

Symposium on Operation Enduring Freedom and the War on Terrorism

Declaring War on the War Powers Resolution

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Note

DECLARING WAR ON THE WAR POWERS RESOLUTION

Already possessing vast power over the country's foreign relations, the executive, by acquiring the authority to commit the country to war, now exercises something approaching absolute power over the life or death of every living American—to say nothing of millions of other people all over the world. There is no human being or group of human beings alive wise and competent enough to be entrusted with such vast power. Plenary powers in the hands of any man or group threatens all other men with tyranny or disaster. Recognizing the impossibility of assuring the wise exercise of power by any one man or institution, the American Constitution divided that power among many men and several institutions and, in doing so, limited the ability of any one to impose tyranny or disaster on the country. The concentration in the hands of the President of virtually unlimited authority over matters of war and peace has all but removed the limits to executive power in the most important single area of our national life. Until they are restored the American people will be threatened with tyranny or disaster.¹

I. INTRODUCTION

The population of the United States is approximately 280 million.² These quarter of a billion people are protected from foreign threat by the United States Armed Forces comprised of approximately three and one-half million men and women.³ The United States Armed Forces are the means by which the federal government provides for the common

¹ SENATE FOREIGN RELATIONS COMM., NATIONAL COMMITMENTS, S. REP. NO. 90-797, at 26-27 (1967).

² *Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000*, Table 2, U.S. CENSUS BUREAU, at <http://blue.census.gov/population/www/cen2000/tab02.txt> (last visited Sept. 7, 2002).

³ *DoD101: An Introductory Overview of the Department of Defense*, U.S. DEP'T OF DEF., at <http://www.defenselink.mil/pubs/dod101/dod101.html> (last visited Sept. 7, 2002).

defense and secures the blessings of liberty.⁴ No single person, not even the President of the United States, solely directs the use of these armed forces.⁵

Fearing the tyranny of a legislature or the tyranny of a single executive, the Framers of the Constitution sought to separate the powers of the government through a system of checks and balances.⁶ War powers are no different.⁷ War powers can be defined as the authority to direct the introduction of the armed forces into hostilities.⁸ Congress is an integral part in the war powers design in our limited, constitutional government.⁹

This Note contends that the current balance of the war powers embodied by the War Powers Resolution of 1973 is unconstitutional and must be rectified through an amendment to the U.S. Constitution.¹⁰ Part II examines the background and development of the war powers during the founding of this republic and follows their implementation through

⁴ See U.S. CONST. pmbl.; see also U.S. CONST. art. I, § 8 (granting Congress the power to raise, support, and regulate armies and a navy). Madison explained, "Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils." THE FEDERALIST NO. 41, at 256 (James Madison) (Clinton Rossiter ed., 1961).

⁵ See generally THOMAS F. EAGLETON, WAR AND PRESIDENTIAL POWER (1974) (discussing the Congress as the rightful possessor of the war powers); JOHN HART ELY, WAR AND RESPONSIBILITY (1993) (discussing the constitutional lessons of Vietnam and beyond and that Congress has an important role in the direction of war); *infra* Part II (discussing the original understanding and development of the war powers in American jurisprudence).

⁶ See, e.g., THE FEDERALIST NO. 51 (James Madison); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 36 (1987) (discussing the Constitution's central theme of the separation of powers); FRED W. FRIENDLY & MARTHA J. H. ELLIOTT, THE CONSTITUTION: THAT DELICATE BALANCE 277 (1984) (discussing the internal safeguards created by the Framers of the Constitution to divide the power among three distinct branches and to give each branch a check over the other branches); Thomas A. Ascik, *In Republican Government, The Legislative Authority Necessarily Predominates*, in RESTORING THE CONSTITUTION 45 (H. Wayne House ed., 1987) (discussing in great detail the source and justification for the separation of powers with checks and balances).

⁷ See *infra* Part II.

⁸ See 50 U.S.C. § 1541 (2000).

⁹ See *infra* Part II.A-B.

¹⁰ See War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (2000)); *infra* Part IV.

American history.¹¹ These military events culminated in several mid-twentieth century conflicts and fueled the passage of a central and flawed piece of legislation, the War Powers Resolution of 1973.¹² Then, in Part III, this Note turns to the legal and practical problems incorporated in the War Powers Resolution, including the problem of delegation of powers.¹³ Finally, Part IV proposes a Constitutional War Powers Amendment to rectify the constitutional disaster that the War Powers Resolution of 1973 fueled and to ensure that those in charge of the armed forces will not attain “despotic preeminence.”¹⁴

II. THE DEVELOPMENT OF THE WAR POWERS

Despotic preeminence was exactly the fear of many of the Framers whether in the realm of war or simply in the halls of Congress.¹⁵ This Part examines the war powers at the time of the framing of the Constitution.¹⁶ After a review of the Constitution’s broad separation of powers principle, this Part details the development of the war powers in early American history.¹⁷ Finally, this Part chronicles and develops the War Powers Resolution of 1973.¹⁸

¹¹ See *infra* Part II.A-C.

¹² See *infra* Part II.D.

¹³ See *infra* Part III.

¹⁴ ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 93 (1994) (stating that the Constitution “gave national military forces two masters, neither of which could attain a despotic preeminence”); see *infra* Part IV.

¹⁵ See generally THE FEDERALIST NOS. 47, 51 (James Madison) (explaining the virtues of a system of government founded upon separation of powers with checks and balances). Madison wrote:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection [to the separation of powers] is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny [L]iberty requires that the three great departments of power should be separate and distinct.

THE FEDERALIST NO. 47, at 30 (James Madison) (Clinton Rossiter ed., 1961).

¹⁶ See *infra* Part II.A.

¹⁷ See *infra* Part II.B-C.

¹⁸ See *infra* Part II.D.

A. *The Framers and the U.S. Constitution*

On the first day of the Constitutional Convention, the Framers addressed a major fault with the Articles of Confederation: the executive powers.¹⁹ The Framers retained a profound distrust of standing armies and powerful executive control.²⁰ In the first few weeks, the debate turned to the question of war within the larger debate of the separation of executive and legislative powers.²¹ The New Jersey Plan gave the executive the power to direct all military operations, while Alexander Hamilton's plan conceived of an executive holding the power to direct war when declared by the Senate.²² James Madison, the primary author

¹⁹ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24 (Max Farrand ed., 1966) [hereinafter RECORDS] (recounting the events of May 29, 1787). See generally David Gray Adler, *The President's War-Making Power*, in INVENTING THE AMERICAN PRESIDENCY 119 (Thomas E. Cronin ed., 1989). Article Nine of the Articles of Confederation stated that the Congress "shall have the sole and exclusive right and power of determining on peace and war." ART. OF CONFED'N art. IX (1781).

²⁰ See Adler, *supra* note 19, at 121-24; see also Kay Bailey Hutchison, *America's Engagement in the World at a New Century's Dawn: Legal and Ethical Implications for the Use of Force*, 53 SMU L. REV. 377, 379 (2000). "[The Framers] did not break with a monarchy in England only to establish another monarchy in America. In drafting our constitution, they were chiefly concerned with checking the abuses of executive power." Hutchison, *supra*, at 379.

²¹ See 1 RECORDS, *supra* note 19, at 64-65. Mr. Pinkney of South Carolina supported a "vigorous" executive but feared that the executive powers under the Articles of Confederation had extended to peace and war, which would render the executive a monarchy. *Id.* Mr. Rutledge, also of South Carolina, said that he was for vesting the executive power in a single person, though he was not for giving him the power of war and peace. *Id.* at 65. On the other side, Mr. Sherman viewed the Executive as nothing more than an institution for carrying out the will of the legislature. *Id.* Mr. Wilson of Pennsylvania supported a single magistrate but thought that the Prerogatives of the British King could not be the proper guides. *Id.* Some of those powers, he pointed out, were legislative in nature. *Id.* Among those powers to be withheld from the grand executive were the powers of war and peace. *Id.* at 65-66. Always the masterful compromiser, Mr. Madison steered the Convention back to a more basic discussion—that of defining the executive powers. *Id.* at 66-67. For a rigorous discussion on the nature and development of the separation of powers doctrine, see Louis Fisher, *Point/Counterpoint: Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1638-44 (2000).

²² See 1 RECORDS, *supra* note 19, at 244, 292. Hamilton's plan was not formally before the Convention, but several delegates used it. See 3 *id.* at 617. Hamilton conceived of the Senate holding the exclusive power of declaring war. 3 *id.* at 622. Considering Hamilton's general preference for executive power, this proposal is especially interesting.

of the Constitution, agreed with several delegates that war power was legislative in character.²³

The war powers discussion held an important position in the debates as the Framers sought to satisfy two goals: first, that war should not be entered into whimsically and, second, that armed conflict should generally be avoided.²⁴ Suggestions to vest the war powers in the executive were met by swift, contemptuous, and scornful responses; the similarities between this proposal and the powers of the crown were too great for the delegates.²⁵ Restricting the role of the executive would deter armed conflict and make war difficult to enter.²⁶

A draft of the Constitution gave the legislature the power “to make war” and the executive the power to be commander in chief of the armed forces.²⁷ The Convention’s full body considered and changed the “make

²³ See 1 *id.* at 65-66, 73-74; Adler, *supra* note 19, at 121. “[Mr. Wilson] did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace.” 1 RECORDS, *supra* note 19, at 65-66. “Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers.” *Id.* at 73-74

²⁴ See James Madison, *Letter of Apr. 2, 1798, to Thomas Jefferson*, 6 THE WRITINGS OF JAMES MADISON 312, reprinted in 3 THE FOUNDERS’ CONSTITUTION 96 (Philip B. Kurland & Ralph Lerner eds., 1987). Mr. Madison stated, “The Constitution supposes what the History of all Gov[ernment] demonstrates, that the Ex[ecutive] is the branch of power most interested in war, and most prone to it. It has accordingly, with studied care, vested the question of war in the Legis[ature].” *Id.*

²⁵ 2 RECORDS, *supra* note 19, at 318. Elbridge Gerry of Massachusetts stated, “I never expected to hear in a republic a motion to empower the Executive alone to declare war.” *Id.*

²⁶ See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836) [hereinafter STATE DEBATES]. Delegate James Wilson spoke directly to this before the Pennsylvania Convention:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such a distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into war.

Id. Illustratively, Virginian delegate George Mason championed “clogging” rather than facilitating the process to go to war. 2 RECORDS, *supra* note 19, at 319.

²⁷ Supp. RECORDS, *supra* note 19, at 183, 188-89. This product of two months of deliberations was presented to the Committee of Detail, the group charged with working out the precise details of language, in late July of 1787. *Id.* at 183.

war" clause because it considered that vesting that power in a sole institution or individual was against republican ideals.²⁸ The delegates believed that the division of responsibility and power through a system of checks and balances would ensure that power was not greatly abused.²⁹ The solution was to change "make war" to "declare war," an amendment which passed by an eight-to-one vote.³⁰ Thus, the language

²⁸ 2 *id.* at 313. These provisions had emerged from the Committee of Detail without change. Supp. *id.* at 182.

²⁹ See *id.* at 318-19. The complete debate follows:

[Mr. Dickenson moved] "[t]o make war."

Mr. Pinkney opposed the vesting [of] this power in the Legislature. Its proceedings were too slow. It w[ould] meet but once a year. The H[ouse] of Rep[resentatives] would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. . . . It would be singular for one authority to make war, and another peace.

Mr. Butler. The Objections ag[ain]st the Legislature lie in a great degree against the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.

Mr. M[adison] and Mr. Gerry moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks.

Mr. Sharman [sic] thought it stood very well. The Executive [should] be able to repel and not commence war. "Make" [is] better than "declare[.]" the latter narrowing the power too much.

Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

Mr. Elseworth. [T]here is a material difference between the cases of making *war*, and making *peace*. It should be more easy to get out of war, than into it. War also is a simple and overt declaration. [P]eace attended with intricate [and] secret negotiations [sic].

Mr. Mason was [against] giving the power of war to the Executive, because not <safely> to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "declare" to "make."

On the Motion to insert *declare*-in place of *Make*, it was agreed to [NH, no; MA, abst., CT, no, but after Mr. King remarked that "make" war might be understood to "conduct" it which was an Executive function, Mr. Elseworth changed to aye; PA, aye; DE, aye; MD, aye; VA, aye; NC, aye; SC, aye; GA, aye].

Id. (citations omitted or incorporated as in Mr. King's remarks).

³⁰ *Id.*; see also Alexander C. Linn, *International Security and the War Powers Resolution*, 8 WM. & MARY BILL RTS. J. 725, 733 (2000) (discussing the significance of the make/declare

finalized by the Committee of Style and Arrangement included "declare."³¹ In the end, the conduct of war was to be within the purview of the President; the initiation of hostilities would rest with the legislators.³²

Alexander Hamilton, the advocate of strong executive power, even supported this secondary role for the President.³³ Hamilton argued that the President would rightly differ from other executives in two ways.³⁴ First, the President would only command the military under legislative directive, rather than for all time.³⁵ In addition, the President would then serve as Commander in Chief of the armed forces, rather than holding all military decision-making powers.³⁶ These views are iterated throughout

discussion as suggesting that the Framers wished to empower Congress rather than the Executive).

³¹ 2 RECORDS, *supra* note 19, at 570, 595.

³² See 4 STATE DEBATES, *supra* note 26, at 263. Mr. Butler summarized the debate as such in 1788:

It was at first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction. The House of Representatives was then named; but an insurmountable objection was made to this proposition—which was, that negotiations always required the greatest secrecy, which could not be expected in a large body. The honorable gentleman then gave a clear, concise opinion on the propriety of the proposed Constitution.

Id.

³³ See THE FEDERALIST NO. 69, at 417-23 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton, arguing in support of the Constitution, points out that "in most of these particulars [such as the Commander in Chief role], the power of the President will resemble equally that of the king of Great Britain and the governor of New York." *Id.* at 417.

³⁴ *Id.*

³⁵ *Id.* The President would "have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union." *Id.* For example, "[t]he king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions." *Id.* "[T]herefore, the power of the President would be inferior to that of either the monarch or the governor." *Id.*

³⁶ *Id.* at 418. Hamilton points out that the President serves merely as commander in chief, "while [the power] of the British King extend[ed] to the declaring of war and to the

the writings of the Framers and their compatriots.³⁷ However, the language of the day was slightly different.³⁸

B. *Language and Looming Constitutional Principles*

“Declare” currently has a different connotation than it did two hundred years ago.³⁹ Although “declare” today sways toward “announce,” as early as 1552, it was synonymous with “commence” or an initiation of hostilities.⁴⁰ “Declaration” meant to proclaim a state of war and included all the international legal implications that war entails.⁴¹ A logical division existed between declaring and making war.⁴²

raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.” Id.

³⁷ See, e.g., 4 STATE DEBATES, *supra* note 26, at 107-08. James Iredell, later a Supreme Court Justice, delineated the powers of the President in a speech to the North Carolina legislature that reflects *The Federalist No. 69*:

In almost every country, the executive has command of the military forces. From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations, can only be expected from one person. The President, therefore, is to command the military forces of the United States, and this power I think a proper one; at the same time it will be found to be sufficiently guarded. A very material difference may be observed between this power, and the authority of the king of Great Britain under similar circumstances. The king of Great Britain is not only the commander in chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He also has the power to declare war. The President has not the power of declaring war by his own authority, nor that of raising fleets and armies. The powers are vested in other hands. The power of declaring war is expressly given to Congress, that is, to the two branches of the legislature They have also expressly delegated to them the powers of raising and supporting armies, and of providing and maintaining a navy.

Id.

³⁸ See Adler, *supra* note 19, at 123.

³⁹ *Id.*

⁴⁰ *Id.*; see AMERICAN HERITAGE DICTIONARY 484 (3d ed. 1996) [hereinafter DICTIONARY 1996] (defining “declare” as “to make known formally or officially” and “declare war” as “to state formally the intention to carry on armed hostilities against”).

⁴¹ See, e.g., *United States v. Smith*, 27 F. Cas. 1192 (C.C.N.Y. 1806). Justice Paterson explained international law: “In the case of invasive hostilities, there cannot be war on the one side and peace on the other There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration.” *Id.* at 1230.

This division, in modern terms, then, corresponds to initiating and conducting war.⁴³

Another term that has expanded in its connotation is “commander in chief.” Commander in chief is the title of the highest officer in a particular chain of command.⁴⁴ It is not a new term—Charles I introduced it in 1639.⁴⁵ The officer was to be the first General and Admiral to direct war once authorized or begun.⁴⁶ Thus, the President was thought of as a subordinate who, once given a mission by Congress, would execute it within authorized bounds. Because of its size and lengthy procedures, Congress would not be capable of conducting war in a way resembling proper military practice, so that responsibility fell to the President as Commander in Chief.⁴⁷

Certainly, some incidents or crises do not allow time for Congress to deliberate; swift action can be necessary.⁴⁸ However, the Framers only believed these circumstances to be defensive events, as they considered the President to possess the ability to repel invasions or attacks.⁴⁹ The power to repel sudden attacks permitted the executive to hold an enemy

⁴² See, e.g., JOHN BOUVIER, *BOUVIER'S LAW DICTIONARY* (1889). In the nineteenth century, Bouvier defined “make” as “to perform or execute” and “declaration of war” as “the public proclamation of the government of a state, by which it declares itself to be at war with a foreign power.” *Id.*

⁴³ See *DICTIONARY* 1996, *supra* note 40, at 394, 929 (defining “initiate” as “to set going by taking the first step, begin” and “conduct” as “to direct the course of, manage or control”).

⁴⁴ See *id.* at 379 (defining “commander in chief” as “the supreme commander of all the armed forces of a nation” and “commander” as one who “has control or authority over; rule”); see also Adler, *supra* note 19, at 126.

⁴⁵ Adler, *supra* note 19, at 126.

⁴⁶ 1 *RECORDS*, *supra* note 19, at 292.

⁴⁷ See U.S. CONST. art. 2, § 2 (stating that the President shall be the Commander in Chief of the Army and Navy). During the Constitutional Convention Mr. Pinkney “opposed the vesting [of the war] power in the Legislature. Its proceedings were too slow. It w[oul]d meet but once a year. The H[ouse] of Rep[resentatives] would be too numerous for such deliberations.” 2 *RECORDS*, *supra* note 19, at 318.

⁴⁸ See generally Fisher, *supra* note 21. Fisher argues that “the Framers deliberately divided government by making the President the Commander in Chief and reserving to Congress the power to finance military expeditions. The Framers rejected a government in which a single branch could both make war and fund it.” *Id.* at 1645.

⁴⁹ See *supra* note 29. Such a power is also implied in Article IV, Section 4 because the United States is bound to protect each state against invasion. U.S. CONST. art. IV, § 4. This is only possible with an ever-present institution, the President. See generally Fisher, *supra* note 21, at 1645.

at bay while Congress made a final and appropriate decision of how to handle or respond to the attack.⁵⁰ Thus, the two branches of government had particular responsibilities.⁵¹

⁵⁰ MERLO J. PUSEY, *THE WAY WE GO TO WAR* 47 (1969). This power was also similar to that granted to the colonial governors prior to the new Constitution. *See, e.g.*, MASS. CONST. of 1780, art. VII. Massachusetts carefully spelled out the governor's power to include grants to "repel, resist, [and] expel attempts to invade the Commonwealth." *Id.* Some scholars confuse this issue of presidential war prerogative and find it hopelessly unclear. *See, e.g.*, JAMES MACGREGOR BURNS, *THE POWER TO LEAD: THE CRISIS OF THE AMERICAN PRESIDENCY* 114 (1984). Burns assumes the President was meant to be so similar to the monarchs of the past:

It was obvious, of course, that the executive must have extensive authority in these areas; that's what kings, prime ministers, and presidents were for. The great John Locke himself, as well as other political philosophers to whom the Founders had gone to school, argued for "Prerogative" empowering executives to cope with accidents and crises. Acutely aware, however, of the long record of kings and others who had plunged their nations into war without popular or legislative consent, the Framers tried to hedge in presidential war-making power as closely as possible. They proposed to grant him power to respond to surprise attack but deny him power to make war.

In that day as this, though, it was almost impossible to draw the line. Leaving the issue unresolved, the Framers took some comfort in the impeachment power of Congress.

Id. David Adler reads the Constitutional design differently:

There is no intimation in the records of the Constitutional Convention or of the state ratifying conventions that executive power includes the right to make war The record establishes that neither the commander-in-chief clause nor the executive power clause affords support for the claim that the President is empowered to commence hostilities. Indeed, such authority was specifically withheld from the President.

Adler, *supra* note 19, at 132.

⁵¹ U.S. CONST. art. I, § 8; *id.* art. II, §§ 1-2. The Constitution provides:

Article I, Section 8. The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces;

U.S. CONST. art. I, § 8.

Article II, Section 1. The executive Power shall be vested in a President of the United States of America

The war powers are but a small part of the grand constitutional design of separated powers.⁵² Congress does have the authority to delegate limited powers that it has been given by the Constitution.⁵³ The courts have become increasingly willing to uphold delegation against constitutional attack, especially when foreign affairs are involved.⁵⁴ Under the current delegation jurisprudence, Congress must provide for the executive (1) an “intelligible principle” to follow, (2) a specific policy or objective, and (3) limits circumscribing that power.⁵⁵ The United States Supreme Court has used its nondelegation doctrine to invalidate laws only twice in the doctrine’s history.⁵⁶ Although these two cases predated the delineation of the three-prong test in *Star-Kist Foods, Inc. v. United States*,⁵⁷ the analyses were quite similar.⁵⁸ The Court found the lack of specific direction, objectives, or standards to be dispositive.⁵⁹

Article II, Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States

Id. art. II, §§ 1-2.

⁵² See generally THE FEDERALIST NO. 51 (James Madison). Madison argued, In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

Id. at 322 (Clinton Rossiter ed., 1961).

⁵³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Star-kist Foods, Inc. v. United States*, 275 F.2d 472 (C.C.P.A 1959).

⁵⁴ See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding the Iranian hostage financial settlement).

⁵⁵ See *Curtiss-Wright*, 299 U.S. at 327-29 (holding that a congressional resolution, which gave the President the power to prohibit arms sales to Bolivia and Paraguay, was not an unconstitutional delegation of power); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (creating the intelligible principle analysis); *Star-kist Foods*, 275 F.2d at 480 (delineating a three-prong test from the long history of delegation cases in the foreign relations realm).

⁵⁶ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding provisions of the Federal Trade Commission Act to be unconstitutional delegations of power); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding provisions of the National Industrial Recovery Act and Petroleum Code to contain unconstitutional delegations of power).

⁵⁷ 275 F.2d 472.

C. *Pre-War Powers Resolution Understanding and Application*

In 1775, notwithstanding the unanimous decision to appoint George Washington as General of the Army, the Continental Congress limited his powers to only executing its directives because of a natural distrust of military power.⁶⁰ Nineteenth-century jurists agreed that the war clause meant that the President could not lawfully initiate war because only Congress could initiate it.⁶¹ However, modern commentators disagree over whether nineteenth-century Presidents followed this constitutional principle, and nearly all criticisms of Presidents for abuse of authority arose during the twentieth century.⁶²

⁵⁸ Compare *Star-kist Foods*, 275 F.2d at 480 (holding that Congress “must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose”), with *Schechter Poultry*, 295 U.S. at 541-42 (holding that the delegation of code-making authority to the President was unconstitutional because it was so broad and virtually unfettered), and *Panama Refining*, 293 U.S. at 431-33 (holding that the President may only act within congressional declarations of policy that provide a framework and when the President makes clear statements and findings within that framework).

⁵⁹ See *Schechter Poultry*, 295 U.S. at 541-42; *Panama Refining*, 293 U.S. at 431-33.

⁶⁰ See Adler, *supra* note 19, at 127. Washington was ordered “punctually to observe and follow such orders and directions, from time to time, as [he] shall receive from this, or a future Congress of these United Colonies, or Committee of Congress.” *Id.*

⁶¹ See, e.g., 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 55 (O. W. Holmes, Jr. ed., 1884); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 87 (1891). James Kent, the prominent jurist, wrote,

[I]t is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the facts. . . . [W]ar cannot lawfully be commenced on the part of the United States without an act of Congress.

1 KENT, *supra*, at 55. Justice Story wrote, “The power of declaring war is . . . so critical and calamitous, that it requires the utmost deliberation, and the successful revise of all the councils of the Nation.” 2 STORY, *supra*, at 87. This support extended into the early twentieth century as evidenced by the 1929 writings of Westel W. Willoughby, eminent political scientist and expert in constitutional law. WESTEL W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1560 (1929). “The right of making war belongs exclusively to the supreme or sovereign power of the state. This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country. By our own Constitution, the power is lodged in Congress.” *Id.*

⁶² See LOUIS FISHER, PRESIDENTIAL WAR POWER 13 (1995) [hereinafter FISHER, WAR POWER]. One case, however, is of particular note. The Mexican War, after congressional

In early decisions, the Supreme Court defined two kinds of declarations and two kinds of war: regular and conditional declarations for perfect and imperfect wars.⁶³ “Perfect” wars are the general and unlimited; conversely, the “imperfect” wars represent limited conflicts.⁶⁴ Thus, “perfect” wars are large-scale, multiple-theater, sovereign-versus-sovereign types of conflicts; “imperfect” wars, in twenty-first century terms, are low-intensity conflicts with potentially short duration, limited goals, and restricted participation.⁶⁵ In *Bas v. Tingy*,⁶⁶ the Supreme Court held that Congress has jurisdiction over both perfect and imperfect wars.⁶⁷ The Court reasoned that imperfect wars are wars in the constitutional sense because the government authorizes them just the same.⁶⁸

investigation, was found to be “unnecessarily and unconstitutionally begun by the President of the United States.” Adler, *supra* note 19, at 138. President Polk ordered the army into the area and told Congress, “Mexico has passed the boundary of the United States, has invaded our territory, and shed American blood on American soil.” PUSEY, *supra* note 50, at 61. On January 13, 1846, President Polk ordered General Taylor to invade Mexico and take position on the south shore of Rio Grande del Norte. *Id.* However, it was not until the May of 1846 that Polk submitted his request for a declaration of war. *Id.* The Congress argued that Polk’s reasons for invading were false, and the after-the-fact process was unconstitutional. *Id.*

⁶³ *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800).

⁶⁴ *Id.* (discussing the eighteenth-century understanding of war); see generally MILLETT & MASLOWSKI, *supra* note 14, at 22-123; John C. Yoo, *Point/Counterpoint: Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1689-90 (2000) (same).

⁶⁵ See *Bas*, 4 U.S. (4 Dall.) at 40.

⁶⁶ *Id.* at 37.

⁶⁷ *Id.* at 40-41. The Court reasoned,

[H]ostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is a *public war*, because it is an external contention by force, between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrains the general power.

Id. (emphasis added).

⁶⁸ *Id.* One year later, the Court explained that Congress may authorize general hostilities or partial war. Talbot v. Seemen, 5 U.S. (1 Cranch) 1, 28 (1801). The Court reasoned that, because “[t]he whole powers of war being, by the constitution of the United States, [are]

In *United States v. Smith*,⁶⁹ the New York federal circuit court reviewed hostilities against Spanish forces.⁷⁰ The court held that the President's power was limited to responding decisively and that the power to initiate hostilities was exclusively vested in Congress.⁷¹ If an invasion of American soil occurs, a state of war exists, making a congressional declaration superfluous.⁷² The court held that the

vested in congress, the acts of that body can alone be resorted to as our guides" in resolving the question of whether a war in fact existed. *Id.*

⁶⁹ 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

⁷⁰ *Id.* at 1200.

⁷¹ *Id.* at 1199 (pointing out that "Congress [has] the power of declaring war; and when that is done, the [P]resident is to act under it"). The court held that "Congress [has] alone the constitutional right to elect to go to war; but in case of an actual war declared or waged by a foreign power, there is no option, war does already exist; a defensive war, without the agency of congress; a war *de facto*." *Id.* at 1201 (emphasis added).

⁷² *Id.* The court summarized the state of the law at the time as such:

Put the case of actual war commenced by Spain, against the United States, when war has not been declared by congress, would it not be permitted to the president, to call out the military forces of the Union, to repel the aggression? Certainly it would Offensive war once begun, the nation attacked succeeds to all the rights of legitimate warfare. It may merely resist its enemy, or it may repel its aggressions by a stroke at the head, the heart, or the extremities. All are equally justifiable

I ask, whether a war has not existed between this country and other nations, without a declaration of war by congress? . . . And will it be denied, that we were then in a state of actual war [after the attack by Spain]? Yet congress had declared no war. Was the president of the United States justifiable for this act of hostility, commenced without the authority of congress? Certainly he was. It can never be denied to the executive to resist an attack. He is constitutionally bound to defend the United States against all foreign attacks, as well as domestic insurrections, and in the way best calculated in his judgment to insure success. A law was afterwards passed by congress [2 Stat. 129], providing the ways and means of carrying on the war, then existing, and so existing; and let it be remarked, continuing to exist, without any positive or formal declaration by congress. If war then can exist between the United States and a foreign nation without a declaration of war by congress, it belongs to the executive of the Union to ascertain the fact, and to declare the condition of the nation,—to say if actual war exists or not. The constitution delegates to the executive the power to protect and preserve the peace of the United States,—to communicate with foreign nations; and he is the constitutional organ through which the people derive their knowledge of our political relations with foreign powers.

President would then be authorized to initiate offensive actions against the attacking enemy because a state of war already existed between the nations. However, no presidential right to intervene in a foreign war or against a peaceful enemy existed because Congress was charged with declaring the change from peace to war.⁷³

These decisions continued through the turn of the century and World War II. In 1895, the Supreme Court, in *United States v. Sweeney*,⁷⁴ ruled that the Commander-in-Chief Clause granted the President supreme and undivided command to prosecute a successful war.⁷⁵ As recently as 1942, the Court recognized congressional supremacy.⁷⁶ The twentieth century saw a rapid change in the application of the war powers, too.⁷⁷ Presidents Theodore Roosevelt through Woodrow Wilson

Id. Thus, Congress actually took up the issue of the attack on the Union and directed the President in his actions, which acted as a functional declaration although it was already unnecessary due to the attack. An Act for the Protection of the Commerce of the United States Against the Tripolitan Cruisers, 2 Stat. 129 (1802).

⁷³ *Smith*, 27 F. Cas. at 1230-31. The court reasoned the difference:

There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war. A nation, however, may be in such a situation as to render it more prudent to submit to certain acts of a hostile nature, and to trust to negotiations for redress, than to make an immediate appeal to arms. Various considerations may induce to a measure of this kind; such as motives of policy, calculations of interest, the nature of the injury and provocation, the relative resources, means and strength of the two nations, &c. and, therefore, the organ intrusted [sic] with the power to declare war, should first decide whether it is expedient to go to war, or to continue in peace; and until such a decision be made, no individual ought to assume an [sic] hostile attitude; and to pronounce, contrary to the constitutional will, that the nation is at war, and that he will shape his conduct and act according to such a state of things.

Id.

⁷⁴ 157 U.S. 281 (1895).

⁷⁵ *Id.* at 284.

⁷⁶ *Ex parte Quirin*, 317 U.S. 1 (1942) (holding that the President executes the directives of Congress). Chief Justice Stone stated for the Court, "The Constitution thus invests the President with the power to wage war which Congress has declared and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces." *Id.* at 26.

⁷⁷ Compare *infra* notes 78-96 and accompanying text, with *supra* notes 60-62 and accompanying text.

were active in numerous armed conflicts abroad.⁷⁸ Politics increasingly trumped institutional protections, and the post-World War II era saw the growth of presidential unilateralism.⁷⁹ For example, President Harry S. Truman's actions relative to the Koreans represented presidential war-making.⁸⁰ Truman sent troops to fight in Korea without a declaration of war or an action of Congress.⁸¹ President Truman, with the advice of his Secretary of State, justified his actions by referring to his Article II powers.⁸² He decided not to ask Congress to declare war because his Administration feared that a declared war would grow out of hand rather than remaining limited and short.⁸³ The President responded affirmatively to a journalist's suggestion that Korea was only a "police action" and not a "war."⁸⁴ The Representatives neither discussed, nor acted upon, their constitutional duty.⁸⁵ Only one Congressman repeatedly questioned the institutional silence because he worried that the President would take it to mean that he could send troops anywhere in the world without the slightest voice of Congress in the matter.⁸⁶

⁷⁸ See Joseph R. Avella, *Whose Decision to Use Force?*, 26 PRES. STUD. Q. 485 (1996). The Roosevelt Corollary, the update of the Monroe Doctrine, dominated American foreign policy towards the Western Hemisphere at the beginning of the twentieth century. See 2 WALTER LA FEBER, *CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS* 199-200 (1993). In 1904, Theodore Roosevelt proclaimed that the United States alone had the right to police the little countries of this hemisphere, to protect property, maintain order, and make sure they paid their debts. *Id.* Woodrow Wilson ordered Marines to Veracruz in 1914, told General John Pershing to enter Mexico in March 1915, and sent soldiers to Haiti in 1915 and the Dominican Republic in 1916. Avella, *supra*, at 487. Wilson undertook each of these actions without congressional authorization. *Id.* The United States also had intervened in Columbia to create Panama for a future canal. See 2 LA FEBER, *supra*, at 193-96.

⁷⁹ See *infra* notes 80-96 and accompanying text.

⁸⁰ See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 178-79 (1996).

⁸¹ See *id.*

⁸² *Id.*

⁸³ WALTER LA FEBER, *THE AMERICAN AGE: UNITED STATES FOREIGN POLICY AT HOME AND ABROAD SINCE 1750*, at 489 (1989) [hereinafter LA FEBER, AGE].

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *id.* at 490. Illustratively, during the Korean Conflict, Truman seized a strike-threatened steel mill claiming inherent powers. *Id.* The President's legal spokesman, Mr. Baldrige, went before Federal District Judge David A. Pine to defend the seizure against claims of unconstitutionality. *Id.* The in-court interchange follows:

The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution, but

President Eisenhower also expanded presidential power through his Chinese and Southeast Asian policies, but did so with respect and aplomb.⁸⁷ In early 1955, President Eisenhower asked Congress for broad authority to use U.S. forces in that area.⁸⁸ In a display of trust, Congress quickly agreed and gave broad powers by mere resolution.⁸⁹ The resolution set a historic precedent for later grants of power by Congress to the President.⁹⁰

limited the powers of Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?

Mr. Baldrige: That is the way we read Article II of the Constitution.

MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE 121 (1977). See also ALAN F. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 59-65 (1958). Mr. Baldrige later clarified his argument in that the President must still act within the Constitution and only has the vast powers in a grave national emergency. MARCUS, *supra*, at 306 n.89.

⁸⁷ LAFEBER, AGE, *supra* note 83, at 525.

⁸⁸ *Id.* President Eisenhower urged Congress to act very quickly to provide measures by which he could respond to China's attacks and seizures near Formosa. See FISHER, WAR POWER, *supra* note 62, at 105-06. He preferred to act along with Congress because a "suitable Congressional resolution would clearly and publicly establish the authority [for him] . . . to employ the armed forces . . . promptly and effectively for the purposes indicated if in his judgment it became necessary. It would make clear the unified and serious intentions of our Government, our Congress, and our people." *Special Message to the Congress Regarding United States Policy for the Defense of Formosa*, PUB. PAPERS 207, 210 (Jan. 24, 1955). President Eisenhower also requested that the resolution be temporary in character. *Id.* The expiration would be contingent upon the President's ability to report to Congress that peace and security in the region were assured. *Id.*

⁸⁹ See H.R. REP. NO. 84-4, at 4 (1955) (reporting unanimously the resolution regarding actions in the Formosa Straits out of the Foreign Affairs Committee). The committee concluded that the resolution made it clear that the people supported the President and that the Constitution was satisfied by the cooperation between the branches. *Id.* The bill found little resistance and was passed only five days after President Eisenhower sought the approval of Congress. See H.R.J. Res. 159, 84th Cong., 69 Stat. 7 (1955); 101 CONG. REC. 994-95 (1955); FISHER, WAR POWER, *supra* note 62, at 105-06. The statute authorized the President to use the armed forces "as he deem[ed] necessary for the specific purpose of securing and protecting Formosa . . . against armed attack." H.R.J. Res. 159. The authority extended to securing and protecting lands and positions related to that area too. *Id.* Congress also passed the expiration language that President Eisenhower had asked for. *Id.*; see *supra* note 88.

⁹⁰ See LAFEBER, AGE, *supra* note 83, at 525.

However, such congressional-presidential cooperation was short lived.⁹¹ Soon, subsequent Administrations filled the power vacuum left by the silent Congresses.⁹² Nonetheless, in 1964, the Tonkin Gulf Resolution gave President Johnson a blank check and very wide latitude to deal with the conflict in Vietnam.⁹³ In the wake of this resolution, however, many questioned the truthfulness of the facts presented by the President, which supplied yet another reason for many to be skeptical of the President's actions.⁹⁴ In fact, some in Congress took issue with Under-Secretary of State Nicholas Katzenbach's characterization of the Tonkin Gulf Resolution as a functional equivalent to a declaration of war.⁹⁵ In the wake of Vietnam and the political atmosphere created by the generally unpopular conflict, the war powers were at the fore of political discussion.⁹⁶

⁹¹ See generally FISHER, WAR POWER, *supra* note 62, at 92-113. Very broad powers had been invoked to justify involvement in Southeast Asia. See *id.* at 114-23. John F. Kennedy stated he was acting by executive order, presidential proclamation, and inherent powers, not under any resolution or act of Congress, when he brought the United States to the brink of war with the Soviet Union during the Cuban Missile Crisis. See LAFEBER, AGE, *supra* note 83, at 525.

⁹² See PUSEY, *supra* note 50, at 6. For example, in 1966, the State Department proclaimed wide foreign relations powers that included the legitimate deployment of forces abroad and conduct of military operations under the sole authority of the President. *Id.* "Foggy Bottom" stated blandly that the President held prime responsibility for foreign relations and that such responsibilities carry very broad powers that include the power to deploy and commit forces abroad. *Id.*

⁹³ FISHER, WAR POWER, *supra* note 62, at 115-18. The Resolution allowed the Commander in Chief to, "as the President determines, take all necessary steps, including the use of armed force," to help the Southeast Asian nations in their defense of freedom. Pub. L. No. 88-408, 78 Stat. 384 (Aug. 10, 1964). The range of armed force could only be terminated in two ways: presidential determination or by concurrent resolution of Congress. *Id.*

⁹⁴ See FISHER, WAR POWER, *supra* note 62, at 115-17. The Senate Foreign Relations Committee investigated the incident in 1968 and cast much doubt on the events in the Tonkin Gulf, calling them, at one point in the hearing, based on "unfounded speculation." *The Gulf of Tonkin, The 1964 Incidents, Hearing Before the Senate Foreign Relations Comm.*, 90th Cong., 2d Sess. 54 (1968), reprinted in JOHN GALLOWAY, THE GULF OF TONKIN RESOLUTION 237-406, 320 (1970) [hereinafter *Hearings*].

⁹⁵ See *Hearings*, *supra* note 94, at 52; Speech of Senator Wayne Morse on the Gulf of Tonkin Resolution (Feb. 28, 1968), reprinted in GALLOWAY, *supra* note 94, at 443-55, 450; see generally JOSEPH C. GOULDEN, TRUTH IS THE FIRST CASUALTY: THE GULF OF TONKIN AFFAIR-ILLUSION AND REALITY 181-237 (1969).

⁹⁶ See Thomas F. Eagleton, *Congress: Does It Abdicate Its Power?*, 19 ST. LOUIS U. PUB. L. REV. 1, 3-4 (2000) (discussing the turbulent political atmosphere and the public and congressional interest in the war powers).

D. *The War Powers Resolution of 1973*

1. Development

Upset with the perceived injustice done to the Constitution's separation of powers, several Senators drafted a bill to correct these perceived excesses of the President in Vietnam.⁹⁷ The intent was to frame a statute that would require the President to seek authorization from Congress in situations not involving emergencies requiring

⁹⁷ See S. 2956, 92d Cong. (1971); R. GORDON HOXIE, *COMMAND DECISION AND THE PRESIDENCY: A STUDY IN NATIONAL SECURITY POLICY AND ORGANIZATION* 270 (1977); Eagleton, *supra* note 96, at 2-6. In 1970, U.S. Senator Thomas Eagleton approached Senator Frank Church, a major player on the Foreign Relations Committee from Idaho, about reasserting the congressional role in the war decision-making process. FISHER, *WAR POWER*, *supra* note 62, at 115 (1995); Eagleton, *supra* note 96, at 3. Senator Eagleton went to work drafting such a bill with the help of Senators Jacob Javits and John Stennis. Eagleton, *supra* note 96, at 3. Senator Javits thought it "essential that we devise a national means to prevent other Vietnams [from occurring], and no one has a higher stake in this task than the President of the United States." S. 2956. In his statements on the floor of Congress, Senator Javits argued in the long term and the short:

We live in an age of undeclared war, which has meant Presidential war. Prolonged engagement in undeclared, Presidential war has created a most dangerous imbalance in our constitutional system of checks and balances. That danger now permeates the political climate beyond the immediate issue of the war *per se*.

.....
[The Resolution is] a crucial first step in reestablishing the constitutional balance so essential to the survival and proper functioning of our democratic political system.

Id. at 128-29; see also HOXIE, *supra*, at 270; Eagleton, *supra*, note 96, at 2-6. War power scholars David Gray Adler and Louis Fisher point out,

The War Powers Resolution of 1973 is generally considered the high-water mark of congressional reassertion in national security affairs. In fact, it was ill conceived and badly compromised from the start, replete with tortured ambiguity and self-contradiction. The net result was to legalize a scope for independent presidential power that would have astonished the Framers, who vested the power to initiate hostilities exclusively in Congress. The resolution, however, grants to the president unbridled discretion to go to war as he deems necessary against anyone, anytime, anywhere, for at least ninety days. As Arthur Schlesinger Jr. has observed, before "the passage of the resolution, unilateral presidential war was a matter of usurpation. Now at least for the first ninety days, it was a matter of law."

David Gray Adler & Louis Fisher, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 1 (1998).

immediate attention.⁹⁸ The bill passed the Senate with relative ease, but it emerged from the House with several differences and required compromises in order to produce a passable bill.⁹⁹ President Richard Nixon vetoed Congress' resolution upon passage, labeling it an unconstitutional intrusion into presidential authority and an action that would seriously undermine the Nation's ability to act decisively and convincingly in times of international crisis.¹⁰⁰ President Nixon also vetoed the legislation because he felt it was unconstitutional to use a statute to fix the procedure by which President and Congress share the war powers.¹⁰¹ Congress mustered the two-thirds vote to override his veto, and the bill became law.¹⁰²

In addition to the law's obvious impact on the war powers, the contemporary political benefits to an override were strong.¹⁰³ Some members of Congress feared that a vote to sustain would lend credence to President Nixon's claims of presidential power, while others thought that an override might be a step towards impeaching him.¹⁰⁴ The

⁹⁸ Eagleton, *supra* note 96, at 4. These excepted situations were self-defense, forestallment of an attack, and rescue of American citizens or property. *Id.*

⁹⁹ *Id.* Senator Eagleton read the House bill as stating that, "in war, the President alone knows best." *Id.* Senators Eagleton and Javits even used the term "bastardized" to describe the disservice done to their vision. *Id.* Senator Eagleton even voted against Congress' final version of the bill; he considered it to be "untenable and even unconstitutional in its attempt to give the President the sole power to wage war." *Id.* at 4-5.

¹⁰⁰ *Veto of the War Powers Resolution*, PUB. PAPERS 893-94 (Oct. 24, 1973) [hereinafter *Veto Statement*] (arguing that Congress should be required to act affirmatively and that the Resolution undermines the nation's ability to act decisively and convincingly in a crisis); see also BURNS, *supra* note 50, at 186.

¹⁰¹ *Veto Statement*, *supra* note 100, at 893-94 (arguing that "the only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution"); Adler & Fisher, *supra* note 97, at 2.

¹⁰² War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (2000)).

¹⁰³ See generally FISHER, WAR POWER, *supra* note 62, at 130-31; Adler & Fisher, *supra* note 97, at 2. For example, fifteen Congressmen voted against the House bill and the conference language because it gave the President too much power, yet they voted to override it in part because a nonoverriding vote could be seen as supporting the claims of President Nixon. FISHER, WAR POWER, *supra* note 62, at 130. To some, the law represented "efforts to score some short-term political points at the cost of long-term institutional and constitutional interests." Adler & Fisher, *supra* note 97, at 2.

¹⁰⁴ Adler & Fisher, *supra* note 97, at 2. For example, Representative Bella Abzug, a Democrat from New York, voted against the House bill and the conference version because she rightly saw that they expanded presidential war power. *Id.* Yet, she was vehement in

political atmosphere in which this legislation passed was perhaps the most tumultuous in decades because of the Watergate scandal and the social repercussions of Vietnam.¹⁰⁵

2. The Provisions

As enacted, the War Powers Resolution ("Resolution") has four crucial elements in its construction of the war powers procedure.¹⁰⁶ First,

her support of a veto override stating, "This could be a turning point in the struggle to control an administration that has run amuck. It could accelerate the demand for the impeachment of the President." *Id.*

¹⁰⁵ *Id.* at 4-5. Vice President Spiro Agnew had resigned only two weeks prior to Nixon's veto. *Id.* The Saturday Night Massacre, as it has come to be called, which sent many of the key Watergate players out of the government, occurred just four days before the veto. *Id.* The Saturday Night Massacre was one part of Watergate in which President Nixon dismissed Special Prosecutor Archibald Cox, Attorney General Elliot Richardson, and Deputy Attorney General William French Smith. FISHER, WAR POWER, *supra* note 62, at 130. Despite the pressures of party politics, several House Democrats recognized that the Resolution codified a balance of power not contemplated in the Constitution. Adler & Fisher, *supra* note 97, at 5. Vernon Thomson of Wisconsin had no illusions about the bill: "The clear meaning of the words certainly points to a diminution rather than an enhancement of the role of Congress in the critical decisions whether the country will or will not go to war." *Id.* "Bob Eckhardt of Texas condemned the abdication of congressional power [He stated,] 'the Congress provides the color of authority to the President to exercise a war-making power which I find the Constitution has exclusively assigned to the Congress.'" *Id.* Senator Eagleton, who was a primary sponsor of the Senate's version, which was stronger in that it required the President to pull out the forces after a thirty-day period, denounced the bill that emerged from conference as a "total, complete distortion of the war powers concept." *Id.* As Senator Eagleton so eloquently put it, the War Powers Resolution, after being so nobly conceived, "has been horribly bastardized to the point of being a menace." *Id.* "Rather than encourage congressional participation, the resolution's flaws ensure that presidents will make important decisions by themselves." DENISE M. BOSTDORFF, THE PRESIDENCY AND THE RHETORIC OF FOREIGN CRISIS 141 (1994).

¹⁰⁶ 50 U.S.C. §§ 1541-1548 (2000). The War Powers Resolution, as codified, provides, in pertinent part:

§ 1541. Purpose And Policy

(a) Congressional declaration

It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Congressional legislative power under necessary and proper clause

Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) Presidential executive power as Commander-in-Chief; limitation

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Id. § 1541.

§ 1542. Consultation; initial and regular consultations

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Id. § 1542.

§ 1543. Reporting requirement

(a) written report; time of submission; circumstances necessitating submission; information reported

In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the president shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) Other information reported

The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Periodic reports; semiannual requirement

Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

Id. § 1543.

§ 1544. Congressional action

(a) Transmittal of report and referral to Congressional committees; joint request for convening Congress

Each report submitted pursuant to section 1543(a)(1) of this title shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Termination of use of United States Armed Forces; exceptions; extension period

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the

the Resolution explains that the purpose of the statute was to satisfy the intent of the Framers of the Constitution in questions of the introduction of armed forces into hostilities through a system of collective judgment by the Congress and the President.¹⁰⁷ Further, the President may only introduce armed forces into hostilities pursuant to a declaration of war, specific statutory authorization, or a national emergency caused by an attack upon the United States.¹⁰⁸

Second, the Resolution requires the President "in every possible instance" to consult with Congress before introducing armed forces into hostilities.¹⁰⁹ This consultation is to continue regularly throughout the operation until the armed forces are no longer engaged or have been removed from the theater of operations.¹¹⁰

Third, the President must submit a report to Congress within forty-eight hours of deploying troops absent a congressional declaration of war.¹¹¹ The report must describe the circumstantial necessities, authority, scope, and duration of the hostilities.¹¹² Congress may also request additional information from the President.¹¹³ The President

continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Concurrent resolution for removal by President of United States Armed Forces

Notwithstanding subsection (b) of this subsection, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Id. § 1544. Hereafter, citation to the Resolution is directed to the U.S.C., but common practice uses the Resolution's uncodified section numbering, which is what will be used in the textual references.

¹⁰⁷ *Id.* § 1541(a). Throughout the text, "into hostilities" is shored up with "situations where imminent involvement in hostilities is clearly indicate[d] by the circumstances." *Id.*

¹⁰⁸ *Id.* § 1541(c). For the purposes of the statute, the United States also includes its territories or possessions and the armed forces themselves. *Id.*

¹⁰⁹ *Id.* § 1542.

¹¹⁰ *Id.*

¹¹¹ *Id.* § 1543(a).

¹¹² *Id.*

¹¹³ *Id.* § 1543(b).

must also continue to periodically report to Congress on the status, scope, and duration of the hostile situation.¹¹⁴

Fourth, the Resolution limits the duration of unapproved hostilities to sixty days.¹¹⁵ Approval comes in only four forms: a declaration of war by Congress, specific authorization for that use of the armed forces, a law extending the sixty-day period, or circumstances of an armed attack upon the United States making termination physically impossible.¹¹⁶ However, the sixty-day period could be extended for up to thirty additional days upon the President's determination of unavoidable military necessity respecting the safety of the armed forces.¹¹⁷ In addition, Congress may direct the President to remove armed forces by concurrent resolution.¹¹⁸ Regardless of the Resolution's attempted construction of a fail-safe and proper system, the application and procedures raise constitutional questions.¹¹⁹

III. THE INFIRMITIES OF THE WAR POWERS RESOLUTION

Given almost thirty years of history, the War Powers Resolution has been criticized as a dead letter and a total failure.¹²⁰ Not only has the Resolution been a total failure in fulfilling its stated purposes, but the

¹¹⁴ *Id.* § 1543(c). The President must report no less often than once every six months. *Id.*

¹¹⁵ *Id.* § 1544(b).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 1544(c). However, this provision causes major constitutional issues addressed in *INS v. Chadha*, 462 U.S. 919, 958 (1983) (holding that only joint resolutions or bills can have legal effect). This Note does not address these concerns as it focuses on more fatal errors of construction.

¹¹⁹ See *infra* Part III.

¹²⁰ Eagleton, *supra* note 96, at 5; Yoo, *supra* note 64, at 1674. Former Senator Eagleton, a drafter of the original bill, wrote, "In my judgment, the existing War Powers Resolution is an unworkable mess. All recent presidents insist that warmaking is their decision and their decision alone. Future presidents will undoubtedly take the same approach." Eagleton, *supra* note 96, at 6. Geoffrey S. Corn explains that an "[a]nalysis of the actual operation of the Resolution in relation to these various combat operations reveals a consistent pattern of executive side-stepping, legislative acquiescence, and judicial abstention." Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1152 (2001) (emphasis added).

Resolution also suffers from inherent constitutional failings.¹²¹ This Note argues that these ills result from several factors.

First, the Resolution fails to meet the demands of the Constitution because it designs a new system of war powers inconsistent with principles of separation of powers and accountability.¹²² Second, the Resolution has been a total failure due to its weak construction of enforcement mechanisms.¹²³ Third, the necessities of military command and execution require a more strict and swift system.¹²⁴ This Note further argues that the solution to the Resolution's ills and to the necessities of American civilian-military decision-making is a constitutional amendment.¹²⁵

A. *Constitutional Concerns*

Although the Resolution began with genuine and virtuous aspirations, it created a system of powers inconsistent with the Constitution in several ways. The Resolution sought to rearrange the separation of the powers held by two major institutions of American government in which the third branch of government has remained reticent regarding this breach of constitutional principles.¹²⁶ The Resolution also defies the constitutional value of discourse and accountability by allowing the President to act unilaterally.¹²⁷

1. Separation of Powers and Delegation

The Constitution is the document that established the separation of powers and the structure of the federal government.¹²⁸ The Resolution reconceived one part of the separation of powers through a simple act of

¹²¹ See *supra* text accompanying note 107 for the Resolution's stated purpose. See also *infra* Part III.A.

¹²² See *infra* Part III.A.

¹²³ See *infra* Part III.B.

¹²⁴ See *infra* Part III.C.

¹²⁵ See *infra* Part IV.

¹²⁶ See *supra* Part II.

¹²⁷ See *infra* Part III.A.2.

¹²⁸ See U.S. CONST. art I, § 1 (vesting all legislative powers in Congress); *id.* art II, § 1 (vesting the executive power in the President); *id.* art III, § 1 (vesting the judicial power in the Supreme Court and inferior courts).

Congress.¹²⁹ The reconception was improper because it was inconsistent with principles set forth explicitly in the document and with the principle of delegation of power. On the other hand, a constitutional amendment is appropriate because its subject is the determination of the separation of powers, and it sets the rights and responsibilities of the branches in relation to each other. An amendment would help to solidify the limits and responsibilities of the branches of government in a manner consistent with the Constitution itself.

a. General Constitutional Construction

The Constitution gives to Congress the enumerated power to declare war and to the President the power and responsibility to conduct those operations as Commander in Chief.¹³⁰ The Framers' make/declare debate shows that they wished Congress to hold the power to initiate hostilities.¹³¹ The early courts were also clear that the President's role was the prosecution of war.¹³²

The Resolution allows the President to initiate hostilities in some circumstances, but the Resolution's permission is too broad to be considered a declaration because it does not contemplate an actual situation facing the United States.¹³³ Thus, by granting the President this power, the Resolution rewrites the separation of powers as conceived by the Constitution. Such a rewrite may not be conducted in violation of the principles laid forth in the Constitution because the Supremacy

¹²⁹ See *supra* Part II.D.2.

¹³⁰ See U.S. CONST. art. I, § 8; *id.* art. II, § 2; *supra* Part II.A.

¹³¹ See *supra* notes 27-32 and accompanying text; *supra* Part II.B.

¹³² *United States v. Sweeney*, 157 U.S. 281, 284 (1895). The Court ruled that the Commander-in-Chief Clause granted the President "such supreme and undivided command as would be necessary to the prosecution of a successful war." *Id.* The language here is quite revealing considering the use of the terms *prosecution* and *war*. Prosecution is an activity taken within a situation and not simply the initiation of activity. Instead, war is a pre-existing state within which the President commands the armed forces. See *DICTIONARY* 1996, *supra* note 40, at 2012 (defining "war" as "a state of open, armed, often prolonged conflict carried on between nations, states, or parties").

¹³³ See *BOUVIER*, *supra* note 42 (defining declaration of war as an action taken regarding another nation).

Clause states that federal laws must be made in accordance with the Constitution.¹³⁴

Some commentators, however, argue that the Framers purposely left the war powers in a cloudy, uncertain arrangement.¹³⁵ It is hard to think that the Framers left this great potential for tyranny and abuse to a purely political process without guidance as to how the balance was to be stricken.¹³⁶ Some scholars also argue that the power of the purse was a sufficient check on the President; however, this contention is not valid today.¹³⁷ Congressional implied consent, which is argued to flow from the unused power of the purse, cannot be constitutionally sufficient either, although it may be supported by recent history.¹³⁸ The Supreme Court has only upheld a claim of implied consent in cases involving a proper delegation of power, and the Resolution does not represent a proper delegation.¹³⁹

¹³⁴ See U.S. CONST. art. VI.

¹³⁵ See John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1171 (1999). Professor Yoo points to the lack of explicit language in the Constitution. Yoo, *supra* note 64, at 1688 (arguing that the "Framers did not intend the Constitution to establish a single, correct method for going to war"). Yoo argues that, "if the Framers had intended the Constitution to impose the strict process demanded by most foreign affairs scholars, they would have employed the more detailed mechanisms and language that they used elsewhere." *Id.* Specifically, the make/declare dichotomy meant that the Framers understood broader powers to exist and insisted on limiting Congress' power to only declaration. *Id.* at 1694. Since "engage" is used in article I, section 10, Yoo argues that the Framers would not have used "declare" in section 8. *Id.* at 1690. This argument is set in the context that "declare" only acted to set the international legal status of nations, rather than the commencement of hostilities. *Id.* at 1690-91.

¹³⁶ See *supra* Part II.A. Thomas Jefferson "opposed the right of the Presi[dent] to declare anything future on the qu[estion] shall there or shall there not be war? & that no such thing was intended." THOMAS JEFFERSON, THE ANAS (Nov. 8, 1793), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 95 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹³⁷ See Yoo, *supra* note 64, at 1705; *infra* Part III.C. Yoo argues that a refusal to fund military operations would be a legitimate recourse and ample authority for Congress to check the President. Yoo, *supra* note 64, at 1675.

¹³⁸ Corn, *supra* note 120, at 1167. Major Corn sees congressional inertia and past practices as standing for the principle that Congress' inaction is acquiescence. *Id.* at 1158-62.

¹³⁹ See *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *infra* Part III.A.1.b-c.

b. Improper Delegation of Power

Congress may delegate limited powers that it has been given by the Constitution.¹⁴⁰ The courts have become increasingly willing to uphold delegation against constitutional attack, especially when foreign affairs issues are involved.¹⁴¹ In accordance with the *Star-kist Foods* test for proper delegation of power, Congress must provide (1) an “intelligible principle” for the executive to follow, (2) a specific policy or objective, and (3) limits circumscribing that power.¹⁴² One may argue that the War Powers Resolution fit these requirements fully and represented a proper delegation of power. However, based on the historical and political developments, a closer legal analysis reveals that the Resolution was not a proper delegation.

The War Powers Resolution states a purpose and policy but does not provide any guidance as to when the President may introduce forces into hostilities.¹⁴³ Section 2(a) of the Resolution states the purpose as an effort to “fulfill the intent of the Framers of the Constitution” and “insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”¹⁴⁴ Although the purpose is allegedly to guarantee the collective judgment of both the Congress and the President, the provisions of the War Powers Resolution are very weak.¹⁴⁵

Section 2(b) states that Congress has the power to make all laws necessary and proper for carrying into execution its own powers and all other constitutional powers.¹⁴⁶ However, Congress may not wholly delegate legislative powers.¹⁴⁷ The courts have allowed Congress some

¹⁴⁰ See *supra* notes 53-59 and accompanying text .

¹⁴¹ See *Dames & Moore*, 453 U.S. 654 (upholding the Iranian hostage financial settlement).

¹⁴² See *Star-kist Foods, Inc. v. United States*, 275 F.2d 472 (C.C.P.A 1959); *supra* notes 53-59 and accompanying text.

¹⁴³ See 50 U.S.C. § 1541 (2000). See *supra* note 106 for the language of § 1541.

¹⁴⁴ *Id.* § 1541(a).

¹⁴⁵ See, e.g., *id.* § 1542. This section provides that the President “*in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities.*” *Id.* (emphasis added).

¹⁴⁶ *Id.* § 1541(b).

¹⁴⁷ See *infra* Part III.A.1.c.

leeway in this area, but only where Congress has provided sufficient guidance that the President is not working in a vacuum.

Section 2(c) states that the President may only act pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack upon the United States.¹⁴⁸ This section approaches the sort of guidance that the courts have contemplated; however, this construction relies on specific congressional action in two situations and an attack upon the United States in the third.¹⁴⁹ Given the post-Resolution activities of the President, this paragraph seems to have had no import to the Executive.¹⁵⁰ Thus, through the Resolution's application, presidents have failed to comply with this section by claiming a general unilateral right to take action.

Through these provisions, the Resolution does not create an "intelligible principle" by which the President is guided to decide *whether* to introduce forces. The President has unbridled discretion. In addition, apart from the three specific situations described in section 2(c), the statute lacks a policy for when the President may act. The only prong of the *Star-kist Foods* test that may actually be satisfied by the Resolution is the limit on the power delegated because the President is allowed to act only within certain but broad circumstances. However, the Resolution does not suggest to the President how he or she must make the determination to introduce armed forces into hostilities. A proper delegation of power requires no less.

c. Impossible Delegation of Legislative Power

Nevertheless, Congress generally lacks the constitutional ability to delegate legislative powers.¹⁵¹ Article I of the Constitution makes it clear that all enumerated legislative powers are vested in Congress.¹⁵² In 1892, the Supreme Court recognized the principle that Congress cannot

¹⁴⁸ 50 U.S.C. § 1541(c).

¹⁴⁹ *See id.*

¹⁵⁰ *See infra* notes 173, 177, 185 and accompanying text.

¹⁵¹ *See also supra* note 23.

¹⁵² U.S. CONST. art. 1, § 1.

constitutionally delegate legislative power to the President.¹⁵³ As recently as 1989, the Court reaffirmed that mandate.¹⁵⁴ The war powers are indeed legislative powers and may not be delegated in whole.¹⁵⁵ However, the courts have allowed Congress to delegate purely legislative powers under some circumstances, such as the Federal Sentencing Guidelines, but those delegations involved only a part of the legislative power as Congress merely used the agencies to work out the minute details.¹⁵⁶ This is not the case with the Resolution because Congress neither provided clear guidance nor limited the actual role of the subordinate.

d. The Courts

The courts have been very reserved in foreign affairs matters, but an amendment may make the interpretation of war powers a clear constitutional issue requiring the Supreme Court's analysis. The courts have avoided adjudication of disputes arising under the War Powers Resolution because of the justiciability doctrines of impasse, ripeness, standing, and political question.¹⁵⁷

¹⁵³ *Field v. Clark*, 143 U.S. 649, 692 (1892). “[That] Congress cannot delegate legislative power to the President is . . . universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” *Id.*

¹⁵⁴ *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989). The Court reaffirmed that the nondelegation doctrine is rooted in the separation of powers and that Congress may not generally delegate its legislative power to another branch. *Id.* Congress, the Court held, may seek the assistance of another branch, but the character of the “assistance must be fixed according to common sense and the inherent necessities of the government coordination.” *Id.* at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

¹⁵⁵ See *supra* note 23 and accompanying text.

¹⁵⁶ See, e.g., 28 U.S.C. § 994(a) (2000) (giving the Sentencing Commission the power to create guidelines in accordance with many rules and policies). “Congress, for example, has created a federal Sentencing Commission, giving it the power to create Guidelines that (within the sentencing range set by individual statutes) reflect the host of factors that might be used to determine the actual sentence imposed for each individual crime.” *Apprendi v. New Jersey*, 530 U.S. 466, 560 (2000) (Breyer, J., dissenting).

¹⁵⁷ See generally COX, *supra* note 6, at 347 (discussing the exceedingly difficult invocation of judicial remedies under the Resolution); Recent Case, *D.C. Circuit Holds That Members Of Congress May Not Challenge the President’s Use of Troops in Kosovo*—Campbell v. Clinton, 113 HARV. L. REV. 2134 (2000) [hereinafter *Campbell Challenge*] (discussing in detail the procedural and substantive history behind the challenge).

One case arose when twenty-six members of Congress took their war-power grievances to court in 1999.¹⁵⁸ The suit was promptly dismissed for a lack of standing for two reasons. The President's actions had not invalidated Congress' votes or powers, and the case was essentially a taxpayer suit on behalf of Congress that had not been authorized by that body.¹⁵⁹ Upon appeal, the circuit court affirmed, applying an exception that legislators could only challenge executive action if they had *no* legislative power to prevent or counter it.¹⁶⁰ This analysis, however, burdens Congress too heavily because of the nature of the war powers. That is, the difficult and tumultuous debate the Framers treasured must be struck in a constitutionally satisfying manner, which the Resolution simply does not represent.¹⁶¹ Congress having the power and ability to counter the President is exactly the point of the war powers controversy. The courts could be in the position to help resolve this aged issue, but they have successfully avoided the issue by using nonjusticiability and standing analyses rather than looking to the Constitution for ultimate guidance.¹⁶² The absence of vigorous discourse and discussion is a problem regarding not only court oversight but also the decisions to introduce armed forces into hostilities.

2. Discourse and Accountability

The courts have not yet intervened substantively because of justiciability issues, and the prized problem of difficult deliberation

¹⁵⁸ *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999). The members of Congress sought a declaratory judgment that President Clinton had violated the War Powers Resolution and the war powers under the Constitution through his actions in Kosovo. *Id.* at 34-35.

¹⁵⁹ *Id.* at 45 ("Absent a clear impasse between the executive and legislative branches, resort to the judicial branch is inappropriate."). The court reasoned that Congress' votes had not been invalidated because the members of Congress failed to show that the President contravened clear language supported by a majority. *Id.* at 43-45.

¹⁶⁰ *Campbell v. Clinton*, 203 F.3d 19, 22-24 (D.C. Cir. 2000). For a more in-depth analysis of *Campbell* in relation to standing, see Mark B. Stern, *War Powers Revisited Congress, Standing and the War Powers Act*, 37 STAN. J. INT'L L. 205 (2001).

¹⁶¹ See *supra* notes 24-32 and accompanying text; *supra* Part III.A.1.a.

¹⁶² See *Campbell Challenge*, *supra* note 157, at 2139. "[P]olitical branches' negotiations over the proper separation of powers will suffer from each side's tendency to believe itself unequivocally in the right." *Id.* at 2134.

leaves Congress in a challenging position.¹⁶³ This position, however, is an important element in accountability.¹⁶⁴ Congress' involvement helps to foster the legitimacy and trust in the righteousness (if it's possible) of military actions.¹⁶⁵ It is unsettling to reflect that the Resolution was actually only agreed to by one branch of our tripartite federal government.¹⁶⁶ Also, the division of the pro-executive and pro-legislative factions in the government have been predictably political since 1973, but this appears to be an unavoidable by-product of the American system of government.¹⁶⁷

¹⁶³ See *supra* Part III.A.1.d. It is a *prized* problem because the discourse of our representatives demonstrates, supports, and proves our republic's vitality.

¹⁶⁴ See generally THE FEDERALIST NO. 10 (James Madison) (relating the activities of factions as the healthy and effective means by which just government may be conducted).

¹⁶⁵ See Hutchison, *supra* note 20, at 380 (arguing that Congress being involved helps accountability).

¹⁶⁶ See *supra* Part II.D.1 (pointing out the political atmosphere and process by which the Resolution came about, which involved an override of President Nixon's veto).

¹⁶⁷ See Yoo, *supra* note 64, at 1684. Professor Yoo explains,

[I]t seems that the modern practice of warmaking has freed itself from the partisanship that afflicted earlier struggles over foreign policy. Before the Clinton administration, war power disputes invariably assumed party lines, with Republicans defending executive power and Democrats asserting that all hostilities required legislative authorization. Republicans controlled the executive branch for all but four of the twenty-four years between the presidencies of Johnson and Clinton, while Democrats controlled the majority of the House for that entire period. After President Clinton's two victories in 1992 and 1996, however, Democrats in Congress have lost their fire on the war powers issue. It is astonishing how Democratic congressmen who vociferously attacked aid to El Salvador, escorting oil tankers in the Persian Gulf, or the Grenada, Panama, and Persian Gulf Wars have been so obviously inconsistent toward the Clinton administration. Other Democrats in the executive branch defend presidential war powers with all of the fervor of their Republican predecessors. The only governmental critics of the modern system of war powers—and they seem to be a relatively small group—are Republican congressmen who began service after the 1994 elections, and thus are not bound by earlier statements on war powers under Republican presidents.

Id. It should be noted, however, that the critical Republicans would be naturally critical of the Democratic President. See *id.*

B. *The Resolution's Failings in Implementation*

Possibly the greatest problem with the Resolution is Congress' inability to enforce compliance.¹⁶⁸ The Resolution is essentially toothless.¹⁶⁹ Its cornerstone of express congressional authorization has been virtually meaningless.¹⁷⁰ Lawmakers have asserted that Congress is effectively powerless because the revocation of funding is ineffective once troops are on the ground.¹⁷¹ As such, the application of the Resolution has been disappointing in terms of the Resolution's policies and purposes.¹⁷² Every President since 1973 has initiated some military hostilities.¹⁷³ A recent *Congressional Research Service Report* identified

¹⁶⁸ *Id.* at 1677 ("Presidents have never acknowledged the [War Powers Resolution's] constitutionality, and their recent actions have ignored its terms."). See generally *supra* Part II.D.2 (explaining the requirements of the Resolution on the actions of the President and Congress).

¹⁶⁹ Gerald G. Howard, *Combat In Kosovo: Ignoring The War Powers Resolution*, 38 HOUS. L. REV. 261, 293 (2001). Howard argues that it is "clear that the War Powers Resolution is effectively toothless when the President chooses to ignore it. It must be revised in order to assuage continuing public and political anxiety over the power of the Executive branch to immerse the nation in war." *Id.* But see 50 U.S.C. § 1544(c) (2000) (stating that Congress may direct the President by concurrent resolution to withdraw forces engaged in situations absent the declaration of war or statutory authorization). However, recourse to concurrent resolution may be unusable after *INS v. Chadha*, 462 U.S. 919 (1983). See *supra* note 118 and accompanying text.

¹⁷⁰ Corn, *supra* note 120, at 1152. The Clinton Administration, for example, based its interpretation of the Resolution upon the legal work of Assistant Attorney General Walter Dellinger. Adler & Fisher, *supra* note 97, at 11. Dellinger claimed that the statute "recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces 'into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.'" *Id.* The words chosen by Dellinger, *recognize* and *presuppose*, carry an immodest tone that seems to be in direct conflict with the language of the Resolution itself. See 50 U.S.C. § 1541 (2000) (stating the Resolution's purpose, i.e., to insure that the decision to lead American armed forces into combat would be a shared decision).

¹⁷¹ See Hutchison, *supra* note 20, at 380 (pointing out that the "Congress has few tools to check [a president's] excesses"); *supra* Part III.C.

¹⁷² See Adler & Fisher, *supra* note 97, at 10 (concluding that Congress is being progressively marginalized).

¹⁷³ See *id.* President Ford used military forces as part of the evacuations from Southeast Asia and during the *Mayagüez* incident during which he ordered air strikes and land forces into Cambodia without consulting Congress. FISHER, WAR POWER, *supra* note 62, at 136-38. The *Mayagüez* incident was the first combat operation since the passage of the Resolution and followed the capture of a U.S. merchant ship by Cambodians. HOXIE, *supra* note 97, at 270. President Ford did fulfill the requirement of a written report to Congress within forty-eight hours. *Id.* President Carter used military force in the attempted rescue of hostages in

ninety-two specific instances that have been reported under the Resolution along with a lengthy list of actions taken in hostile or potentially hostile areas abroad.¹⁷⁴ Although section 2(c) creates prerequisites for presidential action, Congress has not responded to violations of the law in any clear form.¹⁷⁵ The consultation requirement has not been enforced either.¹⁷⁶

Interpretation of a collection of congressional actions regarding a particular situation becomes quite unclear when taken together. For example, the 106th Congress' set of bills regarding President Clinton's actions in Kosovo left much to be desired in the way of clear

Iran. FISHER, WAR POWER, *supra* note 62, at 139-40. President Reagan authorized the action in Lebanon, the Grenadine invasion, and Libyan air strikes. *Id.* at 140-44. In fact, the actions in Lebanon led to the first invocation of the War Powers Resolution by Congress because President Reagan sent troops into Lebanon without consulting or reporting. *See id.* at 140; Howard, *supra* note 169, at 277. The Multinational Force in Lebanon Resolution ("MFLR") constituted the specific statutory authorization contemplated in section 2(c) of the Resolution, included very specific end times, and was, on the whole, a very specific authorization of deployment. *See* Pub. L. No. 98-119, 97 Stat. 805 (1983); Howard, *supra* note 169, at 277-78. President Reagan ordered the invasion of Grenada, a Caribbean island, after a coup broke out there only two days after a terrorist act in Lebanon killed 241 American soldiers. *See* FISHER, WAR POWER, *supra* note 62, at 141-42. President Reagan ordered air strikes against Libya following several attacks on U.S. naval aircraft and ships and an act of terrorism in Germany that caused about fifty casualties. *See id.* at 142-44. President Bush used the Resolution in what later became the Gulf War in 1991, and he also was involved with Panama and other Latin American strikes. *See id.* at 144-48; Howard, *supra* note 169, at 278. The Authorization for Use of Military Force Against Iraq Resolution was a much less constrictive authorization than the MFLR authorization eight years earlier. *See* Pub. L. No. 102-1, 105 Stat. 3 (1991). For examples of President Clinton's uses of force, see notes 177-85 and accompanying text.

¹⁷⁴ Richard F. Grimmert, *The War Powers Resolution: After Twenty-Eight Years*, CRS REPORT FOR CONGRESS, CRS WEB 53-69, at <http://fpc.state.gov/documents/organization/7655.pdf> (last visited Sept. 29, 2002).

¹⁷⁵ *See* 50 U.S.C. § 1541(c) (mandating that the President may only act pursuant to a declaration of war, specific statutory authorization, or an attack on the United States). Most responses come in the form of suits such as *Campbell* and perennial bills to repeal the Resolution; both forms of response continue to fail. *See, e.g., Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999); H.R.J. Res. 27, 107th Cong. (2001) (proposing to repeal the Resolution, disallow funding of unauthorized uses of armed forces, and create standing for cases arising under the bill); H.R. Res. 474, 107th Cong. (2001) (proposing to repeal the Resolution).

¹⁷⁶ *See* 50 U.S.C. § 1542 (2000) (stating that the President shall consult with Congress in every possible instance before introducing troops); *supra* note 173 (pointing out several situations in which consultation was neither sought nor received by Congress).

congressional intent.¹⁷⁷ Thirty-six days into Operation Allied Force, the House took up four bills regarding Kosovo.¹⁷⁸ The first, which happened to pass, prohibited Department of Defense expenditures for ground forces in Kosovo without specific congressional authorization.¹⁷⁹ The second contemplated a section 5(c) removal via concurrent resolution, but this effort failed.¹⁸⁰ The third contemplated an actual declaration of war against the Federal Republic of Yugoslavia, but this was also

¹⁷⁷ See Howard, *supra* note 169, at 263-68 (discussing the history and process involved in Kosovo). In connection with other continuing conflicts in the Balkan region, the war in Kosovo became the next hotspot for American forces in the region. See *id.*; Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 9-16 (1999) (discussing the earlier intervention in Bosnia starting in 1995 involving 20,000 U.S. troops). On March 11, 1999, the House of Representatives passed a resolution authorizing the President to deploy forces to be used in peacekeeping once a peace agreement was reached. H.R. Con. Res. 42, 106th Cong., 145 CONG. REC. H1214-15 (1999). However, no such agreement was on the immediate horizon. In fact, on March 23, the Senate passed a simple resolution authorizing air and missile strikes, but the House did not follow suit. S. Con. Res. 21, 106th Cong., 145 CONG. REC. S3110, S3118 (1999); see Howard, *supra* note 169, at 285. The very next day, President Clinton ordered air strikes to begin against Serbian targets in response to continuing atrocities. See Campbell *Challenge*, *supra* note 157, at 2134; Yoo, *supra* note 64, at 1673. The campaign, Operation Allied Force, involved over 20,000 troops. See H.R. Res. 130, 106th Cong., 145 CONG. REC. H1660 (1999); Corn, *supra* note 120, at 1149; Yoo, *supra* note 64, at 1673. On the day the combat began, the House voted on House Resolution 130, which could have authorized combat operations but instead only expressed support for service members. H.R. Res. 130, 106th Cong., 145 CONG. REC. H1660 (1999) ("That the House of Representatives supports the members of the United States Armed Forces who are engaged in military operations against the Federal Republic of Yugoslavia and recognizes their professionalism, dedication, patriotism, and courage."). Next, in an attempt to comply with the third element of the War Powers Resolution, President Clinton submitted a letter to Congress documenting his actions. Letter to Congressional Leaders Reporting on Airstrikes Against the Federal Republic of Yugoslavia, 35 WEEKLY COMP. PRES. DOC. 527, 528 (Mar. 29, 1999). However, the letter was a few days late, and the authority cited was ambiguous. See *id.* President Clinton stated that he took "these actions pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. In doing so, [he took] into account the views and support expressed by the Congress in S. Con. Res. 21 and H. Con. Res. 42." *Id.* However, Resolution 42 was an authorization only for deployment for peacekeeping and not combat. See H.R. Con. Res. 42. The bombing continued through the next round of congressional antics. See Yoo, *supra* note 64, at 1680-82.

¹⁷⁸ See *infra* notes 179-82 and accompanying text.

¹⁷⁹ H.R. 1569, 106th Cong., 145 CONG. REC. H2400 (1999) (passing by a vote of 249 to 180).

¹⁸⁰ H.R. Con. Res. 82, 106th Cong., 145 CONG. REC. H2414 (1999) (failing by a vote of 139 to 290); see *supra* note 118 and accompanying text.

resoundingly defeated.¹⁸¹ Finally, the House took up a Senate bill that had been one of President Clinton's cited authorities since it allowed for air strikes, but the House action failed through a tie.¹⁸² These votes do not create any coherent sense of what the House intended with respect to Kosovo.¹⁸³ There was no declaration of war nor was there any claim of an attack on U.S. personnel or property.¹⁸⁴ The claim that any of the preceding resolutions constituted "specific statutory authorization" also seems unfounded since the closest expression was the Senate Concurrent Resolution 21, which did not even pass in the House.¹⁸⁵

¹⁸¹ H.R.J. Res. 44, 106th Cong., 145 CONG. REC. H2427, H2440 (1999) (failing by a vote of 427 to 2).

¹⁸² S. Con. Res. 21, 106th Cong., 145 CONG. REC. H2441, H2451-52 (1999) (failing by a vote of 213 to 213).

¹⁸³ See S. Con. Res. 21, 106th Cong., 145 CONG. REC. H2456 (1999). Congressman Dave Obey criticized his colleagues:

[T]his Congress could not have been more irresponsible in the way it has dealt with the issue in Kosovo if it had taken lessons.

....

Never, never in the 30 years that I have served here have I seen less vision. Never have I seen less leadership. Never have I seen more confusion. And never have I seen the national interest being left in the dust the way it is tonight.

Id. Making the issue even more muddled, on May 20, 1999, Congress increased the Administration's request for emergency funding for Operation Allied Force, but it did not authorize the war in explicit terms. 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, § 2002, 113 Stat. 57 (1999). The bombing ended on June 10, 1999, a full seventy-nine days after it began, with the entrance of almost 7000 ground troops under the North Atlantic Treaty Organization's flag. Yoo, *supra* note 64, at 1682 (arguing that the Kosovo conflict "highlighted the War Powers Resolution's impotence in constraining presidential decision-making"). In addition, President Clinton did not comply with the sixty-day requirement, and Congress failed to press the issue. Howard, *supra* note 169, at 284.

¹⁸⁴ See Howard, *supra* note 169, at 281-89.

¹⁸⁵ See *supra* notes 177, 179-82 and accompanying text. Several other of President Clinton's actions also raise implications for an impact on the Resolution. For example, in the 1998 strikes against sites in Iraq, the Sudan, and Afghanistan, no one in the Clinton administration or Congress ever mentioned the Resolution or how it might relate to the situation. Adler & Fisher, *supra* note 97, at 5; see Tiefer, *supra* note 177, at 8-9 (discussing the 1998 attacks on Iraq and Bosnia). The Administration did not even distribute a legal analysis to justify the use of armed force. Adler & Fisher, *supra* note 97, at 10. In 1993, President Clinton expanded the number and goals of 28,000 troops in Somalia that had been originally deployed by President Bush for humanitarian reasons. Yoo, *supra* note 64, at 1673. In November 1993, Congress authorized participation in the multinational force although these forces had already been there for a year. See An Act Making

Two discordant and unfitting conclusions result: either Presidents rely upon the Resolution but simply fail to abide by its requirements with impunity, or the Resolution was an unconstitutional delegation of power by Congress. In the former case, the President is not respecting the laws of Congress, which is a violation of constitutional magnitude.¹⁸⁶ In the latter, the Resolution operates contrary to constitutional specifications and must be changed.

C. *The Implications of Modern Warfare*

A third major problem with the Resolution is that the world is a very different place than it was in 1973. The war powers construct needs to be reconfigured for the post-Cold War era.¹⁸⁷ The proliferation and increased power of intergovernmental organizations and supra-national

Appropriations for the Department of Defense for the Fiscal Year Ending September 30, 1994, and for Other Purposes, Pub. L. No. 103-139, § 8151, 107 Stat. 1418 (1993); Howard, *supra* note 169, at 279. Congress also declared policies for Somalian intervention and gave President Clinton a deadline to remove the forces. See An Act to Authorize Appropriations for Fiscal Year 1994 for Military Activities of the Department of Defense, for Military Construction, and for Defense Activities of the Department of Energy, to Prescribe Personnel Strengths for Such Fiscal Year for the Armed Forces, and for Other Purposes, Pub. L. No. 103-160, § 1512, 107 Stat. 1547 (1993). Interestingly, this bill did not become law until after the deadline Congress set had already tolled. *Id.* Nothing ever came of the deadline or Congress' mandates as President Clinton withdrew the forces after political heat and combat casualties began to rise. See Yoo, *supra* note 64, at 1673. U.S. military involvement in Haiti became an even more disappointing display of congressional principles. Howard, *supra* note 169, at 281 (pointing out that Clinton should have withdrawn forces from Haiti in accordance with the Resolution but that Congress chose not to require him to do so, either). In 1994, 16,000 troops were sent into Haiti under the backing of the United Nations to oversee the transition to democracy. Yoo, *supra* note 64, at 1673. The resulting legislation contained specific language supporting the "men and women of the United States Armed Forces in Haiti," admonishing the President for not seeking congressional approval, requesting a list of documents within seven days resembling those required under section 3 of the Resolution, and avoiding the point of whether the language itself constituted congressional approval or disapproval. Joint Resolution Regarding United States Policy Toward Haiti, Pub. L. No. 103-423, 108 Stat 4358 (1994). Mixed signals and ambivalence thereafter became the Congress' *modus operandi*.

¹⁸⁶ See Yoo, *supra* note 64, at 1673. "Aside from getting himself impeached but not removed, [President Clinton's] most noteworthy impact on the Constitution has been in the area of war powers." *Id.*

¹⁸⁷ Tiefer, *supra* note 177, at 3 (arguing that the "war powers theory must catch up with how the [recent conflicts] marked both the emergence of new issues in foreign affairs and bases for military intervention").

groups is only a small aspect of the change.¹⁸⁸ Warfare continues to change; low-intensity conflicts and small-scale conventional wars have become the norm of modern warfare.¹⁸⁹ Speed in decision-making is at a premium because of advancements in communications, intelligence, and warfare technology.¹⁹⁰ Not only have we benefited from two hundred years of presidential-congressional controversies, but the United States is also fighting wars in a much different manner.¹⁹¹ Nevertheless, the Constitution vests the sole and exclusive authority to initiate military hostilities in Congress, regardless of the scope, size, or nature of the conflict.¹⁹² The immediacy of contemporary warfare causes a heightened scrutiny of the war powers too. Failed war powers discussions may, in the end, cost lives and not just waste taxpayers' money as in other realms of governmental debate.¹⁹³

Contrary to some commentators, the power of the purse is not a sufficient check on the President, nor does the funding of the military act

¹⁸⁸ See generally BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1227-28 (1999).

¹⁸⁹ RICHARD A. PRESTON ET AL., MEN IN ARMS: A HISTORY OF WARFARE AND ITS INTER-RELATIONSHIPS WITH WESTERN SOCIETY 331-86 (1991). The epilogue offers a somewhat prophetic synopsis of the world in the 1990s and early twenty-first century:

Low-intensity conflict shows no signs of abating. Indeed, the end of the Cold War seems to have sparked a host of ethnic, regional, religious, and cultural conflicts that have been simmering for decades beneath constraints imposed by empire or by the Cold War itself. . . . The new technology of war places in terrorists' hands weapons far more powerful than ever before. . . . It will be a dangerous world indeed if they continue to view war as their only recourse.

Id. at 392.

¹⁹⁰ *Id.* at 372-73.

¹⁹¹ See *supra* notes 187-90 and accompanying text. On February 19, 1998, when Secretary of State Madeleine Albright spoke at Tennessee State University, she was asked how President Clinton could order military action against Iraq after opposing American intervention in Vietnam. Adler & Fisher, *supra* note 97, at 19-20. She replied, "We are talking about using military force, but we are not talking about a war. That is an important distinction." *Id.*

¹⁹² See *supra* notes 63-68 and accompanying text.

¹⁹³ See Campbell *Challenge*, *supra* note 157, at 2138. This commentary points out that a "failed budget negotiation means that until public pressure resolves an impasse, nonessential government workers will stay home, which wastes money; a failed war powers negotiation means that troops may be unwisely sent into or withdrawn from the theater, which may cost lives." *Id.*

as an implicit consent by Congress.¹⁹⁴ One must account for the military realities involved in refusing to fund on-going military operations. War, at the time of the Framers, was much slower; wars lasted years and involved troop movements and communications that were only as fast as a horse or boat.¹⁹⁵ During that period, Congress' deliberative and ensuing check of de-funding a military operation would not be militarily frustrating because armies took so long to coordinate and move.¹⁹⁶ Thus, such a check could be sufficient and historically based, but time is of the essence in today's world.¹⁹⁷

A constitutional amendment allows the government to realign the powers through a process that respects the Constitution's timelessness because the change would be sought and affected through proper constitutional means.¹⁹⁸

IV. THE WAR POWERS AMENDMENT

A. *Introductory Remarks*

The War Powers Resolution of 1973 is an unconstitutional determination of the war powers.¹⁹⁹ This Part proposes an alternative in the form of a constitutional amendment, the passage of which would

¹⁹⁴ See Yoo, *supra* note 64, at 1699, 1705. Yoo argues that Kosovo was a case in which Congress simply chose, as a political matter, not to refuse to fund the military operations. *Id.* at 1675. A refusal to fund military operations, then, would be a legitimate recourse and ample authority for Congress to check the President. *Id.*

¹⁹⁵ See generally MILLETT & MASLOWSKI, *supra* note 14, at 51-161 (describing the status, conduct, and development of warfare during the American Revolution and the fifty years following).

¹⁹⁶ See *id.*

¹⁹⁷ See *supra* notes 189-90 and accompanying text.

¹⁹⁸ But see David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001). Strauss points out that presidential war powers have been broadened without the use of constitutional amendments. *Id.* at 1471-72. However, this is a purely positivist view and fails to consider the normative ramifications of the shift in the war powers construct.

¹⁹⁹ See *supra* Part III.A. In addition, the Resolution may be unconstitutional because it constrains future Congresses in their means of support for the President. Corn, *supra* note 120, at 1155. The Ninety-third Congress seemed to want to solidify, for the rest of U.S. constitutional history, the means by which the nation goes to war. See *supra* Part II.D. This does not seem to be constitutional itself because it affected such a long-standing and central concern and function of the federal government without proceeding through the Constitution's normal mechanisms for affecting such a broad change or statement.

satisfy both the Constitution's substantive and procedural requirements. The amendment process will encourage discourse because it is protracted, public, intergovernmental, and intragovernmental. Considering the interests in the balance, a devotion to the righteousness of the process and to the justice of the solution requires nothing less.

Surprisingly, most commentators do not suggest a single remedy or solution but only raise questions or possibilities.²⁰⁰ The repeal of the Resolution hardly seems to be a wise solution, at least by itself, because the Resolution at least sets down some guidelines and a return to pre-1973 jurisprudence would open up a chaotic situation in constitutional law.²⁰¹ Serious ends require serious means, and there is no more serious means than a constitutional amendment.²⁰² Simply put, the amendment

²⁰⁰ See FISHER, WAR POWER, *supra* note 62, at 191-94 (suggesting many possible revisions to the War Powers Resolution). Howard has surveyed the options and makes a good case against inaction:

Options for legislative action range from repealing the War Powers Resolution to strengthening its authority. The choice is not clear. What is certain, however, is that failing to resolve the issue could be disastrous the next time we face a national emergency. The political events surrounding the commitment of American forces to combat against the Federal Republic of Yugoslavia is indicative of a fundamental breakdown in the allocation of duties and responsibilities among branches of the federal government. We cannot accept laws that "hog tie" the Commander-in-Chief in fulfilling his duties to provide for the security of the nation while not also firmly charging Congress to act. Similarly, we cannot accept blatant disregard for the law by any branch of the government that may deem compliance inconvenient. Finally, we cannot accept a judiciary that is unwilling to enter the fray when there is a conflict between the executive and legislative branches.

Howard, *supra* note 169, at 293. However, many amendments have been suggested over the years by legislators themselves, but each succumbs to political pressures and fears. See Grimm, *supra* note 174, at 48-52. Grimm summarizes many of the proposals, which range from elimination of specific sections of the Resolution to judicial review. *Id.* A handful of proposals have been similar to the one proposed here, but each lacked the benefit of a streamlined, small body as the primary consultative group. See *id.* at 50-51.

²⁰¹ See Howard, *supra* note 169, at 293. Howard points out that "to simply repeal [the War Powers Resolution] without further action would be to catapult the United States back to the mid-1900s, thus returning the nation to an era that allowed one elected official to disregard hundreds of other elected representatives and embroil the nation in years of unpopular war." *Id.*

²⁰² See CARL VON CLAUSEWITZ, ON WAR 86 (Vom Kriege trans., Michael Howard & Peter Paret eds., Princeton University Press 1984) (1832). "War is no pastime; it is no mere joy in

creates a clear method for the process that will be necessary before introducing U.S. Armed Forces into hostilities.

B. *A Proposed Amendment*²⁰³

WAR POWERS.

SECTION 1. *The President, before introducing armed forces into hostilities abroad, shall obtain the consent of two-thirds of the Congressional War Council.*

(a) *The Congressional War Council.*

(i) *Membership.*

(A) *The Council shall be composed of the President Pro Tempore of the Senate, the Senate Majority Leader, the Senate Minority Leader, the Speaker of the House, the House Majority Leader, and the House Minority Leader.*

(B) *Each Council member may appoint a proxy. Proxies may only be members of the same House of Congress as the member making the appointment. A Council member who wishes to appoint a proxy must do so in writing and must certify such writing to the President and the other Council members at a time prior to the invocation of an action under this section. The original Council member may rescind this appointment using the same method.*

(ii) *The Council's deliberations, meetings, and communications made pursuant to this section are not open to the public or press.*

(iii) *Consent may be manifested in writing, orally, or electronically.*

(b) *If consent has been granted, the President shall immediately call for Congress to assemble.*

(c) *Congressional Action.*

(i) *Congress shall assemble within twenty-four hours for this purpose if not already in session.*

(ii) *Each House of Congress shall take up the question of the armed forces in hostilities to determine the largest extent of the operations and so decide by concurrent resolution. The determination must contemplate the duration, mission, and theater of operations. Congress shall produce a concurrent resolution within forty-eight*

daring and winning, no place for irresponsible enthusiasts. It is a serious means to a serious end." *Id.*

²⁰³ All text in italics and the subsequent commentary are the contribution of the author.

hours and fulfill the requirements of this section. The President must abide by the resolution's determinations.

Commentary

Section 1 sets forth the process of introduction of armed forces into hostilities abroad. By requiring the consent of the key leaders of Congress, several interests are satisfied.²⁰⁴ Congress has a necessary voice in the decision, and a small group has the benefit of fast action.²⁰⁵ A difficulty is the extent of that consent and its impact on the President's actions. Key leaders who would have great authority in their respective Houses of Congress make up the Congressional War Council.²⁰⁶ In order to preserve bicameralism, an equal number of members from each House and the two-thirds majority requirement ensure that both Houses of Congress would be represented in the positive consent. The proxy clause would allow any of these members to appoint a member they feel would be better suited to the position and responsibility. The reality of communications technology today minimizes the threat to national security caused by the delay of contacting six people. The secrecy of the deliberations, meetings, and communications serves only to protect the national security interests of forces involved in the potential action and of American citizens abroad.

²⁰⁴ See Linn, *supra* note 30, at 749.

²⁰⁵ But see FISHER, WAR POWER, *supra* note 62, at 194. Fisher suggests a consultative group of eighteen congressional members to be used in a revised Resolution scheme. *Id.* The eighteen would expand the list proposed here to include the chairperson and ranking members of the following committees: Senate Foreign Relations, House Foreign Affairs, Senate Armed Services, House Armed Services, Senate Intelligence, and House Intelligence. *Id.* The amendment plan above should be preferred to Fisher's suggestion for two reasons: size and function. Although communications and transportation are undoubtedly faster, easier, and more secure than in the past, such an expansion to eighteen defeats the purpose of utilizing a small group because of the speed at which the members can be contacted, advised, implored, and consulted. The function of the Congressional War Council would be to ensure that Congress had affirmative input into the process while respecting the necessities of fast action because its consent would be necessary rather than consultation.

²⁰⁶ See generally Hutchison, *supra* note 20. Senator Hutchison argues that "congressional involvement in foreign affairs is not and should not be a partisan issue [because it is] an institutional issue, critical to the future conduct of principled foreign policy." *Id.* at 380. Certainly, politics is involved in all decisions in Washington, but these powers hold a position that many wish would be conducted apolitically.

Congress would then have the job of debating the issues in session, which is a return to a deliberative system. The assemblage language ensures that this issue is addressed in due time. The largest extent clause does grant Congress some latitude in the restrictions to be placed on the action. The elements of the determination resolution cover the *when* ("duration"); *where* ("theater of operations"); and the *who, what, and why* ("mission"). The *how* is up to the Commander in Chief.

Therefore, section 1 of the Amendment acts to remedy several of the problems with the Resolution. First, the separation of powers problem is disposed of by creating an explicit structure for the war powers through the use of an amendment.²⁰⁷ Second, the mandatory action by Congress encourages discourse and debate.²⁰⁸ Third, the Amendment uses obligatory language at each stage of the process, giving it more teeth than the Resolution.²⁰⁹ Fourth, the seventy-two hour total maximum time comports with the necessities of modern warfare.²¹⁰

SECTION 2. The President shall have the authority to repel an imminent armed attack on the United States, its territories, possessions, and armed forces located abroad. An operation arising under this section must then follow the provisions of section 1(c) once the imminent threat to the United States, its territories, possessions, and armed forces located abroad has been quelled.

Commentary

Section 2 recognizes the President's necessary power as the overseer of the United States and its interests.²¹¹ As such, it reflects section 2(c) of the Resolution.²¹² This section, however, also adds language limiting the scope of defensive actions so that they may not become wholly offensive operations without the consideration of Congress. This section serves to

²⁰⁷ See *supra* Part III.A.1.

²⁰⁸ See *supra* Part III.A.2.

²⁰⁹ See *supra* Part III.B. Compare 50 U.S.C. § 1542 (2000) (requiring the President to consult with Congress "in every possible instance"), with section 1 of the proposed Amendment (requiring that the President "shall obtain . . . consent" before taking action).

²¹⁰ See *supra* Part III.C; see also DoD101: An Introductory Overview of the Department of Defense, U.S. DEP'T OF DEF., at <http://www.defenselink.mil/pubs/dod101/dod101.html> (last visited Sept. 7, 2002) (stating that the U.S. Air Force is now "able to deliver forces anywhere in the world in less than 48 hours").

²¹¹ See *supra* Part II.A.

²¹² See 50 U.S.C. § 1541(c) (2000).

remedy the separation of powers problem by codifying custom and traditional understandings while making the system clear in form.²¹³

SECTION 3. The Congress shall have power to enforce this article by appropriate legislation.

Commentary

Section 3 allows Congress to create mechanisms to expedite consultation, deliberation, and checks within the process. For example, Congress could prohibit the use of funds by the Department of Defense in actions that violate the Amendment.²¹⁴ This section serves to remedy the separation of powers and the implementation problem by explicitly allowing Congress to enforce the article with further legislative mechanisms.

Overall, the proposed War Powers Amendment allows the President to act quickly when necessary and ensures that the deliberative process of our Nation's elected representatives would check those actions. At the core of the war powers debate are the lives of the Nation's sons and daughters and the memories of those who paid the ultimate price for the

²¹³ See *supra* Parts II.B, III.A.1.

²¹⁴ See H.R.J. Res. 27, 107th Cong. (2001). This bill, currently sitting idle in several House committees, proposes a repeal of the Resolution and a strong redrafting of the war powers. See *id.* In pertinent part, the bill reads:

Sec. 4. Deployment of Armed Forces into Hostilities and Other Similar Situations.

(a) Requirement.—Elements of the Armed Forces may be deployed into hostilities outside the United States or into situations where imminent involvement in hostilities outside the United States is clearly indicated by the circumstances only pursuant to (1) a declaration of war under article 1, section 8 of the Constitution, or (2) an attack upon the United States or the territories or possessions of the United States.

(b) Prohibition on Use of Funds.—None of the funds appropriated or otherwise made available to the Department of Defense may be obligated or expended for the deployment of elements of the Armed Forces in contravention of subsection (a).

Id. § 4. The bill also seeks to create standing to challenge presidential orders that violate the re-written war powers. See *id.* § 5. However, under *Lujan v. Defenders of Wildlife*, a concrete injury is required for suits against the government, and such an injury may not be easily shown. 504 U.S. 555 (1992).

freedoms enjoyed by all U.S. citizens.²¹⁵ A great respect to those lives and memories requires more than the War Powers Resolution offers.

V. CONCLUSION

The Framers had a natural distrust of unitary power and sought to diffuse the power amongst several actors for governmental authority and decision-making; the war powers are no different. The design adopted by the Framers was rooted in history, tradition, and American principles of democracy, accountability, and checks and balances. However, times do change, and warfare is certainly no exception. The necessities of time and energy require must faster action than Congress could ever be capable of as a whole. The President must be able to defend the Nation and only be allowed to embroil the armed forces in conflict with some authorization from the governed, as represented by Congress. The War Powers Resolution, conceived in genuine and virtuous aspirations, failed to ensure that the armed forces would have two masters incapable of despotic preeminence. Only a constitutional amendment conceived with the above values can hope to secure the rights of the people with safety and respect.

EPILOGUE

The images of September 11, 2001, will haunt every American for the rest of their lives. On that fateful day, nineteen terrorists working under the guise of the al Qaeda terror network hijacked four commercial airliners, crashing each one of them. Two struck the twin towers of the World Trade Center in New York City, the third struck the United States Department of Defense headquarters of the Pentagon in Arlington, Virginia, and the fourth crashed into a wooded area in Pennsylvania. Estimations in the loss of life total nearly four thousand citizens from more than eighty nations, and the financial costs have been projected in the tens of billions of dollars.

²¹⁵ See Howard, *supra* note 169, at 295. Howard proclaims that a “return to the nebulous processes that allowed the U.S. to become embroiled in the foreign and domestic fiasco that was Vietnam would be a travesty. It is time to agree, document, comply, and move forward—for the sake of the nation.” *Id.*

In the following days, the Bush Administration and the 107th Congress discussed a military response. On September 14, Senate Majority Leader Thomas Daschle introduced Senate Joint Resolution 23, which later became Public Law 107-40.²¹⁶ The bill moved extraordinarily quickly and easily towards enactment.²¹⁷ The President signed the bill into law four days later.²¹⁸ The law authorized the President to use broad military powers:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.²¹⁹

The law also made direct reference to the War Powers Resolution by stating that this resolution would “constitute specific statutory authorization within the meaning of section 5(b)” but would not supercede any requirement of that resolution.²²⁰

On September 20, the President publicly identified Saudi-born Osama bin Laden and his al Qaeda terrorist network as the perpetrators of this “act of war.”²²¹ He further explained that bin Laden was

²¹⁶ Acts Approved by the President, 37 WEEKLY COMP. PRES. DOC. 1355 (Sept. 24, 2001).

²¹⁷ The bill was submitted to the Senate, considered, and agreed to without amendment by a vote of 98-0. Upon submission to the House of Representatives, the bill passed that same day by a vote of 420-1 with ten members not voting. 147 CONG. REC. S9421 (2001) (detailing the vote on S.J. Res. 23 in the Senate). One of the nonvoting members of the Senate was Senator Jesse Helms of South Carolina, who missed the vote because of a “traffic jam” but would have voted for the resolution, which would bring the expressed vote to 99-0. *Id.* 147 CONG. REC. H5683 (2001) (detailing the vote on S.J. Res. 23 in the House). One of the nonvoting members of the House was Representative Thomas E. Petri of Wisconsin, who missed the vote but would have voted for the resolution, which would bring the expressed vote to 421-1. *Id.*

²¹⁸ Acts Approved by the President, 37 WEEKLY COMP. PRES. DOC. 1355 (Sept. 24, 2001).

²¹⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

²²⁰ *Id.*

²²¹ Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1347 (Sept. 20, 2001).

entangled in the country that gave him harbor, Afghanistan, and was especially symbiotically supportive of the Taliban regime that governed most of that nation-state.²²² After issuing an ultimatum to the Taliban regime, President Bush called for hope and vigilance.²²³ On September 24, President Bush reported to Congress that he was ordering additional forces into the Central and Pacific Command areas of operations.²²⁴

The Taliban did not conform to President Bush's ultimatum, and, on October 7, 2001, a military response, later termed Operation Enduring Freedom, began as part of the multi-faceted War on Terrorism.²²⁵ The operations involved more than simply military forces and included diplomatic, humanitarian, financial, investigative, and homeland security means.²²⁶ Two days later, the President again reported to Congress in accordance with the War Powers Resolution and the September 14 resolution.²²⁷ The war continued in Afghanistan and led to the toppling of the Taliban regime and re-institution of civil order. By the State of the Union Address of 2002, liberated Afghanistan had an interim leader, but the battle was not yet over.²²⁸ President Bush sought the elimination of the entire al Qaeda network, which was scattered in

President Bush explained, "Al Qaeda is to terror what the mafia is to crime. But its goal is not making money; its goal is remaking the world—and imposing its radical beliefs on people everywhere." *Id.* at 1348. The President, before Congress, stated that this was the second act of war on American soil in the 136 years since the Civil War. *Id.* at 1347.

²²² *Id.* at 1348.

²²³ See *id.* President Bush demanded the regime hand over the leaders of al Qaeda and close all the terrorist sites. *Id.* This ultimatum stressed that the Taliban must act immediately and cooperate, or "they will share in [the terrorists'] fate." *Id.* The public policy provided that the United States "will pursue nations that provide aid or safe haven to terrorism Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime." *Id.* at 1349.

²²⁴ Letter to Congressional Leaders Reporting on the Deployment of Forces in Response to the Terrorist Attacks of September 11, *id.* 1372 (Sept. 24, 2001).

²²⁵ Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, *id.* 1432, 1432 (Oct. 7, 2001).

²²⁶ Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters, *id.* 1447 (Oct. 9, 2001).

²²⁷ *Id.* at 1448.

²²⁸ Address Before a Joint Session of the Congress on the State of the Union, 38 *id.* 133, 133-34 (Jan. 29, 2002).

the mountains of Afghanistan and throughout the globe.²²⁹ However, the war in Afghanistan was only beginning, as President Bush saw the entire world as a battlefield in the war against terror.²³⁰ He also declared that states, such as Iraq, Iran, and North Korea, constituted an “axis of evil.”²³¹ President Bush pointed out that Iraq had continued its hostile posture toward America and had also continued a support of terror.²³² As the Afghan phase of Operation Enduring Freedom was winding down, the overtures regarding Iraq and Iraqi President Saddam Hussein increased in intensity and frequency. By July of 2002, Congress was holding hearings regarding Iraq.²³³

As a military move against Iraq became more imminent, questions began to arise regarding the legal basis for such an action. White House Counsel Al Gonzalez argued that President Bush could order a military action under three premises: (1) the U.S. Constitution gives the President authority to wage war without explicit authorization from Congress; (2) authorization still exists under the resolutions for the Gulf War in 1991; or (3) reliance on the resolution of September 14, 2001.²³⁴ The resolution of September 14, 2001, does not provide a sound legal basis.²³⁵ However, neither Saddam Hussein nor the nation-state of Iraq have been linked to the al Qaeda network or the events of September 11, although Hussein may be preparing weapons of mass destruction.

²²⁹ *Id.* at 134-35. “America will do what is necessary to ensure our nation’s security.” *Id.* at 135. “If [timid governments] do not act, America will.” *Id.* “September the Eleventh brought out the best in America, and the best in this Congress. And I join the American people in applauding your unity and resolve.” *Id.* President Bush was forceful and assertive: “We’ll be deliberate, yet time is not on our side I will not wait on events while dangers gather. I will not stand by, as peril draws closer and closer.” *Id.*

²³⁰ *Id.* at 134.

²³¹ *Id.* at 135.

²³² *Id.*

²³³ *Senators Urge Bush to Make Case for Iraq War*, at <http://www.cnn.com/2002/US/08/04/us.iraq/index.html> (last visited Mar. 31, 2003) [hereinafter *Senators*].

²³⁴ *Sources: Lawyers Tell Bush He Does Not Need Congress to Attack Iraq*, at <http://www.cnn.com/2002/US/08/26/us.iraq.ap/index.html> (last visited Sept. 7, 2002) [hereinafter *Sources*]. The President’s inability to wage war without Congress hopefully has become clear in the foregoing. The resolutions granting President George H. W. Bush authority to act in Iraq were all in order to achieve implementation of a series of United Nations Security Council Resolutions revolving around Iraq’s invasion of Kuwait and threat of use of weapons of mass destruction. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

²³⁵ See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

In late August and September of 2002, Congress began to seriously assert its role in the war powers process.²³⁶ Several members of Congress were skeptical of any action and urged the use of an approval resolution from Congress before action would be taken.²³⁷ However, some members placed more trust in the President.²³⁸ On September 4, 2002, President Bush invited several members of Congress, including the Speaker of the House, to the White House to discuss the Iraqi dilemma, seeking the approval of Congress to use the American armed forces unilaterally against President Hussein.²³⁹ On October 10, 2002, Congress passed an authorization for the use of force against Iraq.²⁴⁰ Upon almost

²³⁶ In the end, President Bush stated that he intends to consult with Congress because "Congress has an important role to play." Sources, *supra* note 234; see *GOP Debate Over Iraq Heats Up*, at <http://www.cnn.com/2002/ALLPOLITICS/08/25/iraq.debate.ap/index.html> (last visited Sept. 7, 2002) [hereinafter *GOP*] (describing Press Secretary Ari Fleischer as stating that Congress' opinions are always welcome as support for his decisions that have not yet been made).

²³⁷ E.g., *Senators*, *supra* note 233. Senator Arlen Specter of Pennsylvania stated that collecting facts and presenting them to Congress would be critical to the President's efforts. *Id.* Senator Joseph Biden of Delaware, Chairman of the Senate Foreign Relations Committee, believed that there probably would be a war in Iraq. *Id.* Senator Joseph Lieberman of Connecticut wanted the President to seek permission from Congress and wanted to schedule a debate on the topic. *Id.*; see *WH Lawyers: Bush Can Order Iraq Attack*, at <http://www.cnn.com/2002/ALLPOLITICS/08/26/bush.iraq/index.html> (last visited Mar. 31, 2003) (House Minority Leader Richard Gephardt stated that it is imperative that a debate and vote occur).

²³⁸ *GOP*, *supra* note 236 (noting that Congressman Tom DeLay of Texas stated that President Bush had taken the advice of many people in Congress and that the President wanted the input of Congress). Former Senate Minority Leader Trent Lott of Mississippi did not think that there was a constitutional demand that the President come before Congress, but he was confident that President Bush would do so anyway. *Hill Leaders, Bush to Talk Iraq*, at <http://www.cnn.com/2002/ALLPOLITICS/09/03/congress.iraq/index.html> (last visited Mar. 31, 2003). Senator Lott expected that something specific would be asked of Congress before overt action would begin. *Id.*

²³⁹ *Bush Letter: 'America Intends to Lead,'* at <http://cnn.com/2002/ALLPOLITICS/09/04/bush.letter/index.html> (last visited Mar. 31, 2003). At the meeting, President Bush presented a letter stating, in part,

I am in the process of deciding how to proceed. This is an important decision that must be made with great thought and care. Therefore, I welcome and encourage discussion and debate. The Congress will hold hearings on Iraq this month, and I have asked members of my Administration to participate fully.

Id.

²⁴⁰ Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 107-243, 116 Stat. 1497 (2002).

two dozen findings and determinations, Congress resolved that the President must, along with his normal reporting requirement, make his own determinations regarding the necessity of such military action.²⁴¹ On March 18, 2003, President Bush dispatched such a letter to Congress as Operation Iraqi Freedom had begun.²⁴²

Given the months of public debate, the congressional action, and the President's policies and actions, Operation Iraqi Freedom spawned from a process and climate based on the War Powers Resolution. The Resolution's legitimacy may *only* be traced by this sort of practice but still remains constitutionally frail. The constitutional design of the war powers has once again been ignored or, at least, swept asunder.

Andre Miksha*

²⁴¹ See *id.* § 3, 116 Stat. at 1501.

²⁴² Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Iraq, 39 WEEKLY COMP. PRES. DOC. 348 (Mar. 21, 2003); Letter to Congressional Leaders on the Conclusion of Diplomatic Efforts with Regard to Iraq, *id.* 341 (Mar. 18, 2003).

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