKING FOR NATIONAL SECURITY 237, 247 (Jiri Valenta & William C. Potter eds., 1984).

[51] ROSE MCDERMOTT, RISK-TAKING IN INTERNATIONAL POLITICS: PROSPECT THEORY IN AMERICAN FOREIGN POLICY 11 (2001).

Powers Resolution before ordering a rescue attempt,[52] illustrates some of the lessons prospect theory holds for debates over war powers. There were certainly compelling reasons (e.g., the element of surprise) why a full congressional vote on the rescue mission would have been impractical. At the same time, with President Carter already hemorrhaging support in part because of his perceived failures in the Embassy takeover and hostage crisis, he may have been unduly predisposed to riskier options.

A further wrinkle in the prospect theory literature is the identity of the relevant decisionmaker. Researchers have shown that the "tendency to escalate commitment" is greater "when the actor who made the original decision is still in charge . . . ."[53] As we have noted, many of the decisionmaking biases that can affect a President's calculus may also apply to Congress. But while members of Congress, as representatives of the nation, may also be inclined to take risks to recoup national losses, they may not be quite as influenced by the psychological desire to recover the sunk costs stemming from the *President's* original decision. This phenomenon is sometimes described in purely political terms, with Congress seeking to evade political responsibility by allowing the President to act without congressional involvement and then criticizing the President if her actions fail.[54] The psychological literature suggests that the decisionmaker's identity and the sunk costs bias might be complementary phenomena at work in these situations.[55]

These biases have particularly clear application in the context of war termination. A President who is fighting a losing war might irrationally decide to escalate her commitment not based on a sober calculation of the future costs and benefits, but in part because of a willingness to take risks in order to recoup or justify sunk costs—the dollars and lives spent thus far in a long and complex war.[56] In some

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[52] *See NBC Nightly News: Congress Reacts to President Carter's Rescue Mission in Iran* (NBC television broadcast Apr. 25, 1980) (transcript available at http://archives.nbclearn.com/portal/site/k-12/flatview?cuecard=2874) (interviewing senators and representatives regarding the President's failure to consult Congress about the mission).

[53] Kahneman & Renshon, *supra* note 14, at 90.

[54] For a discussion of the links between elections, political incentives, and war authorization, see generally Nzelibe, *Congressionally Authorized Wars*, *supra* note 7.

[55] *See* Kahneman & Renshon, *supra* note 14, at 90 ("An agency problem often compounds the pyschological difficulties of giving up a lost cause.").

[56] To be clear, we are not discussing here the more conspiratorial theory that leaders "wag the dog" by *initiating* an unjustified conflict to distract from domestic political difficulties. This hypothesis is in tension with evidence that leaders who initiate a conflict are less likely to remain in power. *See* Bruce Bueno de Mesquita & Randolph M. Siverson, *War and the Survival of Political Leaders: A Comparative Study of Regime Types and Political Accountability*, 89 AM. POL. SCI. REV. 841, 841 (1995) (finding that "leaders who

ways, then-Lieutenant John Kerry's question in 1971, during testimony on the Vietnam War, captures a form of this problem: "[H]ow do you ask a man to be the last man to die in Vietnam? How do you ask a man to be the last man to die for a mistake."[57] The behavioral reading of Kerry's question suggests that the future costs of the war outweighed the future benefits, and that the war in Vietnam continued primarily because of the significant costs in lives, money, and time spent until that point.[58]

An important lesson from the sunk costs insight relates to potential ways Congress might involve itself in decisions relating to the conduct and termination of hostilities. First, under the War Powers Resolution, Congress may direct the President to remove U.S. forces from hostilities by concurrent resolution,[59] but Presidents uniformly insist that such an order would be unconstitutional.[60] Second, Congress might pass a law adopting a particular military strategy. This option is also frequently considered unconstitutional, as famously articulated by Justice Rehnquist in his confirmation hearings: "I do not believe Congress has the authority . . . to tell the President that he shall not try another attack on Hamburger Hill."[61] Reconsidered in light of the sunk costs fallacy and the relevance of the original decisionmaker, it is easier to see a functional case for a congressional role weighing in on termination and strategic matters.

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engage their nation in war subject themselves to a domestic political hazard that threatens . . . the retention of political power"). Such a theory also indicates a level of bad faith that is orders of magnitude greater than what we are discussing. The hypothetical discussed above should make clear that leaders who regard themselves as good faith actors may be confronted with legitimately close calls where their decision could, at the margins, be tipped by the problem of looking backward instead of forward at the costs and benefits of continuing a conflict.

57 John Kerry, Testimony to the U.S. Senate Committee on Foreign Relations (Apr. 23, 1971) (transcript available at http://www.pbs.org/wgbh/amex/vietnam/psources/ps_against.html).

58 Kerry suggested that the justification for continuing the war was "so that President Nixon [wouldn't] be . . . the first President to lose a war," a different justification than the behavioral one. *Id.* (internal quotation marks omitted). For a discussion of this more politically minded reason, see Nzelibe, *Positive Theory*, *supra* note 7, at 999.

59 50 U.S.C. § 1544(c) (2012).

60 *See, e.g.*, Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4a Op. O.L.C. 185, 196 (1980) [hereinafter Iran Opinion] ("We do not believe that Congress may, on a case-by-case basis, require the removal of our armed forces by passage of a concurrent resolution which is not submitted to the President for his approval or disapproval pursuant to Article I, § 7 of the Constitution.").

61 *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 34 (1971) (statement of William H. Rehnquist, nominee to be Associate Justice of the U.S. Supreme Court); *see also* Barron & Lederman, *supra* note 2, at 755, 760 (discussing the Hamburger Hill example).

C. *Illusion of Transparency*

Central to international negotiations, threats, and diplomacy—actions that can lead to war or forestall it—is the ability to communicate preferences to an opponent. In some cases, these preferences might be a bluff; in others, genuine and benign. People know they cannot assume that others know what they are thinking or feeling, but nonetheless people consistently fall short in correcting for that discrepancy. Psychologists call this "tendency for people to overestimate the extent to which others can discern their internal states" the "illusion of transparency."[62] People assume that more information about their views or feelings have "leak[ed] out" than have actually been conveyed to others.[63]

In experiments, psychologists have found that the illusion of transparency is pervasive. People overestimate how expressive their faces are when drinking a disgusting liquid, how nervous they appear to be when speaking in public, and how likely others are to guess a well-known song they tap on a tabletop.[64] More relevant for war and peace, in experiments that test the illusion of transparency in the negotiation context, people consistently overestimate how detectable their lies are and underestimate how well the preferences they seek to convey are understood by the opposing party.[65]

The illusion of transparency creates obvious problems for foreign policy, particularly for negotiations that could lead to, or end, a conflict. Consider a country that does not want to start a war, or a country that wants to end an ongoing war. The leaders of this country, with cooperative intentions, will assume that those intentions are discernable by their opponent. However, due to the illusion of transparency, these leaders are likely to overestimate the extent to which this cooperative intent is apparent, and to fail to correct the confusion by providing sufficient reassurances of their intent. The other side might, consequently, miss these cues and perceive the leaders' rhetoric or activities as hostile. As a result, the illusion of transparency makes it

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[62] Thomas Gilovich, Kenneth Savitsky & Victoria Husted Medvec, *The Illusion of Transparency: Biased Assessments of Others' Ability to Read One's Emotional States*, 75 J. PERSONALITY & SOC. PSYCHOL. 332, 332 (1998).

[63] *Id.*

[64] *See id.* at 333 (describing the table top findings); Thomas Gilovich & Kenneth Savitsky, *The Spotlight Effect and the Illusion of Transparency: Egocentric Assessments of How We Are Seen by Others*, 8 CURRENT DIRECTIONS IN PSYCHOL. SCI. 165, 167 (1999) (discussing the liquid example); Kenneth Savitsky & Thomas Gilovich, *The Illusion of Transparency and the Alleviation of Speech Anxiety*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 618, 619 (2003) (discussing the speech example).

[65] Leaf Van Boven, Thomas Gilovich & Victoria Husted Medvec, *The Illusion of Transparency in Negotiations*, 19 NEGOTIATION J. 117 (2003).

more likely that two countries will end up at war, even when both leaders want cooperation, not conflict.

Social scientists have argued that Secretary of State Dean Acheson's mindset during the Korean War provides an example of this bias playing out in the international relations context.[66] U.S. and U.N. forces had not planned to invade China, and in his memoirs, Acheson noted that "no possible shred of evidence could have existed in the minds of the Chinese Communists about the non-threatening intentions of the forces of the United Nations."[67] Yet, when U.S./U.N. forces ignored Chinese warnings about crossing the 38th Parallel and drove toward the Yalu River, the Chinese perceived a hostile intent and intervened with almost 800,000 troops.[68]

Indeed, throughout history, policymakers have incorrectly assumed that their peaceful intentions were clear, and that adversaries would therefore not feel threatened by their actions. Since misperceptions are especially dangerous in such circumstances, there is heightened reason to be wary of the decisionmaking bias that our motivations are generally transparent to others.

D. Fundamental Attribution Error

In situations of conflict or potential conflict, a critical task for the decisionmaker is to react and make judgments based on the actions of other parties. For example, if a leader is informed by her intelligence services that a potential adversary has repositioned troops along the border, she will need to decide how to interpret this new information. Is the repositioning a sign of hostility and preparation for aggressive behavior toward a neighbor? Or are there internal political or even bureaucratic reasons for the repositioning? Naturally, the answer to this question will play a role in dictating the response.

A robust finding in psychology is that people do not evaluate others' behavior the same way they view their own. When explaining how they make their own decisions, individuals typically highlight context and situation, but when considering others' actions, people emphasize internal, or "dispositional," factors.[69] In international politics, a result of this "fundamental attribution error" is that decisionmakers tend to underplay the context of their potential adversary's decisions, and assume their actions are based on ill motives.[70]

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66 Kahneman & Renshon, *supra* note 14, at 85 (internal quotation marks omitted).

67 *Id.*

68 *Id.*

69 *See id.* at 82–83 (describing the fundamental attribution error).

70 *See* Jack Snyder, *Introduction* to DOMINOES AND BANDWAGONS: STRATEGIC BELIEFS AND GREAT POWER COMPETITION IN THE EURASIAN RIMLAND 11 (Robert Jervis

This is not to say the adversary is not hostile. But it does mean that decisionmakers are likely to pay too little attention to possible alternative explanations.

A related decisionmaking bias is to interpret an adversary's behavior based on a preexisting "image" of hostile motives.[71] Thus, international conflict can escalate as actors interpret each successive move as confirmation of their adversaries' hostile intentions.[72] Once again, this is not to say that the adversary does not have hostile motivations. But a leader who is inclined to view new information through the prism of preexisting images risks interpreting that information incorrectly.

One example of the fundamental attribution error is misperceptions regarding weapons acquisition.[73] When a state buys arms to increase its defensive capabilities, an adversary might incorrectly assume that the state's actions actually have an offensive motivation because they tend to view the state's actions as dispositional, and because the two countries are adversaries.[74] Thus, in the years prior to World War I, when British policymakers were alarmed by Germany's naval activity, they assumed that since Great Britain's naval power was purely defensive Germany had no cause to fear it, even though Germans interpreted it as "an important instrument of coercion."[75] By contrast, international regimes (such as inspections)—while far from foolproof—can give insight into the character of the state's behavior and help ameliorate this problem.[76]

Another example can be seen in the 2013 episode involving Syria's chemical weapons. In deciding whether to use force, President Obama had to consider the actions of two "adversaries"—the Assad regime as the direct adversary, but also Russia as an ally of the Syrian

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& Jack Snyder eds., 1991) ("[P]eople tend to offer dispositional explanations for aggressive behavior, but situational explanations for cooperative behavior."); Janice Gross Stein, *Psychological Explanations of International Conflict*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 292, 294 (Walter Carlsnaes, Thomas Risse, & Beth A. Simmons eds., 2002) ("The fundamental attribution error makes it more likely that the leaders will attribute hostile intentions to others and that they will discount the situational constraints other leaders face.").

71 *See* Stein, *supra* note 70, at 10 ("Stability in enemy images is the default and change the exception.").

72 *See id.* at 294 ("Adversarial images tend to become self-fulfilling and self-reinforcing and can fuel spirals of international conflict.").

73 *See* Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POL. 167, 186–87 (1978) (noting the importance of distinguishing defensive weapons and policies from offensive ones).

74 *See* Snyder, *supra* note 70, at 11 ("In conflict relationships" the fundamental attribution error can lead "to the inference that the other is innately aggressive . . . .").

75 Jervis, *supra* note 73, at 170.

76 *Id.* at 181.

regime and an obstacle to effective international action against Syria. According to some reports, the Obama Administration initially believed that, even under threat of force, Assad would not agree to give up his chemical weapons and Russia would not abandon its ally in this regard.[77] This was not necessarily irrational thinking: The Assad regime's use of chemical weapons was a quintessential bad act, and Russia had repeatedly blocked remedial action in the U.N. Security Council.[78] But however uncooperative Syrian and Russian behavior had been to that point, in the end there did appear to be a path to a negotiated resolution, agreeable to Russia, to neutralize Syria's chemical weapons.[79] President Obama's decision to seek congressional approval for striking Syria seems to have played a clear, if indirect, role in avoiding conflict. Simply by delaying the start of hostilities and inviting a period of public deliberation, the presence of a congressional check opened a window in which adversaries were able to signal information inconsistent with the Administration's preexisting images.

The fundamental attribution error suggests the need to broaden our perspective regarding what constitutes a war powers decision. In thinking about who should have the power to set the United States on a path toward hostilities, it is important to understand that such a path may start with a military appropriations bill or a congressional decision to restrict arms reductions. Additionally, the presence of preexisting images and reputations suggests that we should be

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[77] *See* Patrick Wintour, *John Kerry Gives Syria Week to Hand Over Chemical Weapons or Face Attack*, GUARDIAN (Sept. 9, 2013, 7:47 AM), http://www.theguardian.com/world/2013/sep/09/us-syria-chemical-weapons-attack-john-kerry (reporting that Secretary Kerry "had no expectation that [Syrian President Bashar al-Assad] would comply" with an ultimatum to turn over Syria's stock of chemical weapons or face military action by the U.S.). *But see* Matt Viser, *Proposal for Syria's Chemical Weapons Long in Making*, BOSTON GLOBE (Sept. 11, 2013), http://www.bostonglobe.com/news/nation/2013/09/10/how-secretary-state-john-kerry-offhand-comment-set-off-diplomatic-scrambling/6YyGZn4dfUc4YXm8DVn06J/story.html (suggesting that the ultimate diplomatic resolution with Syria was planned).

[78] *See* Hayes Brown, *Flashback: How Russia Has Blocked International Action on Syria*, THINK PROGRESS (Sept. 9, 2013) http://thinkprogress.org/security/2013/09/09/2587861/brief-history-russia-blocking-international-action-syria/ (noting that the Russian Federation spent "three years . . . blocking almost all action from the international community on Damascus").

[79] To date, the international community has been largely satisfied with Syria's compliance. *See* Nick Cumming-Bruce & Rick Gladstone, *Last of Syria's Known Chemical Arms Are Shipped Abroad for Destruction*, N.Y. TIMES, June 24, 2014, at A6 (quoting various officials as lauding the removal of all of Syria's known chemical weapons from the country, but cautioning that undeclared weapons might exist and that production facilities remained intact). However one rates Syria's compliance, the Obama Administration appears (based on Secretary Kerry's remarks) not to have expected even the level of cooperation seen thus far. *See* Wintour, *supra* note 77.

particularly careful when ascribing motivations to adversaries, so as not to let misperceptions guide decisionmaking.

E. Reactive Devaluation

Negotiated solutions are critical to ending conflict and to preventing conflict from starting in the first place. In any negotiation, the goal is to find a proposal that satisfies both sides. However, people consistently suffer from a bias called reactive devaluation that can make agreement on a proposed solution more difficult. Under reactive devaluation, "the very offer of a particular proposal or concession—especially if the offer comes from an *adversary*—may diminish its apparent value or attractiveness in the eyes of the recipient."[80] In other words, simply because an opponent is the one to propose a solution, a country's leadership may devalue the merits of the policy. To be sure, there are many reasons to devalue proposals from an opponent in a negotiation: Tactically, devaluing the proposal might lead to a better final outcome.[81] Substantively, negotiators might reasonably assume that actors will propose solutions that are in their own self-interest.[82]

Still, in a series of studies, psychologists have demonstrated that the reactive devaluation phenomenon is robust, and is robust in ways that have direct relevance to international negotiations. In one study in the late 1980s, Americans were asked whether they supported a nuclear disarmament proposal that resulted in the U.S. and Soviet Union agreeing to an immediate 50% reduction in weapons.[83] When researchers said that President Reagan had proposed the policy, people said the policy was advantageous to the United States or even-handed at a 90% rate; when framed as a neutral third-party proposal, 80% saw it as advantageous or even-handed.[84] But when researchers said Soviet leader Mikhail Gorbachev proposed it, only 44% saw it positively.[85] In another study, psychologists examined whether Stanford students would support different proposals for the University to

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[80] Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 26, 28 (Kenneth J. Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky & Robert B. Wilson eds., 1995); *see also* Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 393 (1991) (noting that each side will "interpret the concessions it will receive from its adversary in a manner that minimizes their apparent significance and value").

[81] *See* Ross, *supra* note 80, at 28 (suggesting that characterizing an offer as inadequate may convince the other side to improve the terms).

[82] *Id.* at 30.

[83] *Id.* at 29.

[84] *Id.*

[85] *Id.*

divest its holdings in Apartheid South Africa. When a proposal was framed as University-initiated, students were less likely to support it than if they were told it was a neutral option available to the University.[86] Most directly relevant for war and peace, in a 2002 study, psychologists tested proposals for peace between the Israelis and Palestinians.[87] Using an actual proposal—suggested by Israel in the early 1990s—the researchers found that Israeli Jews believed the peace plan was less favorable when the researchers attributed it to the Palestinians.[88] They also reacted more negatively to this supposedly Palestinian proposal than to a real Palestinian proposal that the researchers told them had been proposed by Israel.[89] To be sure, in these examples some degree of deference to trusted elites with superior information may be a rational strategy. But the broader lesson of reactive devaluation, frequently observed in negotiations without these information asymmetries, likely applies to leaders negotiating war and peace.

Reactive devaluation suggests that leaders will be less likely to embrace opportunities to peacefully resolve a conflict than is rational, simply because their opponent has sponsored the proposed solution. As a result, this decisionmaking bias is likely to lead to more and longer wars as opportunities for resolution are ignored or undervalued. Note, however, that the research itself also suggests one solution to this problem: third parties. When a third party proposed the disarmament solution in the earliest studies on reactive devaluation, individuals evaluated the policy far more highly (and, we can infer, more neutrally) than when the opponent proposed the solution.[90] In the war powers context, it might be that the participation of third parties, such as neutral states or the United Nations, could be helpful in mediatiating conflict.

F. Psychic Numbing and Psychic Priming

Psychologists have learned that humans have difficulties with large numbers.[91] When making moral judgments about saving the lives of others, individuals are cognitively better equipped to deal with a few discrete individuals than large masses of nameless, faceless

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[86] *Id.* at 30–31.

[87] Ifat Maoz, Andrew Ward, Michael Katz & Lee Ross, *Reactive Devaluation of an "Israeli" vs. "Palestinian" Peace Proposal*, 46 J. CONFLICT RES. 515, 521–41 (2002).

[88] *Id.* at 531–32.

[89] *Id.*

[90] *See supra* notes 83–85 and accompanying text (discussing the study).

[91] Paul Slovic, David Zionts, Andrew K. Woods, Ryan Goodman & Derek Jinks, *Psychic Numbing and Mass Atrocity*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 126, 130 (Eldar Shafir ed., 2013).

people.[92] This cognitive feature, which has been called "psychic numbing," makes it more difficult to feel the reality of mass atrocity.[93] This result stems from the predominance of affective thinking and the use of heuristics which, in general, enable efficient human decision-making.[94] But this generally useful cognitive process leads to mental obstacles when large numbers are at stake, requiring the back-up analytical system to kick in to enable people to react.[95]

A consequence of this cognitive error is a potential bias *against* action, including military action, that would halt mass atrocities and save the lives of many people. The question of whether to engage in such humanitarian intervention has arisen with increasing frequency since the end of the Cold War. In Kosovo and Libya, coalitions intervened. But in other tragic episodes, such as the genocide in Rwanda and ethnic cleansing in the Darfur region in the Sudan, there was no such action. President Clinton has since called his failure to take action in Rwanda the "greatest regret" of his presidency.[96] Psychic numbing is by no means a complete explanation for this or any other failure to act; every situation of mass atrocity and possible intervention presents its own array of geopolitical and other issues. But it does mean that even where a country would, on a sober cost-benefit analysis, choose to act, cognitive processes may cause key decisionmakers to delay.

Thus, the psychic numbing effect potentially points to situations in which decisionmakers will tend toward a suboptimally *low* level of intervention. Of course, if a political judgment is made that the United States places zero value on saving foreign lives, psychic numbing would not result in "wrong" policies. But if people do place some non-zero value on saving foreign lives in cases of mass atrocity, cognitive errors may prevent decisionmakers from acting on that preference. One implication from the pscyhological literature is that internal executive branch processes could trigger automatic cost-benefit reviews of potential action, thereby triggering the analytical cognitive processes to override the numbed affective system.[97] Another possible implication is that a congressional brake on military action in response to an

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[92] *Id.* at 130–31.

[93] *Id.* at 126–42.

[94] *Id.* at 127.

[95] *Id.*

[96] Dana Hughes, *Rwanda, and What Bill Clinton Left Out When He Criticized Obama on Syria*, ABC NEWS (June 13, 2013), http://abcnews.go.com/blogs/politics/2013/06/rwanda-and-what-bill-clinton-left-out-of-criticism-of-obama-on-syria/.

[97] *See* Slovic et al., *supra* note 91, at 127, 138–39 (explaining that activating "System 2" analytical processes can help overcome psychic numbing caused by shortcomings of "System 1" intuitive processes).

imminent humanitarian catastrophe could lead to inferior policy results. Rather than have to overcome only one set of cognitive speed-bumps in the executive branch, a potentially cost-justified intervention would then have to overcome comparable obstacles in Congress.

On the other hand, the fact that we tend to react more naturally to images of suffering individuals than to statistics of mass atrocity may cause a psychic priming bias that cuts in the other direction.[98] Since the 1990s, media scholars in particular have studied the so-called "CNN Effect," the idea that, in a world of round-the-clock media exposure, policy may be driven by "impulse and image."[99] The viral "Kony 2012" video was perhaps the first example of a "YouTube Effect," turning public attention to Joseph Kony's war crimes—well-deserved notoriety but at a time when the warlord's power had already waned substantially.[100] Some pundits have suggested that President Obama's threat of force against the Assad regime was motivated by graphic images of a chemical weapons attack rather than a more dispassionate cost-benefit analysis.[101] And there are indications that the threat posed by ISIL, though no doubt real, is widely perceived to be even greater as a result of the appalling videos showing the beheading of Western journalists and aid-workers.[102]

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[98] This is in some sense the opposite side of the coin of psychic numbing: The same cognitive features that numb us to large numbers lead to surprisingly strong responses to discrete individuals, or even to a suffering puppy. *Id.* at 131.

[99] STEVEN LIVINGSTON, CLARIFYING THE CNN EFFECT: AN EXAMINATION OF MEDIA EFFECTS ACCORDING TO TYPE OF MILITARY INTERVENTION 1 (1997), *available at* http://shorensteincenter.org/wp-content/uploads/2012/03/r18_livingston.pdf. Critics of this theory have responded that the media rarely drives interventionist narratives on its own. *See, e.g.*, PIERS ROBINSON, THE CNN EFFECT: THE MYTH OF NEWS, FOREIGN POLICY AND INTERVENTION 126 (2002) (using case studies to demonstrate this point).

[100] INVISIBLE CHILDREN, *Kony 2012*, YOUTUBE (Mar. 5, 2012), https://www.youtube.com/watch?v=Y4MnpzG5Sqc (original video); *see also* Sam Sanders, *The 'Kony 2012' Effect: Recovering from a Viral Sensation*, NPR (June 14, 2014, 10:35 AM), http://www.npr.org/2014/06/14/321853244/the-kony-2012-effect-recovering-from-a-viral-sensation (noting that despite the large number of individuals who viewed the video and the resulting publicity, Kony had still not been captured within two years of the video's release); Todd Wasserman, *'KONY 2012' Tops 100 Million Views, Becomes Most Viral Video in History*, MASHABLE (Mar. 12, 2012), http://mashable.com/2012/03/12/kony-most-viral/ (stating that the video garnered more than 100 million views in six days).

[101] *See* Joshua Keating, *Is Obama a Victim of the CNN Effect?*, SLATE (Sept. 10, 2013, 10:51 PM), http://www.slate.com/blogs/the_world_/2013/09/10/obama_tells_americans_to_watch_videos_of_the_attack_is_he_a_victim_of_the.html ("Obama and Kerry appear to be appealing to . . . the idea that the U.S. public can't afford to ignore atrocities when the victims appear in gruesome detail on the nightly news.").

[102] *See* Jim Malone, *ISIS Beheadings Could Spur US Public Support for Military Response*, VOICE OF AMERICA (Sept. 3, 2014, 3:07 PM), http://www.voanews.com/content/isis-beheadings-could-spur-us-public-support-for-military-action/2437619.html (noting the shift in public opinion of the threat posed by the Islamic State in Iraq and the Levant (ISIL) and discussing whether U.S. intervention is necessary following the beheadings).

Sorting through these cross-currents can be difficult. In some cases the priming effect of powerful images can help overcome the numbing effect of large numbers,[103] but in other cases priming might skew our decisions on when to intervene and on the costs and benefits of intervention. The effects do not necessarily cancel each other out—they may simultaneously keep us from undertaking worthwhile interventions that could save many lives and also lead us into more costly interventions that will save relatively few. But as with the other biases we have surveyed, these complexities call for greater nuance in thinking through conventional war powers debates.

G. Group Polarization

In a variety of studies, researchers have found that when groups deliberate, the group decisions tend toward polarization. Groups whose members are predisposed to risk-taking will skew toward more risky behavior after deliberation, whereas members who are predisposed to risk-aversion will skew further toward caution after deliberation.[104] These findings have been applied to political issues, with scholars finding that, on topics including affirmative action, marriage equality, and climate change, liberals and conservatives each become more polarized in their beliefs when they deliberate with similarly minded people.[105] Polarization also takes place among experts. Panels of federal appeals court judges, for example, have been shown to suffer from polarization when serving on panels in which all members were appointed by a President of the same party.[106]

There are a wide variety of theories to explain group polarization. One approach is social conformism, most famously identified in the Asch experiments from the 1950s.[107] Asch placed a research subject in a classroom with other subjects, who were actually Asch's confederates.[108] The research subjects were all shown a line and asked to match the line to another line of the same length, choosing from a set

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[103] *See* Slovic et al., *supra* note 91, at 137–38 (suggesting the use of affective imagery as one technique to override numbing).

[104] Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, 1 J. LEGAL ANALYSIS 263, 268 (2009).

[105] David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 CALIF. L. REV. 915, 921–22 (2007).

[106] CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 14–15, 76–77 (2006).

[107] *See* Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. AND APPLIED 1 (1956) (describing the experiment).

[108] *Id.* at 3.

of three lines.[109] When the other subjects (Asch's confederates) chose lines that were obviously not the same length as the original line, the targeted research subject frequently would agree with them.[110] Another possible explanation is groupthink, which Irving Janis argued is more likely to replace critical thinking the more amiable and cohesive the group is.[111]

Professors Glaeser and Sunstein have modeled another driver of polarization, showing that individuals are likely to be "[c]redulous Bayesians," rather than "rational Bayesians."[112] Rational Bayesians learn from other members of the group, using new information and arguments to update their personal views.[113] Credulous Bayesians, on the other hand, "treat offered opinions as unbiased and independent and fail to adjust for the information sources and incentives of the opinions that they hear."[114] In other words, they fail to correct for the fact that the information that others give them might be biased or problematic.

The problems of group deliberation—particularly the problem of homogeneity in the group's views or background—are significant for foreign policy decisionmaking. Consider debates on war and peace in the White House, in which advisors deliberate and make recommendations to the President. If the President's advisors share the same foreign policy worldview (e.g., neoconservative, liberal internationalist, realist), they will be more likely to analyze and interpret a situation in the same way—and reach the same conclusions about their recommended course of action. The result could be that all of the President's advisors—even if they represent institutional voices that are frequently opposed to each other—may end up underestimating the same risks, overestimating the same benefits, and skewing the case for or against conflict.

One of the purported benefits of having multiple individuals involved in decisionmaking is that collective decisions are thought to be better than those made by a single person. This is the famous "wisdom of crowds" or the idea that "two heads are better than one."[115] Arguments that many minds do better than one come in a

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109 *Id.*

110 *Id.*; Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955).

111 Irving L. Janis, *Groupthink*, PSYCHOL. TODAY 43, 44 (Nov. 1971); *see generally* Irving L. Janis, GROUPTHINK (1982).

112 Glaeser & Sunstein, *supra* note 104, at 264.

113 *Id.* at 265.

114 *Id.*

115 For background on these theories, see generally CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006), and JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005).

variety of forms,[116] but what is critical is that many decisionmaking errors are a function of information problems: correlated biases, personal biases, insufficient information, and misperceptions. For any particular decisionmaker—a member of Congress, the President, or the leader of another U.N. Security Council member nation—group deliberation with and within their staff raises the possibility of psychological biases leading to greater polarization. In thinking about war powers, this insight cuts in favor of decisionmaking processes that incorporate a diversity of opinion and perspective, rather than just additional voices.

H. Behavioral Lessons and Methodological Issues

As the foregoing illustrates, there are a number of different decisionmaking biases identified by psychologists and behavioral scientists that have the potential to affect foreign policy decisions and, perhaps, war powers. Although we do not attempt any sort of grand theory of wartime decisionmaking flaws, a few themes emerge.

A Propensity for Undue Risk-Taking. One theme that emerges is a proclivity for decisionmakers to pursue riskier strategies than is called for by a given situation. In the case of positive illusions, a decisionmaker's illusion of control falsely inflates her belief that a given strategy will succeed, and leads her to overestimate her own ability to influence future events. As a result, in deciding to use force, a decisionmaker is likely to hold over-optimistic views on the probability of success and to discount the downsides and costs. Prospect theory points to a similar error in weighing risk and reward, not in all cases but whenever the decisionmaker is operating within the domain of losses (which might happen at the war-initiation phase when the goal is to recover something that has been lost, or once a war is already underway and has led to sunk costs). When these biases apply, they can be seen as skewing decisionmaking in the direction of taking risks that a more neutral cost-benefit analysis would not recommend.

Communicating with Adversaries and Misreading Signals. A second theme that emerges is that decisionmakers can systematically err when it comes to signals, both in the messages they send to adversaries and in comprehending the meaning of adversaries' actions. The illusion of transparency, fundamental attribution error, and reactive devaluation together predict that decisionmakers will both incorrectly expect their adversaries to see benign motives in their own actions,

[116] Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 4–23 (2009) (surveying different models of the "many minds" argument).

and also assume the worst about ambiguous signals sent by their adversaries. Like the suite of biases relating to risk, this group of decisionmaking insights reveals ways in which our difficulty sending and understanding signals can skew decisionmaking toward conflict.

Biases Toward Action or Inaction in Specialized Circumstances. A final lesson that emerges from this survey is that certain decisionmaking biases emerge in particular circumstances. Prospect theory, as we noted above, often points toward undue risk-taking, but not always. Rather, it suggests that a decisionmaker is most likely to take a risk to recover a loss. Thus, the bias toward conflict and escalation may be most pronounced when the policymaker perceives a loss at the outset of conflict (e.g., lost territory, citizens or property captured, threat of losing a close ally to insurgency) or, in any type of conflict, after heavy losses have been sustained. Humanitarian crises present another situation where psychology insights may point toward action or inaction. In many cases, decisionmakers may experience psychic numbing and fail to take cost-justified actions that might save large numbers of lives. At the same time, arresting images that capture a decisionmaker's attention might lead to interventions that are not readily justified by their costs. This set of lessons is not unidirectional, but rather calls for close attention to the circumstances.

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A word on methodology is also in order. Any project seeking to apply behavioral psychology lessons in an institutional-decisionmaking context faces some methodological challenges. How can we account for the fact that individuals, who might suffer from these psychological biases, operate within groups or as part of a team within larger institutions? Is it possible to draw a connection between individual psychological biases and institutional decisions? Can we really translate laboratory lessons into the real world?

There are no simple, clean-cut answers to these questions, but our approach mitigates many of these concerns. First, we do not mean to suggest that institutions, such as "Congress" or the "Executive Branch" or the "State Department," exhibit these behavioral impulses. Rather, these behavioral biases operate at the level of particular individuals within these institutions. Throughout the paper, we refer to "Congress," "the President," and other institutions primarily as shorthand, to encompass all of the particular individuals who work within those institutions. This shorthand is conventional: Even when presidential unilateralists say that the "President" should make the decision, they invariably recognize that any national security action by

the President necessarily involves advice from various advisors and coordination among a plethora of agencies.[117] Within individual agencies, there may be important differences in the perspectives and incentives of political appointees on the one hand and the bureaucracy's "cadre of experts with a long-term institutional worldview" on the other,[118] or even within a group of political appointees or bureaucrats. Add Congress to the mix and we have 100 Senators and 435 Representatives, not to mention the complicated constellation of committee and personal staff. And if one considers the international dimension, institutions such as the United Nations Security Council introduce another set of actors: each country within the United Nations, represented by their ambassador to that body, is actually a collection of individuals within their government, replicating to lesser or greater degrees the variety and complexity of the American government. The point here is that the behavioral phenomena operate at the level of each of these individuals.

Second, with so many individuals operating in groups, it might seem impossible to draw a connection between psychological biases and institutional decisions. We do not doubt that institutional context can mediate individual decisionmaking biases, but neither do we think it is fatal to the overall project.[119] As psychologists have shown, decisionmaking biases can be aggravated in groups, leading to polarization, extremism, and groupthink.[120] Thus, in at least some cases, individual biases might become hardened into a group's conclusion. We cannot say with certainty that the behavioral bias will always translate from the individual to the group. In certain cases, diverse group opinion might counteract an individual's bias. Indeed, one of our goals is to highlight that, in some places, our institutional design *already* counteracts some behavioral biases and that this feature of war powers design has been overlooked.

The broader point is that if the law demands an answer on whether Congress or the President should have some responsibility, some comparative generalizations have to be made—and we believe they can be made. Consider the example of the illusion of control, one

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117 *See, e.g.*, Nzelibe & Yoo, *supra* note 3, at 2523 (discussing the national security and intelligence bureaucracies).

118 Katyal, *supra* note 6, at 2317.

119 Other legal scholars have also applied psychological lessons to institutional contexts. *See, e.g.*, Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 571–82 (2002) (articulating a "psychological model of government policy failure" in Congress, the presidency, the courts, and administrative agencies).

120 *See supra* notes 104–06 and accompanying text (discussing biases that manifest themselves in the group decisionmaking context).

of the positive illusions linked to an optimism bias.[121] It is true that the President, not to mention the Secretary of Defense and the Joint Chiefs of Staff, are not individually on the ground implementing a policy such as a troop surge. But at the same time, there is a direct (if long) causal chain between events on the ground and key decisionmakers in the executive branch's national security establishment. The same cannot be said of members of Congress or their staffs. Even those members with oversight roles on powerful committees have a much less direct role in implementing policy. The basic point is that while there are shades of gray—individual executive branch actors will not feel they are in perfect control of events, and individual congressional actors will not feel themselves wholly disconnected—it still seems fair to say that the illusion of control bias is likely to loom larger for the President than it is for Congress.

A third concern is that laboratory insights simply cannot be translated into the real world,[122] or that the real world is sufficiently different from laboratory conditions so as to make the lessons purely speculative. We think such criticisms go too far. First, as previously discussed, political scientists who study international relations have used case studies based on serious historical and archival research to apply the behavioral insights we review to explain and understand real foreign policy and military decisionmaking. These studies are obviously not the same as laboratory experiments, but they provide strong evidence that the phenomena operate in the foreign policy context. Second, our goal is not to make absolute claims, but rather comparative ones. We are interested in identifying areas where decisions about war and peace might go wrong and determining the directionality of those errors. Third, there is a concern that the subjects of psychological experiments all have shared characteristics that are not universal,[123] and therefore that broad generalizations cannot be made from these lessons. Even if this is true as a general matter, the subjects of these studies share at least some of the same characteristics with American governmental officials. Laboratory insights obviously cannot be translated perfectly to the real world, but these lessons do identify particular risks that institutional designers should consider.

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121 *See supra* notes 31–33 and accompanying text (discussing the illusion of control).

122 *Cf.* Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1741–42 (1998) ("[T]he experimental insights that undergird behavioral law and economics emerge from controlled laboratory settings in which subjects dispassionately assume certain roles.").

123 *See* Joseph Henrich, Steven J. Heine & Ara Norenzayan, *The Weirdest People in the World?*, 33 BEHAV. & BRAIN SCI. 61, 61 (2010) (noting that the subjects of psychological studies are drawn largely "from Western, Educated, Industrialized, Rich, and Democratic (WEIRD) societies").

II
BEHAVIORAL WAR POWERS AND CONTEMPORARY LEGAL DEBATES

Behavioral psychology and political science reveal a number of challenges to decisions about war and peace. Human errors, persistent biases, misaligned incentives, and other decisionmaking phenomena all shape—and sometimes pervert—decisionmaking. Understanding these biases is critical for assessing the constitutional and statutory law of war powers because these real-world practices interact with legal doctrine to determine when wars take place, how wars are conducted, and when wars end.

This Part turns to contemporary legal discussions about war powers, and shows how psychological lessons shed light on debates concerning the powers to threaten, initiate, fight, and terminate wars. While we do not suggest that a behavioral war powers approach ought to be the only factor in these debates (wholly displacing questions of text, history, and other functional considerations), we do contend that these debates, which already feature extensive functional arguments on both sides, would be richer if behavioral decisionmaking considerations were taken into account as well. Indeed, our goal here is not simply prescriptive—identifying areas of concern—but also descriptive, identifying aspects of existing structures that may already mitigate decisionmaking biases.

A. The Power to Threaten War

In a provocative article, Professor Waxman recently noted a paradox in the war powers literature. Despite the many disagreements concerning presidential power to *use* force, there has long been an "implicit consensus that the President is constitutionally empowered to threaten military force."[124] Yet from a grand strategy and political science perspective, *threats* are actually a central way the United States wields military force.[125] Moreover, since a threat, once issued, may entail credibility costs if not followed through on,[126] a presidential threat can "unilaterally alter the costs and benefits of actually using force."[127] Waxman ultimately agrees with the consensus view

[124] Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1629 (2014).

[125] *Id.*

[126] *But see* Ganesh Sitaraman, *Credibility and War Powers*, 127 HARV. L. REV. F. 123 (2014) (demonstrating logical and historical errors in common assumptions about credibility and the use of force).

[127] Waxman, *supra* note 124, at 1660.

that the President has robust authority to issue threats,[128] and avoids prescriptive suggestions stemming from the anomaly he flags.[129]

Behavioral war powers theory offers a complementary lens through which threats of force can be viewed. Waxman recognizes that his analysis need not be limited to threats, noting that it could be extended to "many other presidential powers," such as "diplomatic communication and recognition, intelligence activities, [and] negotiation."[130] But it is not just presidential powers that complicate this story.

In light of some of the behavioral insights we have discussed, it is worth observing that *Congress* has many uncontested powers that play a role similar to threats in the constitutional balance.

Consider three basically undisputed congressional powers. First, as the master of appropriations, Congress controls spending on the military, including budgets for weapons.[131] For example, the sequester imposed by the 2011 Budget Control Act slashed military spending to levels President Obama believed to threaten national security, yet his response was to lobby Congress to reverse the cuts and not to claim any power to spend at a level consistent with his view of security imperatives.[132] Similarly, Congress controls the military aid the United States offers its allies in various ways, including by placing restrictions on aid in the event of a military coup.[133] Even where the provision of assistance raises weighty questions of regional stability—the military takeover of power from the Muslim Brotherhood in Egypt comes immediately to mind—the President has, at least in theory, limited discretion to continue supplying aid.[134]

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128 *Id.* at 1629.

129 *Id.* at 1629, 1662, 1675.

130 *Id.* at 1682.

131 Although the President has veto power over appropriations bills, she may be practically constrained by the general need to fund the government, and thus must accept some congressional appropriations that might appear threatening to other countries. For a general discussion of appropriations, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

132 *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 5652—SEQUESTER REPLACEMENT RECONCILIATION ACT OF 2012 (2012) (noting the Administration's view that the sequester defense cuts "would have destructive effects on national security").

133 *See, e.g.*, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, 111 Stat. 2386, 2407 (1997) (prohibiting the use of funds to assist any country whose elected government is deposed by military coup or decree).

134 According to reports, the Obama Administration is abiding by these aid restrictions with respect to Egypt, but without formally labeling the military takeover a coup, or conceding any legal obligation to actually make a determination on that question. *See, e.g.*, Josh Rogin, *Senator: Obama Administration Secretly Suspended Military Aid to Egypt*,

Second, Congress controls standing military capabilities by forbidding the President from undertaking "militarily significant" arms reductions absent either an Article II treaty implemented with the consent of two-thirds of the Senate, or affirmative legislation by Congress.[135] And third, whether by constitutional command or just tradition, the United States typically reserves binding commitments to come to the defense of allies to Article II treaties.[136]

An important behavioral war powers lesson is that decisions on military spending and arms reduction are critical to security outcomes. Increased military spending or refusal to reduce arms may have myriad explanations: a desired weapon may be intended for wholly defensive purposes, it may be pursued so as not to seem soft on defense for domestic political purposes, or even because it will drive jobs to a powerful member of Congress's district. But the illusion of transparency suggests that a member of Congress will exaggerate the ability of foreign observers to appreciate that these arms purchases are benign (or just cynical as a matter of domestic politics).[137] The lesson of the fundamental attribution error, moreover, is that the decision to ramp up spending (or to refuse an arms control deal that is on the table) could be misperceived by an adversary as an intentionally hostile act, regardless of the actual motivation.[138]

Like Professor Waxman, we do not mean to say that the wrong branch possesses the power to increase the likelihood of war through military spending decisions. But behavioral lessons do illustrate that it is not just threats issued by the President that are a missing piece of the puzzle in terms of looking at war powers. If we should be concerned that the President can unilaterally affect the chances of a war by issuing threats, we should be at least as concerned with Congress's

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DAILY BEAST (Aug. 19, 2013), http://www.thedailybeast.com/articles/2013/08/19/senator-obama-administration-secretly-suspended-military-aid-to-egypt.html.

135 Arms Control and Disarmament Act, 22 U.S.C. § 2573(b) (2012); *see also* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1261 (2008) (noting the executive practice of concluding arms control agreements through the Article II treaty process); Harold Hongju Koh, Remarks, *Twenty-First-Century International Lawmaking*, 101 GEO L.J. 725, 727 (2013) (same).

136 One of the more famous episodes in American foreign relations law is President Carter's unilateral decision to cancel the Mutual Defense Treaty with Taiwan. *See* Goldwater v. Carter, 444 U.S. 996 (1979) (dismissing a challenge to the termination without reaching the merits of the constitutional issue). What is less remarked upon is the uniform practice of Presidents seeking the advice and consent of the Senate before entering such mutual defense agreements in the first place.

137 *See supra* notes 62–63 and accompanying text (discussing the illusion of transparency).

138 *See supra* notes 69–70 and accompanying text (discussing the fundamental attribution error).

power to affect the chances of war by increasing military spending, or by denying the President the ability to signal U.S. intentions through weapons drawdowns.[139] Indeed, for those who support expansive presidential authority over threat-making, there is a credible functional argument that the President should have *greater* authority to unilaterally halt weapons acquisitions or initiate weapons drawdowns in order to signal that the United States is not threatening an adversary.

As for threats themselves, the behavioral consequences of a presidential threat have implications going beyond what Professor Waxman addresses. Professor Waxman focuses on the ability of a presidential threat to change the nation's costs and benefits of entering into a conflict by injecting the threat's credibility as a factor.[140] The logic of credibility preservation as a meaningful policy interest is somewhat dubious.[141] But leaving credibility aside, a threat could have an effect on the future decisionmaking of the person who issued it. Given that the sunk costs fallacy can more significantly affect the individual who incurred the cost, a President who issues a threat may feel compelled to follow through on the threat even if it is irrational.[142] In other words, a President may view the cost of a prior threat as sunk, biasing her future decisions toward the more aggressive options that might be needed to enforce the threat.

All of this suggests that there is an increased risk of biased decisionmaking following a presidential threat of force. We agree with Professor Waxman that curtailing the President's authority to make threats would at a minimum be impractical, and might disadvantageously impede a large swathe of foreign policy activities. It does not necessarily follow, however, that the current constellation of powers around threats is optimal. One possibility is that, since a President's post-threat decisionmaking is potentially skewed, there is a greater need for checks and balances at that stage—whether congressional, internal, or international. That is, not only should a President be unable to manufacture a credibility interest that then justifies unilateral force, but we might also regard a prior threat as reason not to accord the President the unilateral power to follow through on it.

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139 *Cf.* Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 100 (2008) (noting that declarations of war in the seventeenth and eighteenth centuries took many forms, including even parliamentary appropriations to fund war).

140 Waxman, *supra* note 124, at 1660–61.

141 *See* Sitaraman, *supra* note 126, at 123 ("[P]olitical scientists have offered devastating critiques of credibility arguments in the context of military threats . . . [and demonstrated] that the concept is often deployed in incomplete and illogical ways.").

142 *See supra* notes 46–48 and accompanying text (discussing effects of sunk costs bias).

Viewed in this context, President Obama's decision to turn to Congress for authorization to enforce his chemical weapons "red line" for Syria in 2012[143] can be seen as a way of insulating himself from the criticism that the ultimate decision to use force was based on concerns about his personal credibility.

B. The Power to Initiate War

1. Congress Versus the President

The most prominent debate on war powers is whether Congress or the President has the power to initiate war. The divide manifests itself primarily in debates over whether Congress's constitutional authority to "declare War" grants Congress sole authority to initiate wars, over the circumstances in which the President may use force without congressional authority, and over whether the War Powers Resolution is an unconstitutional restriction on the President's ability to manage foreign affairs and initiate hostilities.[144] Each camp is entrenched and has explored textual, historical, and basic functional arguments in defense of its position. Congressionalists focus on the Constitution's Article I powers granted to Congress, including the powers to "declare War," issue letters of marque and reprisal, "raise and support Armies," "provide and maintain a Navy," and appropriate money.[145] They argue that the Founders wanted Congress to act as a vetogate to make it more difficult for the country to go to war,[146] and they note that redundancy, multiple systems of review, and diversity of viewpoints can improve decisionmaking, particularly in

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143 *See* Ernesto Londoño, *Obama Says U.S. Will Take Military Action Against Syria, Pending Congress's Approval*, WASH. POST, Aug. 31, 2013, http://www.washingtonpost.com/world/national-security/obama-set-to-speak-on-syria-in-rose-garden/2013/08/31/65aea210-125b-11e3-85b6-d27422650fd5_story.html ("Shifting the burden to Congress potentially gives the President a way out of the political bind he created . . . when he said Syrian President Bashar al-Assad's use of chemical weapons would be a 'red line' for the United States.").

144 *Compare* GLENNON, *supra* note 4, at 78 (taking a pro-Congress position), *with* YOO, *supra* note 2, at 1661–62 (taking a pro-President position).

145 U.S. CONST. art. I, §§ 8–9. For sources arguing that the power to initiate war is a legislative function, see ELY, *supra* note 4, at 3–10; GLENNON, *supra* note 4, at 81; KOH, *supra* note 4, at 158–61; Berger, *supra* note 4, at 39; Bickel, *supra* note 4, at 132; Lofgren, *supra* note 2; Prakash, *Separation and Overlap*, *supra* note 2, at 309–30; Van Alstyne, *supra* note 4, at 9.

146 *See, e.g.*, ELY, *supra* note 4, at 4; William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, at 723–24 (1997). For a general discussion of vetogates in the legislative process, see William N. Eskridge Jr., *Vetogates and American Public Law*, J.L. ECON. & ORG., Apr. 19, 2012, http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.full.pdftml.

crises.[147] Presidentialists, in contrast, focus on Article II's provisions, namely the Commander-in-Chief Clause and the "historical gloss" on the executive power, as it has developed over American history.[148] They note that the President is best suited to act with speed, secrecy, flexibility, and efficiency—all of which are necessary in foreign affairs, and essential in emergencies.[149] Both sides provide extensive interpretations of historical events and judicial opinions to bolster their positions.[150] Indeed, the ground is so well trod that commentators refer to the debate as having reached a "stalemate."[151]

While lessons from psychology contribute little to textual, historical, and structural debates over the "declare War" Clause and the War Powers Resolution, they do provide important insights that can help inform and deepen the functional arguments in these debates. Foremost, behavioral psychology identifies a number of systematic cognitive errors that lean in a hawkish direction—biases that make it more likely for any individual to decide to initiate conflict.[152] These "hawkish biases" can skew how individuals view their own country and their adversary's country. The positive illusions bias suggests that individuals will unrealistically overestimate their abilities vis-à-vis the adversary, making them more likely to think they can win a war (and therefore more willing to initiate it).[153] The illusion of transparency suggests that individuals will incorrectly assume they have clearly expressed their intent to their opponents.[154] Negotiations might be more likely to break down, leading to war, precisely because one side had an overly optimistic view of its ability to communicate effectively. Other phenomena—the fundamental attribution error and reactive

147 *See* Pearlstein, *supra* note 3, at 1552–55, 1611–18 (exploring the benefits of such features in institutional design).

148 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003). For presidentialist arguments, see, for example, Bork, *Foreword*, *supra* note 5, at ix–x; YOO, *supra* note 2, at 104; Bobbitt, *supra* note 5, at 1370–88; Bork, *Erosion*, *supra* note 5, at 698; Monaghan, *supra* note 5, at 20–25; Powell, *supra* note 5, at 529; Yoo, *supra* note 5, at 177, 180; and Yoo, *supra* note 2, at 1660.

149 For a general discussion of these arguments, see GLENNON, *supra* note 4, at 84, and KOH, *supra* note 4, at 118–19. For a focus on emergencies, see ACKERMAN, *supra* note 3, at 58–73, and ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE 15–58 (2007).

150 *Compare, e.g.*, YOO, *supra* note 2 (taking a pro-presidential approach), *with* GLENNON, *supra* note 4, *and* KOH, *supra* note 4 (taking a more congressionally-focused approach).

151 STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 27 (2013).

152 The term "hawkish bias" is borrowed from Kahneman & Renshon, *supra* note 14, at 79.

153 *See supra* note 31 and accompanying text (discussing the positive illusions bias).

154 *See supra* notes 62–63 and accompanying text (discussing the illusion of transparency).

devaluation—make it systematically more likely that individuals will interpret their adversaries' actions as hostile, even if their adversaries have no hostile intent.[155] Like Don Quixote and the windmill, individuals are more likely to see enemies where none exist—or more precisely, to overestimate the degree to which adversaries are acting in a hostile manner. In addition, there are "dovish biases," such as psychic numbing, which can skew decisionmaking away from intervention.[156]

On their own, these biases do not suggest that either Congress or the President should have a greater share of war powers. Indeed, the biases apply at the individual level to any person assessing whether to initiate war—Presidents and their advisors, members of Congress and their staffs, commentators, and analysts. But when considered in the context of institutional debates between Congress and the President, the hawkish biases suggest a strong functional argument for congressional involvement in the decision to initiate war, at least in some circumstances. First, while members of Congress and their staffs should be expected to suffer from these biases, Congress's bias might not be as acutely problematic as the President's bias. Congress is comprised of many members with different political, geographic, and other perspectives, and as a result could exhibit a greater degree of heterogeneity in perspectives and in degree of bias (and therefore less likelihood of group polarization or groupthink).[157] Second, members of Congress will not actually be in control of the military operations, and therefore might not feel the same illusion of control over events that the President and executive branch staff exhibit. Finally, when faced with a systematic bias in the direction of war, one possible remedy is simply to make initiating war more difficult. Even if members of Congress suffer from hawkish biases at the same rate as Presidents and their staffs, congressional involvement in the decision to go to war creates an additional vetogate (indeed, two vetogates if we consider the House and Senate separately) that raises the time and procedural costs of initiating war.[158] These increased costs may help guard against hawkish biases leading to "bad" decisions to enter a conflict.

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155 *See supra* notes 69–70, 80 and accompanying text (discussing the fundamental attribution error and reactive devaluation).

156 *See supra* notes 91–93 and accompanying text (discussing psychic numbing).

157 For a discussion of these issues generally, see Vermeule, *supra* note 116.

158 Professor Nzelibe argues that the additional vetogates may have a perverse effect in leading Presidents to select into more high-risk wars than otherwise would be chosen because they can share the political costs with Congress. Nzelibe, *Congressionally Authorized Wars*, *supra* note 7, at 910.

There are two important limitations to the lessons of hawkish biases. First, congressional participation might not mitigate hawkish biases in cases of unified government, when one party controls both the legislative and executive branches.[159] In these situations, partisanship might trump institutional identity, even given the magnitude of the decision to initiate war. Second, hawkish biases would apply less strongly to the decision to repel an invasion or attack. Presidentialists and Congressionalists generally agree that the President can act, without prior congressional authorization, to respond to attacks.[160] One reason this consensus makes sense from a behavioral war powers perspective is that, in such cases, there is no danger of misperception of the enemy's intent or of the country's capacity to win a war it wishes to initiate: The United States is not initiating the war. But once the question migrates further from the narrow issue of defending against attacks and invasions, hawkish biases become increasingly important. Thus, while scholars agree that defensive actions can be initiated without Congress, some have argued that a counterattack would need congressional authorization.[161] Similarly, scholars have debated whether preemptive strikes properly fall into the category of defensive actions.[162] At the other end of the spectrum are cases in which the country engages in "wars of choice."[163] As the decision becomes less a question of immediate reaction and more a question of perception of future threat, the behavioral argument for congressional involvement becomes stronger.

2. *The Scope of "Independent" Presidential War Powers*[164]

In between the absolutist pro-President and pro-Congress positions is the "third way" view that the President may act alone to vindi-

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[159] *See* Levinson & Pildes, *supra* note 20, at 2344 (noting that interbranch checks are diminished in times of unified government).

[160] *See, e.g.*, GLENNON, *supra* note 4, at 81–82 (acknowledging that even under a narrow interpretation of presidential war powers, the President has independent authority to repel "sudden attacks").

[161] *Compare* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45, 94 (2007) (arguing that Congress would retain the power to decide on a counterattack in the event of another nation's aggression), *with* Michael D. Ramsey, *The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 191 (2007) (arguing that the country would be at war after another nation's aggression and the power to counterattack would fall within presidential powers).

[162] *See, e.g.*, John B. Mitchell, *"Preemptive War": Is It Constitutional?*, 44 SANTA CLARA L. REV. 497, 502–18 (2004) (arguing that the federal government does not have the constitutional power to conduct preemptive war).

[163] *See generally* RICHARD N. HAASS, WAR OF NECESSITY, WAR OF CHOICE 9–11 (2010).

[164] Portions of this section are drawn from Sitaraman, *supra* note 126.

cate some substantial but not unlimited set of national interests.[165] The scope of the President's power to order the use of military force without congressional approval in this manner is contested. The original meaning of the Constitution's provisions relating to war and peace is seriously debated, the Supreme Court has never issued an opinion that delineates the specific scope of presidential war powers, and Congress and the President have not come to an agreement on the exact boundaries of these powers.[166] As a matter of practice, the Office of Legal Counsel in the Justice Department (OLC) has issued a number of opinions addressing the authority of the President to use force absent congressional approval. The most recent opinion, issued in 2011 and addressing the President's authority to use military force in Libya, sets forth a two-pronged framework for assessing the President's authority to use force absent congressional authorization.[167] First, the military operation must serve "sufficiently important national interests" to justify presidential action based on the Commander-in-Chief and Chief Executive powers and the President's authority to conduct foreign relations.[168] Second, the military operation must have an anticipated "nature, scope, and duration" that does not constitute "war."[169] Lessons from social science raise concerns about both prongs of the test.

Take the "nature, scope, and duration" prong first. In the Libya Opinion, OLC stated that the President's ability to use force without congressional approval would be limited if the military engagement "constitutes a 'war' within the meaning of the Declaration of War Clause."[170] It argued that, for constitutional purposes, determining what operations "constitute[ ] a 'war' . . . requires a fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations."[171] "War," according to OLC, would require "prolonged and substantial military engagements," that usu-

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165 *See* Marty Lederman, *The Constitution, the Charter, and Their Intersection*, OPINIO JURIS (Sept. 1, 2013), http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection/ (describing a "Clinton/Obama 'third way'" on war powers).

166 The literature is voluminous, but for a flavor of these debates, see FISHER, *supra* note 4 (discussing history and arguing for a strong congressional role); YOO, *supra* note 2 (taking a pro-presidential view); Barron & Lederman, *supra* note 2, at 720, 761–66, 770 (discussing the scope of the Commander-in-Chief power).

167 Authority to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at *10 (2011) [hereinafter Libya Opinion].

168 *Id.*

169 *Id.* (internal quotation marks omitted).

170 *Id.* at *8.

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

ally involve "exposure of U.S. military personnel to significant risk," and that take place over "a substantial period" of time.[172]

Perhaps most importantly, OLC's test requires predicting how extensive, dangerous, and long the military operations will run, factors that depend on an assessment of U.S. abilities vis-à-vis the opponent. This is a classic case in which psychologists would expect to see the optimism bias and the illusion of control. Individuals often overestimate their abilities, in particular their ability to shape events that are only partly (if at all) within their control. The OLC's "fact-specific" test is likely therefore to result in overconfidence and consistent skewing in the direction of classifying conflicts as falling short of "war" for constitutional purposes. Indeed, a creative OLC in 1914 (had the United States entered the war at its start) might have even put forth a colorable argument that the conflict in Europe was not envisioned to have an extended "nature, scope, and duration."

Now consider the "national interests" prong. Recent OLC legal opinions identify three different categories of national interests that can justify the President's independent authority to use force: protecting lives and property, preserving regional stability, and maintaining the credibilty of U.N. Security Council Resolutions. Note that OLC opinions, such as the Libya Opinion, generally state that a *combination* of interests creates sufficient foundation for presidential action;[173] as a result, it is not clear whether, in OLC's view, some of these interests can independently provide a sufficient basis for presidential action.

The narrowest and least controversial category is the power to repel attacks on the United States[174] and to protect the "lives and property" of Americans abroad.[175] OLC opinions on presidential action in Iran (1980),[176] Somalia (1992),[177] Bosnia (1995),[178] Haiti (2004),[179] and Libya (2011)[180] all reference this narrow authority.[181]

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172 *Id.*

173 *Id.* at *10.

174 *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority.").

175 Iran Opinion, *supra* note 60, at 187.

176 *Id.*

177 Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 8–9 (1992) [hereinafter Somalia Opinion].

178 Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 332 (1995) [hereinafter Bosnia Opinion].

179 Deployment of United States Armed Forces to Haiti, 28 Op. O.L.C. 30, 31–32 (2004) [hereinafter Haiti Opinion].

180 Libya Opinion, *supra* note 167, at *10.

As with virtually all decisions about military operations, actions to protect American lives and property abroad are likely to feature a positive illusions bias, in which leaders are overly optimistic about the likelihood of success. If the defense-of-persons reasoning is further used to justify extensive military operations,[182] the positive illusions bias—and other hawkish biases—might be more pronounced. At the same time, this concern may be comparatively minor if the action undertaken is narrowly tailored to protecting lives and property. Professor Glennon, for example, has argued that when using force to protect lives and property, the President still should have exhausted all diplomatic remedies, should limit the use of force strictly to rescuing endangered citizens, and should ensure that the force used is proportional to the problem faced.[183]

Even in this narrow class of cases, it is also worth considering the prospect theory lesson that decisionmakers are willing to "overspend" to recover a loss. Prospect theory suggests that a President might be overly willing to undertake a risky rescue operation (President Carter's failed Iran mission, for example). In contrast, if the President's military advisors were to present her with a comparably risky operation to *prevent* equivalent dangers in the future, the fact that she is not operating in the domain of losses might change her decision. This is not to doubt that there may be compelling moral reasons for the U.S. Government to take special risks to rescue citizens in danger. But this behavioral perspective raises the question of whether this is a judgment the President should be unilaterally empowered to make, or at the least whether there exist internal decisionmaking procedures sufficient to mitigate the influence of these biases.

A second national interest OLC has more recently identified in its Libya (2011),[184] Haiti (2004),[185] and Bosnia (1995)[186] opinions is preservation of regional stability. The goal of preserving regional stability should often trigger concerns that decisions will be distorted by the illusion of control and positive illusions biases. Indeed, the very fact that the OLC's doctrine assumes that American action of an

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181 For other references to this authority, see Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186); Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 62 (1941).

182 One example of this phenomenon is the U.N.'s operations in the Congo in the 1960s, in which ensuring freedom of movement became a justification for regime change in Katanga province. *See* TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS 51, 56, 63, 66–81, 85, 100, 357, 358 (2002).

183 GLENNON, *supra* note 4, at 86–87.

184 Libya Opinion, *supra* note 167, at *10.

185 Haiti Opinion, *supra* note 179, at 32.

186 Bosnia Opinion, *supra* note 178, at 333.

extremely limited "nature, scope, and duration" can preserve regional stability may itself be a manifestation of the illusion of control and optimism bias. In essence, the doctrine holds that, with minor effort—effort that does not rise to the level of war—the United States can by itself preserve or restore the stability of an entire region of the world.

The final category of national interest that OLC has recognized as a justification for the President's independent authority to use force is the United States' interest in "maintaining the credibility of United Nations Security Council decisions."[187] In the Libya Opinion, OLC quoted President Obama as stating that "[t]he writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security."[188] It concluded that the President could find upholding the Security Council's credibility a "substantial national foreign policy objective."[189] OLC opinions from Somalia (1992),[190] Bosnia (1995),[191] and Libya (2011)[192] are all rooted in the U.N. credibility argument in the Truman Administration's opinion authorizing the use of military force in Korea. That opinion noted that if the U.S. did not take action, then the U.N. would have "ceased to exist as a serious instrumentality for the maintenance of international peace," and it stated that the "continued existence of the United Nations as an effective international organization is a paramount United States interest."[193] Despite frequent citation, the Korea Opinion—and other Cold War Era opinions—do not actually rely on credibility arguments.[194] Instead, they focus on enforcing collective security agreements[195] or on the President's responsibility to "take

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187 Libya Opinion, *supra* note 167, at *12; Haiti Opinion, *supra* note 179, at 33; Bosnia Opinion, *supra* note 178, at 333; Somalia Opinion, *supra* note 177, at 11.

188 Libya Opinion, *supra* note 167, at *5.

189 *Id.* at *12.

190 Somalia Opinion, *supra* note 177, at 11.

191 Bosnia Opinion, *supra* note 178, at 333.

192 Libya Opinion, *supra* note 167, at *12.

193 *Authority of the President to Repel the Attack in Korea*, 23 DEP'T ST. BULL. 173, 176–77 (1950) [hereinafter *Korea Opinion*].

194 To the extent that the Korea Opinion was concerned about the "effectiveness" of the United Nations, *id.* at 176, there is an argument that the Opinion should be interpreted in light of the broader context: the failure of the League of Nations, the recent establishment of the U.N., and the Korea situation as the first major test of the institution. In this context, the effectiveness interest is less about the credibility of the U.N. in terms of past actions or reputation, and more about ensuring the continued existence of the infant organization.

195 *See, e.g.*, Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474 (1966) (arguing that the United States and South Vietnam had the right under international law to participate in the collective defense of South Vietnam).

Care" that the laws, including treaties, be "faithfully executed."[196] Importantly, this shift from the "take Care" argument to a credibility argument turns a legal argument about treaty obligations into a policy-based argument about U.S. interests.

The social science literature demonstrates that the credibility argument is deeply problematic.[197] Political scientists have shown that credibility arguments suffer from the logical impossibility of ad infinitum recursion and that the historical evidence—from pre-World War I, pre-World War II, and the Berlin Crises—does not support arguments about the importance of credibility to countries' assessment of threats.[198]

The credibility justification is also problematic from a behavioral perspective. Importantly, the presence of credibility arguments in OLC opinions also creates a risk that future opinions will build on these flawed foundations—expanding credibility from the U.N. to the nation's credibility more generally, and leading to a creep in precedent. In the Libya Opinion, OLC referred to the 1999 Kosovo action—which was not authorized by a U.N. resolution and was justified in public discourse partially on the credibility of NATO—as a "precedent."[199] It is thus possible that future OLC lawyers will expand the credibility justification to NATO, other international organizations,[200] or maybe even to the credibility of the United States' threats. The possibility of expansion of the credibility argument in constitutional doctrine is particularly troubling because it could facilitate a behavioral pathology. A President who issues a threat may see that

196 *See, e.g.*, Iran Opinion, *supra* note 60, at 186 (arguing that the President derives authority to deploy armed forces abroad from, inter alia, his Take Care duty). This argument is controversial. *See* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1023–27 (2013) (discussing weaknesses in the Take Care argument); Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 153–56 (1995) (same); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 390–91 (2008) (same).

197 Sitaraman, *supra* note 126, at 126–29.

198 *See id.* at 125–26 (reviewing the political science literature).

199 Libya Opinion, *supra* note 167, at *11 (discussing Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327 (2000)); *see also* Jack Goldsmith, *The Kosovo Precedent for Syria Isn't Much of a Precedent*, LAWFARE (Aug. 24, 2013, 8:02 AM), http://www.lawfareblog.com/2013/08/the-kosovo-precedent-for-syria-isnt-much-of-a-precedent/ (arguing that the Kosovo intervention should not be considered a precedent, at least as a matter of international law).

200 Indeed, military action in Vietnam was in part justified based on treaty commitments to SEATO. *See* Presidential Authority to Permit Incursion into Communist Sanctuaries in the Cambodia-Vietnam Border Area, 1 Supp. Op. O.L.C. 313, 318–20 (1970) (describing the Gulf of Tonkin Resolution as resulting from a presidential request for "a resolution expressing the support of the Congress for all necessary action . . . to assist nations covered by . . . SEATO" (internal citations omitted)).

threat as a sunk cost—and particularly as a personal cost to her own individual credibility, not just the country's. As a result, a President might be inclined to follow up on that threat, even when backing down is rational. While conscientious executive branch lawyering could obviously stop the doctrine from sliding down this slippery slope, there is nonetheless a risk that future OLC opinions will expand credibility arguments and thus enable such a situation.[201]

In addition to protecting lives and property, regional security, and credibility, OLC has discussed, but never expressly relied upon, humanitarian interests in justifying unilateral presidential use of force. Although OLC has been careful not to claim unilateral presidential authority derived from such an interest, the evolution of its doctrine has largely been driven by humanitarian interventions in Somalia (1992), Bosnia (1995), Haiti (2004), and Libya (2011). Indeed, reading the Libya Opinion in particular, humanitarian concerns do not seem to be too far below the surface.[202] Considered in light of psychological biases and the decisionmaking process, there may actually be reasons to think that humanitarian interventions differ from wars against traditional adversaries in significant ways. If the United States assumes its goals are humanitarian and altruistic, it may perceive the local population as welcoming intervention, thereby intensifying the positive illusions bias that creates overconfidence.[203] This optimism in the likelihood of success may lead to an increase in humanitarian interventions, something that OLC doctrine facilitates with its capacious category for military operations that are short of "war." At the same time, the psychic numbing bias may cut in the opposite direction, suggesting that Presidents should possibly have greater leeway in engaging in humanitarian interventions. Psychic numbing might push decisionmakers away from intervention, or at least delay it beyond the point when it would be useful, even where the body politic values the lives of innocent foreigners enough to justify an intervention. These

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201 *Compare* GOLDSMITH, POWER AND CONSTRAINT, *supra* note 6, at 122–60 (arguing that executive branch lawyers can provide meaningful constraints), *with* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 87–116 (2010) (arguing the opposite).

202 *See* Libya Opinion, *supra* note 167, at *5 (emphasizing the threat of a "massacre" of civilians if the United States did not act).

203 Recent political science also suggests another scenario in which humanitarian interventions may be affected by an optimism bias. According to one recent empirical study, outside intervention in civil wars often *increases* civilian suffering by inciting the adversary to more intense violence. Reed M. Wood, Jacob D. Kathman & Stephen E. Gent, *Armed Intervention and Civilian Victimization in Intrastate Conflicts*, 49 J. PEACE RES. 647, 654–58 (2012). In the face of this evidence, there may sometimes be reason to question policymakers' confidence that their proposed intervention will do more good than harm.

countervailing behavioral factors ought to inform the current debate of whether humanitarian interests suffice as a national interest under OLC's framework of independent presidential powers.

3. *The Role of the United Nations and Multilateral Coalitions*

Since the creation of the United Nations in 1945, the relationship between the United Nations and the U.S. Constitution has been frequently debated. The U.N. Charter prohibits countries from using force, except in cases of self-defense or in cases where the U.N. Security Council has authorized the use of force as a way to maintain international peace and security.[204] The basic question has been how these provisions interact with the constitutional system of war powers.

Scholars and practitioners have taken five general positions. First is the "special agreement"[205] approach. The U.N. Charter originally contemplated countries concluding special agreements with the U.N. to make specifically earmarked members of their armed forces available for U.N. operations.[206] During debates over the ratification of the U.N. Charter in the United States—and in the United Nations Participation Act of 1945[207]—Congress understood that it would have to first approve a special agreement, and that the President could use those forces alone for U.N. operations without further congressional authorization.[208] Ultimately, the United States never concluded a special agreement, leading some commentators to argue that congressional authorization is necessary for any use of force, including those uses authorized by the U.N. Security Council.[209] Second is the "police actions"[210] approach. Under this theory, the U.N. Charter effectively outlaws war, leaving only self-defense and U.N.-authorized police actions. Because U.N.-authorized actions are not "war," the "declare War" Clause's requirements are inapplicable and the President can

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204 *See* U.N. Charter art. 2, para. 4 (prohibition on use of force); *id.* arts. 39–42 (Security Council authorization for use of force); *id.* art. 51 (preservation of inherent right of self-defense in event of armed attack).

205 *Id.* art. 43 (stating that member states of the United Nations are to provide military resources in accordance with "special agreement or agreements").

206 *Id.*

207 Participation in United Nations Organization Act, 22 U.S.C. § 287 (1946).

208 Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 86 (1991); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 598, 600, 604–07 (1993).

209 *See, e.g.*, Glennon, *supra* note 208, at 80, 86–87 (1991) (arguing that a Security Council resolution authorizing the use of force "has no effect on the domestic allocation of war-making power" and that the President cannot instruct the U.S. representative to vote in favor of such a resolution without Congressional approval or independent constitutional authority).

210 Stromseth, *supra* note 208, at 600.

commit forces to U.N. police actions without congressional authorization.[211] Third is the "political accommodation" approach, under which "the President needs congressional approval before committing U.S. forces to combat in U.N. authorized military actions that raise the risk of war or great physical sacrifice."[212] Fourth is the "Take Care" argument, that the President can use force without congressional approval in order to "take Care that the Laws" (in this case, the U.N. Charter, a duly ratified treaty and thus law under the Supremacy Clause) are "faithfully executed."[213] Of course, even without wading into deeper academic arguments about the applicability of the Take Care Clause to treaties,[214] one rejoinder to this argument is that the U.N. does not require U.S. action when it authorizes force; it only permits it.[215] Last is OLC's current position: The U.N. Security Council's credibility is an important national interest that can justify the President's use of force without prior congressional approval.[216]

The lessons of behavioral psychology suggest that situations in which the U.N. authorizes the use of force may be less troubling than situations in which the U.N. does not authorize force. As a functional matter, it may therefore be less problematic in situations of U.N. authorization for the President to use force absent prior congressional authorization. Social science identifies lack of diversity in information and perspectives as an important flaw in decisionmaking.[217] Thus, individuals can suffer from groupthink or credulous Bayesianism, in which they assume others' perspectives are based on independent information. Multiple people participating in a decision may therefore not be helpful in reaching better decisions. Similarly, to the extent that congressional participation in decisions about war and peace is helpful because it involves additional—and presumably diverse—voices in the decisionmaking process, unified government under one political party might undermine the independent voice that Congress could bring to

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211 *See id.* at 600–01 (describing how the President has unilateral authority to send U.S. forces to combat in U.N.-authorized "police actions" under the political actions model); *see also* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 63–70 (1991) (discussing the relationship of the U.N. Charter regime of police actions and Congress's power to declare war).

212 Stromseth, *supra* note 208, at 601.

213 U.S. CONST. art. II, § 3; Stromseth, *supra* note 196, at 153–56; Stromseth, *supra* note 208, at 661; *see also Korea Opinion*, *supra* note 193, at 176–77 (adopting the Take Care argument as justification for use of force in Korea).

214 For a discussion, see Swaine, *supra* note 196.

215 Stromseth, *supra* note 208, at 661.

216 *See supra* notes 187–93 (discussing OLC's use of the U.N.-credibility justification).

217 *See supra* Part I.G (discussing group polarization).

war powers decisions.[218] Though it is by no means guaranteed, U.N. authorization is more likely to bring diverse viewpoints to decisions about the use of force. The Security Council is composed of members from a variety of countries around the world, with different perspectives, from different regions, and with different national interests. Perhaps more importantly, the veto power of the permanent five means that China and Russia—countries with different approaches to world affairs than the United States—have to approve of any action. Agreement among the permanent five would be a strong signal that decisions to use force are not suffering from variations on groupthink.

To be sure, the presence of both U.N. and congressional authorization would be an even stronger signal that decisions do not suffer from uniformity-based group decisionmaking errors. Indeed, the literature on two-level games suggests that incorporating two different vetogates—the U.N. and Congress—is likely to reduce the scope of possible agreement,[219] but at the same time, behavioral lessons suggest that agreement from a diverse set of actors will be less likely to suffer from bias and polarization.

Second, the diversity of perspectives inherent in securing U.N. authorization may mitigate hawkish biases. Not all of the countries participating in the use of force decision will contribute meaningfully to the military operation, making it less likely that they will suffer from the illusion of control or other positive illusions. Indeed, some countries—in the targeted region, for example—might be extremely skeptical about the ability of distant powers to affect change in their neighborhood. In situations in which two countries have been at odds for a period of time, the participation of third-party countries is likely to mitigate the fundamental attribution error and reactive devaluation bias. Because third-party countries have not been involved in the dispute or the back-and-forth of high-stakes negotiations, they are less likely to attribute negative dispositional characteristics to either country.

A behavioral approach suggests that U.N. authorization for the use of force can mitigate certain pervasive biases and thus improve decisionmaking on war and peace. Of course, these lessons cannot address the doctrinal debates between the five different approaches to the relationship between the U.N. and the Constitution, but they do provide functional support for robust U.N. participation. Indeed, if there is robust U.N. debate and ultimately authorization for the use of

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[218] *See* Levinson & Pildes, *supra* note 20, at 2344 (noting that interbranch checks are diminished in times of unified government).

[219] *See* Putnam, *supra* note 8, 433–35 (outlining the theory of two-level games in international negotiations).

force, there is a policy-based argument (though not a legal argument) that such participation could, in some ways, serve as a substitute for congressional participation, particularly during times of unified government.[220]

We should note that while U.N. authorization may be the preferred mode of securing international support as a matter of international law, for behavioral purposes, a similar function might be played by other types of broad, multilateral coalitions. The Libya example aside, the persistent failure of the Security Council to act has given rise to the notion that some unauthorized interventions may be, as a matter of international law, "illegal but legitimate."[221] The United States' closest military ally has even dropped the "illegal" qualification and asserted a unilateral right to humanitarian intervention.[222] For our purposes, what is important is not the forum per se but what it tells us about the quality of the underlying decisionmaking. Action by a small group of like-minded allies (a "coalition of the willing"[223]) may have limited utility as a safeguard against various decisionmaking biases. But while broad Security Council support (including at least the acquiescence of Russia and China) may be the most diverse coali-

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[220] *See* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 906 (2007) ("[M]ultilateralism and bipartisan congressional authorization may be substitutes, in terms of generating credibility.").

[221] INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000). The U.K. Government and (after leaving his government post) Professor Koh have recently gone further in suggesting that certain unauthorized humanitarian interventions are internationally lawful. *See* PRIME MINISTER'S OFFICE, CHEMICAL WEAPON USE BY SYRIAN REGIME: U.K. GOVERNMENT LEGAL POSITION 1 (2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf (arguing that the U.K. could lawfully intervene in Syria even if the U.N. blocked a resolution authorizing such an intervention); Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), http:// justsecurity.org/2013/1002/koh-syria-part2/ (arguing that President Obama did not violate international law by threatening to use force in Syria). Notably, both the U.K. paper and Professor Koh emphasize the importance of multilateralism. *See* PRIME MINISTER'S OFFICE, *supra*, at 1 (requiring that there be convincing evidence of humanitarian distress that is "generally accepted by the international community"); Koh, *supra* (arguing that the legal basis for intervention is stronger where "the action was *collective*").

[222] Letter from Rt. Hon. Hugh Robertson MP, Minister of State, U.K. Foreign and Commonwealth Office, to Rt. Hon. Sir Richard Ottaway MP, Chairman, U.K. House of Commons Select Committee on Foreign Affairs (Jan. 14, 2014), *available at* http://justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf.

[223] *Bush: Join "Coalition of Willing,"* CNN (Nov. 20, 2002, 6:13 PM), http://edition.cnn.com/2002/WORLD/europe/11/20/prague.bush.nato/.

tion, there is likely a spectrum between the two poles of unilateralism and full authorization. For example, the support of allies in the region (e.g., the African Union for an intervention in Africa, or the Arab League for an intervention in the Middle East) may go further in injecting diverse viewpoints, as well as perhaps escaping the illusion of control a more distant intervener may feel. The point here is not that, from a behavioral perspective, a specific type of authorization or multilateral coalition is a good in itself, but rather that, depending on the particular circumstances, the degree of international participation may play a more or less useful role in mitigating decisionmaking errors because of the introduction of diverse viewpoints.

C. *The Power to Fight and Terminate Wars*

1. *Limitations on Scope, Means, and Methods of Force*

Although the initiation of conflict is the perennial focus of war powers debates, it is by no means the only significant question. Even when the President has authority to use force—whether by congressional authorization or independent Article II powers—there is the subsidiary question of *how* the President may use force, and in what ways Congress may permissibly tie her hands.

Restrictions (or purported restrictions) on the President take two principal forms. First, when Congress authorizes force, it may condition its authorization on adherence to various limitations. While Congress has sometimes authorized force in very broad terms (beyond outright declarations of war, the Gulf of Tonkin Resolution is the most famous example), it more often restricts the scope of its authorization.[224] For example, Congress's authorization of U.S. participation in a multinational peacekeeping force in Lebanon during the Reagan Administration came with limits on both scope (the functions specified in a bilateral agreement with Lebanon) and duration (eighteen months).[225] The 2013 proposal for authorization for use of force in Syria, approved by the Senate Foreign Relations Committee but then overtaken by events, had similar limits on scope (related to weapons of mass destruction) and duration (sixty to ninety days), as well as method (not authorizing ground troops).[226] It is worth noting, however, that to the extent the President possesses robust independent

[224] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2077 (2005) (surveying authorizations to use force and noting that they all contain either explicit or implicit restrictions).

[225] Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, §§ 3–4, 6, 97 Stat. 805, 806–07 (1983).

[226] S.J. Res. 21, 113th Cong. §§ 2–4 (2013), *available at* https://www.congress.gov/113/bills/sjres21/BILLS-113sjres21pcs.pdf.

authorities, a limited authorization does not have the same bite as express restrictions on the use of force.[227] Thus, a Syria resolution that declined to authorize ground troops would not purport to prevent the President from using ground troops if he otherwise has an Article II basis for doing so.

The second category of congressional attempts to regulate warfighting—affirmative direction or restrictions on the means and methods of combat—is more controversial. This was a central locus of constitutional debate during the early parts of the George W. Bush Administration, when executive branch lawyers reasoned that the Commander-in-Chief Clause precludes Congress from "dictat[ing] strategic or tactical decisions on the battlefield," and that the statutory ban on torture therefore could not bind the President.[228] Although the breadth of this assertion has provoked controversy, "most war powers scholars" have accepted the underlying notion that some core level of strategic or at least tactical decisionmaking is immune from congressional interference.[229] As Justice Rehnquist, a former head of the OLC, put the claim at his Supreme Court confirmation hearings, a statute that prohibited the military from taking "Hamburger Hill" in Vietnam "would be a rather clear invasion of the President's power as Commander in Chief."[230] Only recently has this notion come under some scrutiny: Professors Barron and Lederman point out that if supermajorities of Congress decided to weigh in on a tactical military decision, the existence of such consensus might make the hypothetical statute "not seem so preposterous after all."[231]

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227 For example, notwithstanding the limits adopted in the Lebanon resolution, President Reagan declared that he would not interpret them "to revise the President's constitutional authority to deploy United States Armed Forces." Ronald Reagan, Statement on Signing the Multinational Force in Lebanon Resolution, 2 PUB. PAPERS 1444, 1445 (Oct. 12, 1983); *see also* Jack Goldsmith, *The Senate Draft AUMF for Syria is Narrower than the Administration's Draft, But Still Broad in Some Respects*, LAWFARE (Sept. 4, 2013, 5:03 AM), http://www.lawfareblog.com/2013/09/the-senate-draft-aumf-for-syria-is-narrower-than-the-administrations-draft/ (explaining the difference between limits on authorization and restriction).

228 Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 207 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Bybee Memorandum].

229 Barron & Lederman, *supra* note 2, at 750–51 (noting that this is the prevailing view). *But see id.* at 751–61 (contesting this conventional view).

230 117 CONG. REC. 42,972 (1971) (statement of William H. Rehnquist).

231 Barron & Lederman, *supra* note 2, at 760. For another analysis that suggests that Congress has a constitutional role in war prosecution, see Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009), arguing that a proper interpretation of the Captures Clause supports a broad reading of the Declare War Clause and suggests that some questions of combat strategy were intended to be lodged with Congress.

Behavioral war powers analysis provides new support for Professors Barron and Lederman's suspicion of the conventional wisdom. In the conventional telling, the President's powers are at their apex when fighting a war. Congress may have a vital role to play before U.S. troops are committed to battle, and it may appropriately restrict the scope of such engagements at the outset, but once the troops are in the field, it is for the President to decide strategy and tactics. There are certainly practical reasons why the executive branch would, in general, be best positioned to make these judgments. But the lessons from psychology warn that after hostilities are initiated, there is a unique danger in entrusting the President to make all such decisions alone.

Consider the hypothetical Hamburger Hill legislation in the context of prospect theory and the sunk costs fallacy. If a previous attempt to take Hamburger Hill had cost lives and resources (and perhaps political capital), a decisionmaker might irrationally take those sunk costs into account in evaluating the merit of another attempt. Even worse, if the military had previously held Hamburger Hill and lost it, the decisionmaker might again artificially inflate the value of getting that territory back. We need not assume a President to be acting in obvious bad faith to be concerned with the effects such biases could have.

What of the less hypothetical torture debate? President Bush's legal advisors famously asserted executive authority, rooted in the Commander-in-Chief power, to disregard congressional restrictions on the use of torture and mistreatment of wartime detainees.[232] Much like the Hamburger Hill hypothetical, this debate involved acts of Congress purporting to take a warfighting tactic away from the President. Similar behavioral arguments apply here as well. Prospect theory and sunk costs considerations suggest that a President might be willing to take undue risks in the midst of a war; in the case of torture, this might mean not just risks that should not be taken as a tactical matter, but moral sacrifices that the public does not think are justified.

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[232] This legal debate came in two acts. The first act concerned preexisting prohibitions on torture (through the Convention Against Torture) which OLC expressly claimed to be unconstitutional as applied to the interrogation of enemy combatants ordered by the President pursuant to his Commander-in-Chief power. Bybee Memorandum, *supra* note 228, at 207. The second act concerned the Detainee Treatment Act (DTA) of 2005, which Congress passed to deal specifically with post-9/11 detainees; in this instance, President Bush more obliquely referred to his "constitutional authority . . . as Commander in Chief" as a potential limit on the new law. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2012); George W. Bush, Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 2 PUB. PAPERS 1901, 1902 (Dec. 30, 2005).

Moreover, in light of the substantial questions that have been raised about the efficacy of torture even as a tactical matter,[233] the President and his military advisors might succumb to positive illusions and inflate the likelihood that such extreme measures will succeed. Behavioral insights thus offer functional support for the view that President Bush was wrong to claim an exclusive and preclusive executive authority over the treatment of detainees in wartime.

2. *The War Powers Resolution and Ending Wars*

Like the conduct of war itself, the issue of terminating wars typically receives short shrift in war powers debates.[234] It is a testament to this fact that, in the one recent case when the question of war termination shot to prominence, the Speaker of the House of Representatives initially overlooked the President's apparent failure to adhere to the law.[235] Yet this is an important issue, and for the behavioral reasons we have discussed, potentially fertile ground for decisionmaking biases to arise.

Section 5(b) of the War Powers Resolution purports to set a sixty-day clock, with a thirty-day extension, after which the President "shall terminate" any nonauthorized hostilities.[236] This provision is unlike the limitations on affirmative authorizations mentioned above; it is a Youngstown Category 3[237] bid to compel the President to withdraw U.S. forces from combat. The executive branch has historically taken a restrictive view of Section 5(b), arguing that various military engagements have not constituted "hostilities" and therefore are not subject

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233 *See, e.g.*, Lisa Hajjar, *Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective*, 5 ANN. REV. L. & SOC. SCI. 311 (2009) (reviewing the literature on the efficacy of torture).

234 With the question of the end of the war on terror, this issue has recently received renewed attention. *See, e.g.*, David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV. 685 (2014) (discussing the constitutional framework for the authority to end war); Jeh Charles Johnson, Gen. Counsel, Dep't of Def., Address at the Oxford Union, Oxford University: The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012), *available at* http://www.state.gov/documents/organization/211954.pdf (discussing the end of the conflict with Al Qaeda).

235 *See* Jack Goldsmith, *The Boehner Ultimatum Makes No Legal Sense*, LAWFARE (June 14, 2011, 7:58 PM), http://www.lawfareblog.com/2011/06/the-boehner-ultimatum-makes-no-legal-sense/#.UtGClNJDuSo (noting that the War Powers Resolution's clock is sixty days long, not ninety days, and that "congressional pushback against the President's Libya intervention under the War Powers Resolution should have come at least a month earlier").

236 War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2012).

237 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J. concurring) (dividing the scope of presidential power into three categories).

to the sixty-day limit.[238] For example, State Department Legal Adviser Harold Koh controversially argued in 2011 that the United States' extended bombing campaign against the Gaddafi regime in Libya did not constitute hostilities.[239] Legal Advisor Koh argued that the Libya engagement was not subject to Section 5(b) of the War Powers Resolution based on four factors: (1) the mission was limited to a "supporting role" of a broader "NATO-led multinational civilian protection operation"; (2) there was no significant exposure of U.S. forces to casualties; (3) there was limited chance of escalation; and (4) the military means were limited, with "the overwhelming majority of strike sorties . . . being flown by our partners."[240]

In light of the decisionmaking biases that can arise once a President's chosen military engagement has begun to experience setbacks, some form of congressional participation at the war termination stage may be appropriate. On the one hand, the sixty-day automatic withdrawal provision enables Congress to mitigate the scope and duration of presidentially initiated conflicts, for which the decision to use force may have suffered from behavioral biases. On the other hand, the sixty-day provision is arguably too quick (a sunk costs moment is unlikely to happen so soon) and too automatic (allowing Congress to essentially veto an operation by mere silence or internal disagreement, without necessarily deliberating on whether the engagement should continue). Assuming the validity of the provision, however, additional behavioral insights may inform the legal debate over when there are hostilities sufficient to trigger the provision.

Looked at through this prism, there are reasons to question the executive branch's assertion that the existence of hostilities turns on the exposure of U.S. forces to casualties and the risk of future escalation. Particularly at the beginning of conflict during the initial sixty-day window, decisionmakers will be susceptible to an optimism bias concerning the real risks of casualties and escalation. Moreover, the illusion of control means that decisionmakers may conflate their present intent not to escalate with their ability to effectuate that intent.

On the other hand, Legal Adviser Koh's focus on the U.S. role relative to coalition contributions in his hostilities analysis finds some support from a behavioral analysis. One of the dangers of locating war powers in one branch of government is the possibility of groupthink

238 *See Libya and War Powers*, *supra* note 1, at 7–17 (statement of Harold Hongju Koh, Legal Advisor, U.S. Dep't of State) (discussing the history of executive interpretation of "hostilities" under the the War Powers Resolution).

239 *Id.*

240 *Id.*

and credulous Bayesianism, particularly within a homogenous group. Moreover, the more actors that independently reach a decision to participate in a conflict, the greater the check on the possibility that one individual's or group's biased decisionmaking is the impetus. The participation of Congress is one potential check on the risks of presidential unilateralism, but broad multilateral support might similarly be sound evidence of less biased decisionmaking. Notably, Legal Adviser Koh cited not just general expressions of support by a "coalition of the willing," but rather the very tangible support provided by coalition partners (i.e., that they flew the majority of strike sorties).[241] Whether or not this should constitute a textual basis for determining that hostilities exist, it does provide a functional argument against the sixty-day cutoff of a military engagement with broad multilateral support.

In addition to the sixty-day clock, the War Powers Resolution creates a second mechanism for terminating unauthorized hostilities. At any time, forces engaged in such hostilities "shall be removed . . . if the Congress so directs by concurrent resolution"—that is, if majorities of both Houses of Congress vote to terminate hostilities, without requiring the assent of the President to sign the resolution into law.[242] Congress has never purported to impose this strong medicine, and it would likely take an extreme set of circumstances for it to muster the political will to do so. But another reason the concurrent resolution option is little discussed is that it is widely regarded as unconstitutional. The Supreme Court has held that such a "legislative veto" over executive action violates the Constitution's presentment requirement (that legislation be presented to the President for assent or veto).[243] Indeed, in dissenting from that opinion, which was issued in the context of a one-house veto of an immigration action, Justice White noted that the Court's opinion would invalidate a central component of the War Powers Resolution.[244]

Putting aside the doctrinal debates over the legislative veto, behavioral insights provide some functional support for the termination option. Given the sunk costs bias and group-decisionmaking biases, it is possible that the President may want to continue a war that Congress and, more to the point, the American people believe

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241 *Id.* at 10.

242 War Powers Resolution § 5(c).

243 INS v. Chadha, 462 U.S. 919 (1983). While the conventional wisdom is that the concurrent resolution option is constitutionally suspect, defenders of the War Powers Resolution contend that it is not governed by *Chadha*, because of the uniqueness of the war powers context. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS 7–8 (2012) (discussing whether the War Powers Resolution is governed by *Chadha*).

244 *Chadha*, 462 U.S. at 970–71 (White, J., dissenting).

should end. The power to terminate a war may therefore be an important check for Congress to mitigate this bias.

III
Behavioral War Powers and Institutional Design

Having surveyed a set of biases likely to affect individual decisionmakers and explored how these biases might inform doctrinal war powers debates, we now identify some of the broader themes and institutional design strategies that emerge from considering a behavioral approach to war powers. One of the key insights of behavioral war powers is that not all of the psychology insights we identify operate at every decisionmaking stage. Pathologies in war powers decisionmaking might vary based on the context—threatening wars, initiating wars, fighting wars, and ending wars. The fact that there are different functional considerations at different stages of decisionmaking suggests moving beyond the conventional Congress-versus-the-President dichotomy, and instead considering whether we may want to tailor the constellation of powers, checks, and balances to the particular context.

We then distill some of the recurring institutional design lessons that emerge from applying behavioral insights to the doctrinal debates: informational strategies, internal decisionmaking processes, vetogates, the role of independent third parties, and strategies we group together as the "Ellsworth-Mason Approach." While these common design mechanisms have merits that stand apart from their role in countering psychological biases, psychologists have suggested many of these strategies as ways to debias decisionmaking processes. These design strategies are not meant to be an exhaustive list of institutional design lessons, nor are they unique to war powers, but given their salience in the foregoing analysis, we consider them squarely in order to identify design options, costs, and benefits with greater clarity.

For some, considering war powers in light of behavioral arguments may suggest deploying these features in new or modified ways; for others, the current institutional design of war powers might incorporate enough of these features that they are confident that behavioral pathologies are being sufficiently avoided. Our aim here is therefore not simply prescriptive—identifying design choices that could remedy skewed decisionmaking—but also descriptive—identifying those aspects of the institutions we currently have that may already do part of the work in warding off bad decisions. Importantly, many of these mechanisms can apply to any institutional actor's

internal rules, processes, or practices; war powers is thus not just a separation of powers issue, between congressional involvement and presidential discretion, but an issue of internal institutional design.

A. War Powers in Context

One of the most interesting cross-cutting themes that emerges from a behavioral approach to war powers is that decisionmaking errors and biases operate differently in different contexts. Conventionally, debates on war powers have divided along pro-Congress and pro-Presidential camps across all war powers issues. Behavioral lessons, however, do not cut neatly or consistently in favor of Congress or the President. In many cases, biases are hawkish, making actors more likely to go to war—and suggesting, perhaps, greater congressional involvement to raise the costs of using force. Even the broader category of "resort to force" can be disaggregated, as particular factual circumstances—for example, where an operation is a risky gambit to recover sunk costs—may call for special institutional precautions. But in other cases, like psychic numbing, behavioral biases might actually lead decisionmakers to undervalue the loss of life abroad and the case for intervention. We might even think of this bias as *itself* a vetogate that stands in the way of a use of force. In those cases, additional vetogates might lead to suboptimal levels of force being used. In addition, many of these decisionmaking biases operate *within* each branch of government regardless of whether another branch participates in the decisionmaking process. As a result, in at least some cases, neither congressional participation nor executive unilateralism will necessarily lead to sound decisions.

It may be better, then, to consider how the constellations of powers, checks, and balances can be designed to be more sensitive to each particular context. First, institutional designers might consider the type of action—for example, defending the nation, preempting a perceived threat, offensive war, or humanitarian intervention—when thinking about powers, checks, and balances. For example, psychological biases like the fundamental attribution error and illusion of transparency operate more strongly in cases of offensive war than defensive war or humanitarian intervention. The willingness to take risks to recover a lost territory—as in the Falklands case—is more likely to be driven, in part, by a prospect theory bias. And in cases where robust international support is present, the presence of multiple independent decisionmakers coming to agreement on the course of action might help mitigate the risk of biased decisionmaking. These differences do not necessarily cut in any one direction: In different

situations, we might be more or less concerned about biases skewing the decisionmaking process, and there might be different remedies to mitigate the particular biases.

Second, as our doctrinal discussion demonstrates, we might want a different constellation of powers, checks, and balances based on the different stages of conflict, such as threatening, starting, conducting, and ending wars. Although the power to threaten war is conventionally ascribed to the President, the fundamental attribution error suggests that Congress might play an important role in shaping the context of threats—and that scholars should be attentive to the checks and balances surrounding congressional actions that could be interpreted as threatening. Moreover, the fact of having issued a threat in the past may become an undue feature of a President's later decision to use force, suggesting that an additional institutional check might be especially useful before a President unilaterally backs up her threats. In initiating conflict, the prevalence of various hawkish biases suggests the desirability of putting the brakes on unilateral presidential action—whether through internal checks, requirements of congressional participation, or perhaps international ratification. Within the broad category of initiating conflict, however, there are situations when we can expect decisionmakers to be especially susceptible to biased decisions to go to war (recouping losses), and those in which biased decisionmaking may point in the opposite direction, toward inaction (psychic numbing in the face of humanitarian catastrophe). Meanwhile, the sunk costs fallacy suggests greater checks on presidential decisionmaking during wars because the President's decisionmaking biases may leave her disconnected from the population's preferences. At the termination stage, there is a good argument that Congress should be able to bring an end to a war, even independent of the President's preferences.

Again, we do not seek to define a particular set of war powers rules for every—or any—given context. Analysts might differ on what constellation of powers, checks, and balances are appropriate in each context. And strategies to mitigate decisionmaking biases will also have to be weighed against other practical and functional considerations. Our claim is simply that these different decisionmaking contexts each feature a set of relatively predictable decisionmaking risks, and that scholars, lawyers, and policymakers should be attentive to whether these risks apply in the particular context—and to whether there are ways to mitigate those risks.

B. *Institutional Design Strategies*

As a matter of institutional design, lawyers and policymakers might consider a wide variety of strategies to help mitigate decisionmaking biases. Psychologists have identified a number of ways to help debias decisionmaking,[245] and throughout our doctrinal analysis, a number of design strategies recurred with great frequency. In this subsection, we describe five strategies, culled from the psychological literature on debiasing and from themes emerging from our doctrinal analysis: information strategies, internal decisionmaking processes, vetogates, the role of independent third parties, and what we term the "Ellsworth-Mason Approach." In some cases, these strategies reinforce our descriptive point that behavioral factors may already be mitigated through existing design mechanisms, and in other cases they identify prescriptive options for those who believe more should be done to address behavioral decisionmaking pathologies.

1. *Improving Information*

Many psychological biases are a function of framing, myopia, and narrow thinking—situations in which people do not adequately consider or evaluate all the relevant information when making a decision.[246] As Daniel Kahneman has argued, people often take a WYSIATI (What You See Is All There Is) approach, in which they form judgments based on incomplete or biased information.[247] In other words, one of the major sources of cognitive biases is informational.

Psychologists have identified a wide variety of strategies that can help combat biases rooted in informational problems. Some scholars focus on ensuring that all the relevant information is included in the decisionmaking process. Psychologists have therefore suggested that decisionmakers take a "consider the opposite" strategy and question

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[245] Legal scholars have also suggested debiasing methods in both the litigation context, *see, e.g.*, Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 914–15 (1997), and through substantive legal rules, *see* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 206–24 (2006).

[246] *See, e.g.*, KAHNEMAN, *supra* note 46, at 20–21 (discussing System 1 and System 2 thinking); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343–44 (1984) (discussing framing problems); Jack B. Soll, Katherine L. Milkman, and John W. Payne, *A User's Guide to Debiasing*, *in* WILEY-BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING (Gideon Keren and George Wu eds.) (forthcoming) (manuscript at 2–4) (on file with New York University Law Review), *available at* http://opim.wharton.upenn.edu/~kmilkman/Soll_et_al_2013.pdf (discussing "narrow thinking" and System 1 and System 2 thinking).

[247] KAHNEMAN, *supra* note 46, at 85–88.

fundamental assumptions,[248] use checklists to ensure they have considered all the relevant information,[249] and engage in explicit cost-benefit analysis and mathematical modeling.[250] Others focus on correcting for errors in the baseline of analysis, which is of particular concern with the optimism bias. In this category, "reference class forecasting" is probably the most prominent tactic.[251] People's plans and forecasts about the future are often unrealistically optimistic; cost overruns in home renovations or weapons procurement are common examples.[252] The "cure" to this planning fallacy is for people to take the "outside view" of an observer or analyst, identify previous cases that are similar to the current scenario, and use those cases as reference points to create predictions about the current effort.[253] Another tactic is "prospective hindsight," under which an individual pretends she is in the future, has been told that her endeavor has failed, and must identify the reasons why.[254] In other research, scholars have found that providing reasons or explanations for decisions can help debias decisionmaking.[255] Jennifer Lerner and Philip Tetlock have

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248 *E.g.*, Richard P. Larrick, *Debiasing*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 316, 323–24 (Derek J. Koehler & Nigel Harvey eds., 2004) (describing the "consider the opposite" debiasing strategy); Hal R. Arkes, *Costs and Benefits of Judgment Errors: Implications for Debiasing*, 110 PSYCHOL. BULL. 486, 494 (1991) (same); Thomas Mussweiler, Fritz Strack & Tim Pfeiffer, *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1142, 1144–48 (2000) (same). Note also that some have suggested that considering too many reasons the assumptions are wrong can be counterproductive. *See, e.g.*, Neal J. Roese, *Twisted Pair: Counterfactual Thinking and the Hindsight Bias*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra*, at 258 (exploring the complicated relationship between counterfactual thinking and hindsight bias).

249 *See, e.g.*, Daniel Kahneman, Dan Lovallo & Olivier Sibony, *Before You Make That Big Decision . . .* , 89 HARV. BUS. REV. 51, 54–59 (2011) (suggesting a checklist for businesspeople to make debiased decisions); Soll et al., *supra* note 246, at 9–10 (discussing checklists).

250 *See, e.g.*, Larrick, *supra* note 248, at 327–28 (discussing linear models); Soll et al., *supra* note 246, at 9 (same).

251 *See* Bent Flyvbjerg, *From Nobel Prize to Project Management: Getting Risks Right*, 37 PROJECT MGMT. J. 5 (2006) (advocating forecasting based on actual performance of a "reference class" as a means of bypassing psychological biases).

252 KAHNEMAN, *supra* note 46, at 249–51.

253 *Id.* at 251–52. For the classic on the planning fallacy, see Daniel Kahneman & Amos Tversky, *Intuitive Prediction: Biases and Corrective Procedures*, *in* 12 STUDIES IN THE MANAGEMENT SCIENCES: FORECASTING 313, 315–16.

254 For a thorough introduction to prospective hindsight, see Deborah J. Mitchell, J. Edward Russo & Nancy Pennington, *Back to the Future: Temporal Perspective in the Explanation of Events*, 2 J. BEHAV. DECISION MAKING 25 (1989) and Soll et al., *supra* note 246, at 8.

255 For a discussion of the efficacy of reason-giving, see Hal R. Arkes et al., *Eliminating the Hindsight Bias*, 73 J. APPLIED PSYCHOL. 305 (1988) and Paul M. Miller & N. S. Fagley, *The Effects of Framing, Problem Variations, and Providing Rationale on Choice*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 517 (1991).

thus argued that "accountability," which they define as the "implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others," can mitigate decisionmaking biases because the possibility of social sanctions forces decisionmakers to be more careful in their analysis.[256] Finally, some scholars have found that education about the biases themselves and training to combat biases can have a debiasing effect (though others have not found this same effect).[257]

The various informational strategies that psychologists have identified provide debiasing tactics that do not require fundamental revisions to the separation of powers—or any constitutionally controversial action. Rather, these debiasing tactics can be applied to decisionmaking processes internal to the executive branch (or individual congressional committees or offices, or member governments of the U.N. Security Council).[258] Indeed, to some extent, the debiasing suggestions align with practices that already take place in the executive branch through administrative law. In domestic policymaking, for example, the Office of Information and Regulatory Affairs requires agencies to undertake cost-benefit analysis for any major rules that they propose.[259] The cost-benefit analysis process is often defended as improving the decisionmaking process by forcing policymakers to consider the full range of costs and benefits for proposed policies—eco-

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256 Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999). In particular, they find that "predecisional accountability to an audience with unknown views" is most effective. *Id.* at 270; *see also* Phillip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 233–34 (1985) (discussing study on accountability as a check on attribution errors).

257 For an overview, see Scott O. Lilienfeld, Rachel Ammirati & Kristin Landfield, *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSPS. ON PSYCHOL. SCI. 390, 393–94 (2009) (summarizing relevant studies). For a discussion of the debiasing possibility of education and training, see Larrick, *supra* note 248, at 326. For a study that finds no effect, see Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, *in* HEURISTICS AND BIASES 313, 322–23 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002). For an application of an educational approach to law, see Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 210 (2000) (suggesting "vivid information about plaintiff losses in frivolous litigation" to reduce plaintiffs' overconfidence about victory).

258 For a suggestion that the separation of powers shift from interbranch to internal processes, see Katyal, *supra* note 6.

259 *See, e.g.*, Exec. Order No. 13,563, 3 C.F.R. 215 (2011) (requiring cost-benefit analysis of proposed domestic regulations); Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (same); Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (same); *see also* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845–48 (2013) (discussing the process of regulatory review in the Obama Administration).

nomic, health, environmental.[260] The interagency process chaired by the National Security Council, when it functions well, could perform a similar role. While cost-benefit analysis in the foreign affairs context probably could not work identically to the practice in the domestic context (for example, it might be more qualitative than quantitative and need to happen with greater haste), formalizing cost-benefit analysis could more systematically force policymakers to confront the full range of benefits and drawbacks to possible military options. Cost-benefit analysis could also help mitigate the psychic numbing bias by counteracting the numbing effect of statistics.[261]

Likewise, administrative agencies must engage in a substantial process of reason-giving in order to satisfy "arbitrary and capricious" review.[262] In the *State Farm* decision, the Supreme Court held that an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[263] An agency's action would be "arbitrary and capricious" if, among other things, the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[264] Ex post arbitrariness review pushes agencies to engage in ex ante reason-giving that will satisfy the courts. Formally, "hard look review" *is* applicable

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260 *See, e.g.*, Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1663 (2001) (noting that cost-benefit analysis is "designed to ensure that the consequences of regulation are placed before relevant officials and the public as a whole").

261 By way of analogy, in the context of climate change, the Obama Administration has calculated a range of estimates for the cost in dollars of carbon emissions for purposes of agency cost-benefit analysis. Notably (and controversially), this regulatory process has included the benefits of emission reductions to foreigners, in effect valuing foreign interests in trade-offs with domestic regulatory burdens. INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, U.S. GOV'T, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866, at 10–11 (2010); *see also* Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 CALIF. L. REV. 1557, 1591–96 (2011) (criticizing the use of benefits to foreign countries in cost-benefit analysis of climate change regulation). Though hardly easy, the Obama Administration's Atrocities Prevention Board could undertake a similar project, considering ex ante how we ought to weigh the costs and benefits of saving foreign lives. Doing so in advance of any particular conflict, and mandating that new crises be evaluated under this established rubric, might trigger the analytical thinking that psychology teaches can mitigate the psychic numbing problem.

262 *See* 5 U.S.C. § 706(2)(A) (2012) (allowing courts to invalidate arbitrary or capricious agency action).

263 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks ommitted).

264 *Id.*

to foreign relations law cases,[265] but even leaving aside judicial review (which would rarely be available for the most fundamental decisions of war and peace), the idea of ex ante reason-giving can be helpful to force better decisionmaking on war powers issues. For example, in a recent essay, Jack Goldsmith has argued in favor of the "Front-Page Rule" with respect to communications intelligence.[266] Under this rule, executive branch leaders would not authorize any secret, covert, or clandestine actions that they did not think they could defend publicly to the American people if the activity showed up on the front page of the newspapers.[267] One member of Congress has even proposed legislation that would require intelligence agencies to prepare public relations plans for when secret information is leaked.[268] Whatever the merits of these particular proposals, the point is that the exercise of ex ante reason-giving could lead to better decisionmaking.

Finally, implementing reference class forecasting, prospective hindsight, and training programs might be powerful in helping to mitigate biases that are driven by narrow thinking. Reference class forecasting could yield better predictions about the likely length of time of interventions abroad (part of OLC's "nature, scope, and duration" test), the costs of those interventions, and the postwar reconstruction that will likely be needed. Prospective hindsight could similarly force pro-intervention leaders to consider the postwar challenges—a frequent criticism of the pre-war planning for postwar Iraq. And training programs, such as war games and military exercises, might have an important role to play if participants are made aware of the biases they might fall into during those exercises.

2. *The Design of Internal Decisionmaking*

When individuals come together into groups to deliberate and make decisions, individual biases and group dynamics can skew decisionmaking. From the social conformism of the Asch experiments[269] to credulous Bayesianism,[270] groups of individuals often

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[265] *See* Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489 (2014) (arguing for the applicability of hard look review in foreign relations law cases).

[266] Jack Goldsmith, *A Partial Defense of the Front-Page Rule*, HOOVER INST. (Jan. 29, 2014), http://www.hoover.org/research/partial-defense-front-page-rule.

[267] *Id.*

[268] *See* Steven Aftergood, *HPSCI Wants President to Plan for Leaks of Covert Action*, SECRECY NEWS (Dec. 2, 2013), http://www.fas.org/blogs/secrecy/2013/12/hpsci-covert/ (reporting Representative Jan Schakowsky's inclusion of such a requirement in the Fiscal Year 2014 Intelligence Authorization Act).

[269] *See supra* notes 107–10 and accompanying text (discussing the Asch experiments).

[270] *See supra* notes 112–14 and accompanying text (discussing rational and credulous Bayesianism).

exhibit deliberative pathologies in which two heads are not necessarily better than one. For any particular decisionmaker—whether a member of Congress or the President—group deliberation with and within their staff raises the possibility of psychological biases turning into groupthink.

While it is probably impossible to completely solve these problems, psychologists have argued that group decisionmaking processes can nonetheless help mitigate individual cognitive biases when they introduce diverse perspectives into the decision process.[271] Foremost, including individuals with different perspectives in the decisionmaking processes can help ensure diverse viewpoints are taken into account in decisions about war and peace. For example, Presidents can counteract the bias that comes from unified partisan government through bipartisan personnel choices. The presence of members of the other party—and their agreement on a particular issue—increases the likelihood that the decision is not one that is a function only of partisanship or ideology.[272]

In addition, policymakers can adopt a variety of structural design strategies that scholars have identified as mitigating decisionmaking flaws because they introduce diverse viewpoints. "Red Teams" are groups of individuals who take on the role of an adversary.[273] Commonly used by the military in operational planning, red teams will act as if they are the opponent, designing a strategy to defeat the United States.[274] The hope is that red teams will identify weaknesses in operational assumptions, strategy, and planning that are similar to the weaknesses that the opponent has identified.[275] Assuming that red teams actually take on the perspective of the opponent—often a difficult task—they can help mitigate the psychological biases that push decisionmakers to overvalue their own abilities and misinterpret the opponent's actions.[276]

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271 *E.g.*, Larrick, *supra* note 248, at 326–27.

272 *See* Posner & Vermeule, *supra* note 220, at 900–01 (discussing bipartisan appointments as a credibility-signaling mechanism). Note that partisans may be chosen because they have views counter to their own party on the relevant topic, which would mitigate the effectiveness of this strategy.

273 For an introduction to red teaming, see DEF. SCI. BD., THE ROLE AND STATUS OF DOD RED TEAMING ACTIVITIES (2003), *available at* http://www.fas.org/irp/agency/dod/dsb/redteam.pdf.

274 *See id.* at 1, 7–13 (providing observations regarding existing red team activities used by the U.S. military).

275 *Id.* at 2–3.

276 For historical examples of successful red teaming in foreign policy, see *id.* at 31–33.

Another option is the "devil's advocate."[277] The devil's advocate will "argue an unpopular position": a position with little or no support within the group making a decision, but that should nonetheless be considered.[278] The devil's advocate approach ensures that there is sustained criticism of the dominant approach to addressing a problem. It also has some collateral benefits in that it improves the quality of thinking about the dominant approach, anticipates potential responses that might emerge in public debate, and protects leaders ex post if decisions go bad and deliberations become public.[279] The model has some limitations as the devil's advocate is unlikely to develop an opposition coalition, and some studies suggest that the sincerity of a dissenter matters in how seriously an argument is taken.[280]

A third decisionmaking strategy is the "multiple advocacy" model.[281] Multiple advocacy seeks to "ensure that there will be multiple advocates within the policy-making system who, among themselves, will cover a range of interesting viewpoints and policy options on any given issue."[282] Unlike the devil's advocate system, multiple advocacy creates a balanced debate among people with genuine differences, and provides a wider range of options and perspectives.[283] Multiple advocacy is most successful when four conditions are in place: (1) advocates have a diversity of views; (2) there is rough parity in intellectual and bureaucratic resources among the advocates (e.g., access to information, personnel support, status with leadership); (3) there is participation from the final decisionmaker (the President) in the monitoring and regulation of the teams; and (4) there is time for

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277 For an early discussion of the devil's advocate model as applied to legal opinions on war powers, see Thomas Ehrlich, *The Legal Process in Foreign Affairs: Military Intervention—A Testing Case*, 27 STAN. L. REV. 637, 642–43 (1975).

278 Alexander L. George & Eric K. Stern, *Harnessing Conflict in Foreign Policy Making: From Devil's to Multiple Advocacy*, 32 PRESIDENTIAL STUD. Q. 484, 486 (2002).

279 *Id.* at 488–89.

280 *Id.* at 487. Further, if the devil's advocate turns into a dissenter, there is a far more troubling problem: the "domestication of dissenters." James C. Thomson, Jr., *How Could Vietnam Happen? An Autopsy*, ATLANTIC, Apr. 1968, at 47, 49. In deliberations on Vietnam, for example, after Undersecretary of State George Ball started having misgivings about the war, he was "warmly institutionalized" into becoming "the inhouse devil's advocate on Vietnam." *Id.* Ball felt as if his concerns had been heard; advocates for war felt they had given the alternative opinion a hearing; and the plans simply continued on. *Id.*

281 *See* KOH, *supra* note 4, at 161 (advocating "adversarial review" as part of decisionmaking processes); George & Stern, *supra* note 278, at 490–95 (arguing that "multiple advocacy" improves presidential decisionmaking); *see also* Alexander L. George, *The Case for Multiple Advocacy in Making Foreign Policy*, 66 AM. POL. SCI. REV. 751 (1972) (same).

282 George & Stern, *supra* note 278, at 492.

283 George, *supra* note 281, at 751.

discussion.[284] Multiple advocacy has been shown to be attractive and effective in both foreign and domestic policymaking.[285]

3. Vetogates

Perhaps the most fundamental institutional design choice made by the Framers was to create a system of vetogates.[286] In such a system, critical decisions cannot be made by one institutional actor alone. Thus, whereas parliamentary systems require only a majority of Parliament to pass legislation, in the United States a piece of legislation cannot be enacted if it cannot pass through three constitutional vetogates: passage by the House of Representatives, passage by the Senate, and signature by the President (or, alternatively, a supermajority veto override by both Houses of Congress).[287] On top of these is a series of subconstitutional vetogates, such as the committee process or the Senate tradition of allowing a committed minority to block legislation.[288] The result is that where one or even multiple institutional actors favor enacting legislation, passage is not assured because of the institutional hurdles that stand in the way.

In war powers debates, the desirability of vetogates is a common refrain for the congressionalist position.[289] War, the argument goes, is an extreme policy choice with the potential of highly negative consequences. As a result, it should be disfavored with at least the same institutional constraints as enacting ordinary legislation. The ordinary form of this argument implies a value judgment: War is bad and should be avoided if possible. From a more hawkish perspective, presidentialists typically argue that decisions *not* to go to war, or the failure to make a decision to go to war expeditiously, can also have bad consequences, and so erecting vetogates to block wars will also prevent fighting the wars that should be fought.[290] As we have noted, we are bracketing discussions of the ultimate desirability of war as a policy tool. But what we have identified is a set of decisionmaking errors and related phenomena that, whatever one's prior policy pref-

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284 George & Stern, *supra* note 278, at 492–93.

285 For discussions in foreign policy, see GRAHAM ALLISON & PHILIP ZELIKOW, ESSENCE OF DECISION 265–71 (2d ed. 1999), and George & Stern, *supra* note 278. For an application to domestic policy, see ROGER B. PORTER, PRESIDENTIAL DECISION MAKING 213–52 (1980).

286 For a thorough introduction to the concept of vetogates in American public law, see Eskridge, *supra* note 146.

287 *Id.* at 2–4.

288 *Id.*

289 *See, e.g.*, Diehl & Ginsburg, *supra* note 11, at 1244–45 (advocating vetogates in war powers).

290 *See, e.g.*, Nzelibe & Yoo, *supra* note 3, at 2516–19 (arguing against congressional vetogates).

erences, can lead to bad decisions in the war powers arena. It is therefore natural to consider the relevance of vetogates, a core feature of American constitutional design.

One general lesson from the behavioral insights we have surveyed is that many decisionmaking errors can be considered hawkish biases. If that is so, the Madisonian response of erecting vetogates has some appeal. Importantly, the behavioral reason for establishing vetogates is not that American policy should embrace pacifistic preferences, but rather that whatever our optimal level of war and peace, decisionmakers, when left to their own devices, will tend to produce too much war and too little peace.[291]

But even this first cut at erecting vetogates is a bit simplistic. While conventional war powers debates focus on whether the President may act alone or must have the participation of Congress, there are other institutional design choices.[292] The behavioral reason for desiring vetogates is to place a check on skewed presidential decisionmaking, but that check does not necessarily have to come from Congress. As we have discussed, Presidents have cautiously (but rarely full-throatedly) invoked the approval of the United Nations or the participation of multilateral coalitions when seeking to use force without congressional authorization. While it is not clear precisely what role these factors play in OLC's war powers doctrine, as a matter of institutional design they may well be considered an alternative, substitute vetogate. Thus, if the President's decision to use force is ratified by the United Nations or if a broad coalition participates in the operation, passage through that vetogate gives more confidence in the soundness of the decision to use force. This is not to say, of course, that the decision *will* be a good one; passing through a congressional vetogate is no guarantee of sound decisionmaking either. But insofar as vetogates are an institutional design strategy for combating behavioral errors in warmaking, there is value to considering the substitutability of veto players.

4. The Role of Independent Third Parties

A number of psychological biases are derived from an individual's inaccurate perceptions about herself (positive illusions, illusion of transparency), suboptimal preferences based on her self-interest (loss aversion), and inaccurate perceptions about others'

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[291] Of course, vetogates might suboptimally prevent too many wars as well, particularly in the case of humanitarian interventions.

[292] For an argument that congressional authorization might perversely lead to a President's selecting into riskier wars, see Nzelibe, *Congressionally Authorized Wars*, *supra* note 7, at 910.

behavior (fundamental attribution error, reactive devaluation). At least in some cases, these biases can be mitigated by the participation of independent third parties in the decisionmaking process.[293] For example, the research on reactive devaluation shows that when arms control proposals were framed as originating from the Soviet Union, they were largely dismissed, particularly as compared to the same proposal framed as originating from the United States.[294] This effect was not present, however, when the proposal was framed as coming from a neutral third party, the United Nations.[295]

Incorporating independent third parties into decisions about war and peace could mitigate some of the behavioral biases identified in this Article. These third party actors are effective for two basic reasons. First, even though the third parties are not allies who share the same preferences as the President, they might be more "epistemically competent," because they are not afflicted by psychological biases derived from participation in the foreign relations crisis.[296] Second, even in cases where the third party is not any more epistemically competent, they may simply have biases that are uncorrelated or negatively correlated from the relevant group of decisionmakers (e.g., the President and her advisors).[297] Adding participants to a group decisionmaking process can improve the accuracy of the ultimate decision if the group has uncorrelated biases.[298]

The most obvious design strategy is multilateralism. When the use of force has broad multilateral support, it is more likely that the decision to use force was made by a diverse group of people, with varied interests. Even close international allies have different interests, domestic political pressures, and preferences. And as the international coalition becomes more diverse, there is a greater likelihood of sound decisionmaking.[299] Thus, when the U.N. Security Council—which gives a veto to Russia and China, countries that, at least today, have different preferences from the United States—decides to authorize force, its decision is likely to be more sound than a decision by the United States alone. Of course, multilateral participation

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293 Ross, *supra* note 80, at 41–42.

294 *Id.* at 29.

295 *Id.*

296 Gersen & Vermeule, *supra* note 20, at 2215.

297 *Id.* at 2218.

298 *Id.*; *see also* Vermeule, *supra* note 116, at 6 ("Even if particular voters make biased guesses, the group as a whole will be unbiased on average if guessers' biases are uncorrelated, which is the nub of independence.").

299 *See* Posner & Vermeule, *supra* note 220, at 905 (arguing that participation of multilateral coalitions with diverse interests improves the credibility of decisions to use force).

makes it less likely that the group of nations will agree, and this in turn might lead to a failure to intervene in cases where intervention is justified.[300]

A second option is for Presidents to rely on independent commissions to evaluate decisions about war and peace.[301] Independent commissions are usually bipartisan, and if designed to include a wide variety of people, they can increase the diversity of views that are involved in the decisionmaking process. This increased epistemic diversity should help counteract group decisionmaking biases within a given administration, the problem of unified government, and other biases as well. Consider what might have happened if President George W. Bush had created an independent commission on Iraq's weapons of mass destruction *prior* to the 2003 Iraq war. As Eric Posner and Adrian Vermeule have noted, it is possible that the commission would have reached different, or more nuanced, conclusions in assessing the evidence, which in turn would have affected public opinion regarding—and raised the political costs of—the invasion.[302]

To be sure, decisionmakers need not always follow the recommendations of an independent commission. In 2006, think tanks came together to form the independent Iraq Study Group (ISG) at the urging of Congress and with the cooperation of the Bush Administration.[303] The ISG's role was to review the progress of the war and make recommendations.[304] Interestingly, the ISG's recommendations were opposed to the Bush Administration's decision to initiate a troop surge in Iraq.[305] To the extent that the Bush Administration's surge policy fits the sunk cost narrative, the ISG's report did not prevent the ultimate policy from taking effect. But it did increase the political costs to the Administration of taking that course of action.[306]

A third possibility is to merge the two strategies, and rely on international actors to assess information relevant to decisions on war and peace or to assist with negotiations. Perhaps the best example is

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300 *Id.* at 906–07.

301 For a general discussion, see *id.* at 899–900.

302 *Id.*

303 Letter from James A. Baker, III, and Lee H. Hamilton, Co-Chairs of the Iraq Study Group, to Members of Congress (undated), *available at* http://www.usip.org/node/3700.

304 *Id.*

305 *See* Sheryl Gay Stolberg, *Bush's Strategy for Iraq Risks Confrontations*, N.Y. TIMES (Jan. 11, 2007), http://www.nytimes.com/2007/01/11/washington/11assess.html?_r=0 ("By stepping up the American military presence in Iraq, President Bush is . . . rejecting the central thrust of the bipartisan Iraq Study Group . . . .").

306 *Id.* (discussing political risks to President Bush resulting from disregarding the ISG's recommendations).

the International Atomic Energy Agency (IAEA). The IAEA acts as a third-party, international, independent monitor of nuclear materials.[307] Among other things, it is often called upon to inspect countries' nuclear facilities and assess whether they are on the path toward nuclear weapons.[308] The IAEA's credibility stems in part from the IAEA's diverse membership and interests that are independent of the foreign policies of any particular state.[309]

5. *The Ellsworth-Mason Approach*

On August 17, 1787, the delegates to the Constitutional Convention in Philadelphia debated the War Powers Clause of Article I. According to James Madison's notes, they focused largely on whether the text should give Congress the power to "declare war" or "make war."[310] In the midst of the debate, Oliver Ellsworth and George Mason each made comments that suggest another institutional design theme for alleviating some of the behavioral pathologies of wartime decisionmaking. Ellsworth reportedly commented that "there is a material difference between the cases of making war, and making peace. It shd. be more easy to get out of war, than into it."[311] Mason said that "[h]e was for clogging rather than facilitating war; but for facilitating peace."[312] Interestingly, former Secretary of Defense Robert Gates recently sounded a similar theme in lamenting that "[w]ars are a lot easier to get into than out of," noting that "in recent decades, presidents confronted with tough problems abroad have too often been too quick to reach for a gun."[313]

Extrapolating a bit from the 1787 debates, the "Ellsworth-Mason" approach suggests that war powers need not be symmetrical between starting and ending wars (or, as many interpret the present regime, weighted toward greater congressional participation prior to hostilities rather than during them). Rather, the powers of war and peace can be designed to make it easier to end wars than it is to start wars. This design strategy may be commendable for a number of rea-

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307 *The IAEA Mission Statement*, INT'L ATOMIC ENERGY AGENCY, http://www.iaea.org/About/mission.html (last visited Dec. 22, 2014).

308 *Id.*

309 *See id.* (describing the IAEA as an "independent intergovernmental" organization).

310 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1911). For discussion, see ELY, *supra* note 4, at 5; GLENNON, *supra* note 4, at 81–82; Yoo, *supra* note 5, at 260–64.

311 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 310, at 319.

312 *Id.*

313 Robert M. Gates, *The Quiet Fury of Robert Gates*, WALL ST. J. (Jan. 7, 2014), http://online.wsj.com/articles/SB10001424052702304617404579306851526222552 (excerpting Secretary Gates's forthcoming memoir).

sons, but it may be particularly useful in light of prospect theory and sunk costs. In the sunk costs scenario, the country remains in a war because individuals have difficulty valuing losses accurately and moving on when it is rational to do so.

The Ellsworth-Mason Approach suggests a variety of possible strategies to mitigate this bias. First, war powers could be designed to allow the legislature to repeal authorization of the use of force or to affirmatively terminate war with fewer institutional hurdles. For example, an authorization for the use of force could incorporate a legislative veto that would remove the President from the decision to end a war. The veto could require the participation of both Houses of Congress as presently envisaged by the War Powers Resolution,[314] or it could even be designed as a one-house veto of the kind ruled unconstitutional in *INS v. Chadha*[315] (perhaps limited to some triggering event in the course of the war, either the passage of time or the occurrence of some result). The effect would be to allow one branch of government, or even one House of Congress, to repeal authorization for the use of force. The same strategy could be applied to repealing appropriations: On the legislative veto approach, a minority could be empowered to block appropriations. This strategy would make it harder for the President to continue to prosecute the war based on sunk costs when the Congress and (if Congress is accurately channeling popular preferences) the American people do not want to double-down on a war. To be sure, Congress and the American people might also suffer from the sunk costs fallacy, but by granting power to Congress or even one House, this strategy would make it substantially easier for Congress to exercise its authority, particularly in situations of divided-party government. War would only continue when a large majority supported the effort.

An alternative Ellsworth-Mason strategy is to require supermajorities to extend the authorizations of force or to appropriate money for ongoing conflict. Professor Ackerman has suggested this approach in a slightly different context. Ackerman argues that emergencies require giving greater authority to the executive branch, which often leads to encroachments on civil liberties.[316] To prevent the state of emergency—and its expansive government powers—from becoming normalized and entrenched, he suggests a "supermajoritarian escalator."[317] Emergency powers would be granted for a period of months, and any reauthorization of the emer-

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[314] 50 U.S.C. § 1544(c) (2012).

[315] *See supra* notes 243–44 and accompanying text (discussing *Chadha*).

[316] ACKERMAN, *supra* note 3, at 80–81.

[317] *Id.*

gency powers thereafter would "require an escalating cascade of supermajorities"—60%, then 70%, then 80%.[318] The result would be to spark debate on whether the state of emergency persists, to encourage discussion of civil liberties issues, and to create political pressure on the executive branch to both restrain its actions and persuade the public of its policies.[319] Applied to the continuation of a war, this supermajoritarian escalator would require increasing supermajorities to reauthorize the use of force or to appropriate funds for a conflict.[320] While the design mechanism is supermajoritarian instead of minoritarian, it is fundamentally driven by the Ellsworth-Mason insight that it should be easier to get out of a war than to get into one.

Of course, these design suggestions suffer from the drawback that they might prevent desirable uses of force from continuing, particularly if a relatively small minority in Congress is empowered. Functionally, though, the question is not whether the Ellsworth-Mason Approach would prevent some justified wars from continuing, but whether, on balance, it would overall lead to net benefits. Different people may come to different conclusions as to what the optimal design is based on their perceptions of the likelihood of the practice taking place and their risk preferences on facilitating the end of wars.

In this light, perhaps the most modest (and constitutionally realistic) implementation of the Ellsworth-Mason Approach would be for Congress to simply refuse to acquiesce in the *Chadha* decision and, if ever appropriate, pass a concurring resolution under Section 5(c) of the War Powers Resolution. Although conventional wisdom holds that this provision is unconstitutional under *Chadha*, as a practical matter an assertion (and exercise) of authority to terminate a war by a united Congress would likely place the President under powerful political constraints, perhaps even precipitating a constitutional crisis if the President ignored it. Such an act of "constitutional hardball"[321] might not fit within existing doctrine, but in extraordinary circumstances—

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318 *Id.* at 80.

319 *Id.* at 80–81.

320 Professors Ackerman and Hathaway have argued for a variation on this design in the war context, but without relying on supermajorities. Instead, they argue that the default rule should be for limited, rather than open-ended, wars that are authorized only for two years. After the two-year period, reauthorization would be required and all appropriations prohibited (except for a one-year period to withdraw troops) until Congress affirmatively reauthorizes the use of force. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 496–97 (2011).

321 For an exploration of the concept, see Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

and we assume that any case in which both Houses of Congress voted to terminate a war over the President's objections would be extraordinary—doctrine alone should not deter Congress from putting political pressure on the President.[322]

CONCLUSION

In the real world of war and peace, decisions made by political leaders are subject to behavioral biases, decisionmaking challenges, and misperceptions. However, despite their importance, these all-too-human factors have not been considered in the context of war powers debates. This Article has identified some of the most important lessons from psychology and applied these insights to classic debates on war powers. In some cases, these insights provide functional support for current practices; in others they call into question current doctrines and suggest greater protections in decisionmaking processes. Perhaps most importantly, however, they identify a set of real-world problems that constitutional lawyers and scholars must not ignore. After a decade of war and renewed interest in legal questions surrounding how we ought to initiate, fight, and terminate wars, "behavioral war powers" should be an important part of the conversation.

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[322] Since such a decision would not affect individual rights but rather the allocation of power between branches, it may be a more justifiable example of constitutional "departmentalism." For a discussion of departmentalism, see Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004).