

**DECIDING TO USE  
FORCE ABROAD:  
WAR POWERS  
in a System of  
CHECKS AND BALANCES**

*An Initiative of The Constitution Project*

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# PREFACE

As threats to international peace and security continue to evolve in the 21st century, the question of how we should decide to use U.S. military force abroad is becoming increasingly difficult to answer. The Cold War with the Soviet empire has given way to an indefinite war on terrorism, and the nation-state has been replaced by ill-defined international criminal enterprises as the enemy in that war. National self-defense is now said to include pre-emptive or preventive military action against threatening states and enterprises. This evolution of threats and responses has spurred debate in the U.S. and around the world about the legitimate use of American military strength.

Against this backdrop, the Constitution Project, based at Georgetown University's Public Policy Institute, created the War Powers Initiative. The Initiative was charged with analyzing and prescribing how the U.S. government should constitutionally and prudently make the decision to use armed force abroad. The Initiative's operating premise was that if we can clarify and improve *how* the United States decides to use force, then it will more wisely decide *whether* to use force.

The Constitution divides war powers between the legislative and executive branches. Article I, Section 8 assigns to Congress the power to declare war and to raise and fund the armed forces. Article II, Section 2 assigns to the President the role of Commander in Chief. While it is accepted that the President has the power to repel sudden attacks against the United States and its armed forces, agreement ends there. On nearly every occasion on which the U.S. military has been sent into combat over the past few decades,

including our recent engagements in Afghanistan and Iraq, disputes about the proper division of war powers — about the roles of each branch in making the decision for war — have come to the forefront.

Congress tried to settle these disputes by passing the War Powers Resolution in 1973 over President Richard Nixon’s veto. Since then, however, presidents have consistently maintained that parts of the Resolution intrude unconstitutionally on the President’s war powers. Many congressional leaders, on the other hand, have argued that the executive branch has failed to abide either by constitutional limitations on presidential authority or by the provisions of the Resolution. The federal courts have typically declined to referee war powers disputes or decided cases on narrow grounds that shed little light on broad war powers questions.

The Constitution Project formed a bipartisan, blue-ribbon committee of experts in order to address these complex issues, provide guidance to policymakers, and educate the media, students, and the general public about how the United States can constitutionally and prudently decide to use armed force abroad. It is our hope that the consensus recommendations in this report will serve as a useful guide to Congress and the President when our country is next considering military action. Led by two former Members of Congress, Mickey Edwards and David Skaggs, the committee joined war powers scholars with public policy experts who have senior experience in all three branches of government. Not every committee member who endorsed this report necessarily agrees with the phrasing of every statement in it. However, except where specifically noted, they all agree on the principles and general conclusions of the report.

Peter Raven-Hansen, committee member and reporter, and Senior Associate Dean for Academic Affairs and Glen Earl Weston Research Professor of Law at George Washington University Law School, deserves special thanks for his efforts in preparing the report. Our final product would not have been possible without his commitment to our project. We would also like to thank the Ploughshares Fund for its generous support for our Initiative and the Open Society Institute for its general support for the Constitution Project.

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The Constitution Project conducts national, bipartisan public education on controversial constitutional law and governance issues. In addition to the War Powers Initiative, the Project’s current initiatives address the balance between liberty and security after September 11, 2001, the death penalty, judicial independence, the right to counsel, and criminal sentencing.

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THE WAR POWERS INITIATIVE OF THE CONSTITUTION PROJECT

# **SUMMARY OF RECOMMENDATIONS**

1. Congress must perform its constitutional duty to reach a deliberate and transparent collective judgment about initiating the use of force abroad except when force is used for a limited range of defensive purposes.
2. The President must seek advance authorization from Congress for initiating the use of force abroad except when force is used for a limited range of defensive purposes.
3. To obtain the informed collective judgment of Congress on initiating the use of force abroad, the President should supply Congress, when circumstances permit, with timely and complete information about a use of force, and Congress should also use its own investigatory tools to determine the reliability and completeness of the information on which it relies to reach a collective judgment.
4. Congress should authorize initiating use of force abroad only by declaration of war or a specific statute or appropriation, except that it can more generally authorize clandestine counter-terrorist operations that require secrecy and speed provided it states clearly the purposes and scope of the authorization.
5. Although Congress can condition its authorization for the use of force on compliance

with international law or treaty obligations, or consultation with international organizations, it should not and cannot delegate the use-of-force decision to an international body. Authorization by a treaty organization, international body, or international law is not a constitutional substitute for authorization from Congress.

6. Congress should replace the War Powers Resolution with legislation that fairly acknowledges the President’s defensive war powers, omits any arbitrary general time limit on deployments of force, reaffirms the constitutionally-derived clear statement rule for use-of-force bills, and prescribes rules for their privileged and expedited consideration.
7. Congress should update and clarify the almost 200 standby statutory authorities, triggered variously and often ambiguously by “declared war,” “war” alone, “time of war,” or “national emergency,” and it should codify selected laws of war.
8. Congress does not complete its war powers duties by authorizing a use of force abroad. It should also conduct appropriate and regular oversight of the strategic use of force, monitor the “domino” domestic legal effects of the authorization, and, when appropriate, revise or rescind the authorization or standby legal authorities the authorization triggers.
9. To preserve the system of checks and balances of which war powers are part, the federal courts should, in appropriate cases, decide whether authority exists for the use of force abroad.

# INTRODUCTION

*The Congress shall have Power... To declare War, and grant Letters of Marque and Reprisal....[U.S. CONST., art. I, § 8, cl. 11]*

*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....[U.S. CONST., art. II, §. 2, cl. 1]*

The framers of our Constitution guarded against the abuse of power by any branch of the federal government by embedding governmental powers in a system of checks and balances. Constitutional war powers are no exception. The framers gave Congress the power to declare war to ensure that the decision to initiate hostilities would not be made by a single person, but instead collectively by a deliberative and politically accountable judgment of the legislature. They gave the President the Commander in Chief power to ensure that our armed forces would not be commanded in the field by committee and that the Commander in Chief could defend the United States from sudden attacks without delay.

Consequently, congressional authorization is required before the President initiates the use of force abroad except when that force is used defensively: to defend against actual

attack on the United States or its armed forces, to forestall a reasonably imminent attack, to protect or rescue Americans abroad, and, in exceptional circumstances, to defend against urgent and severe threats to the United States when time does not permit obtaining advance congressional authorization. Congress cannot dictate to the President the day-to-day tactics he or she must use in commanding the armed forces, but it can enact statutory limits on the use of force that the President is bound to follow, and it alone provides and pays for the armed forces the President is given to command. Moreover, the framers laid the ground for political accountability for war by requiring the President and Congress to make war powers decisions transparently and deliberately by the Article I legislative process of bicameral approval and presentment to the President.

In short, the decision of the United States to use force abroad, except for a limited range of defensive purposes, requires a collective judgment of the political branches; the conduct of hostilities requires undivided command by the Commander in Chief; and the continuation of hostilities ultimately requires continued appropriation by Congress.

Furthermore, the war power does not trump the Constitution’s protections at home against unreasonable search and seizure or arbitrary detention, freedom of speech, assembly, association, and the press, or rights to due process and fair trial. The war power must be exercised consistently with these limits and protections, although their scope may be affected by a state of war. Both Congress and the courts must stand ready to check any transgression attempted for “reasons of national security.”

Changes in international threats to the national security from 1789 to the present have not dislodged war powers from this carefully wrought system of checks and balances. The evolution of the world order and the emergence of serious threats from terrorists have supplied new labels for the ways in which force is used (i.e., “peace operations,” “police actions,” “counter-terrorist operations”), and, in some cases, new justifications for pre-authorization of its use. But they have not changed the constitutional necessity for some form of congressional authorization for initiating uses of force abroad except when force is used for a limited range of defensive purposes.

Yet the system of checks and balances is not automatic. Checks are not self-executing. James Madison explained our system as one designed to make “ambition” counteract “ambition”<sup>1</sup> – the ambition of the executive to aggregate power with the ambition of Congress to preserve legislative prerogative and the ambition of the courts to interpret the law. The executive’s ambition rarely flags, spurred by every new real and perceived threat. But Congress’s ambition has sometimes wavered since the Vietnam War.

Although Congress has authorized the use of force abroad, it has also sometimes failed to insist on a collective judgment about initiating force abroad, either because it tries to evade political accountability for a decision on war or because it defers to the presumed superior competency of the executive to make that decision. When national security decisions are said to rest on secret information not widely shared with Congress, the temptation to defer to the President only increases. Furthermore, the courts' ambition, too, has flagged, as they have invoked amorphous procedural doctrines to avoid war powers or national security questions properly presented to them. Just as Congress's wavering ambition to exercise its war powers has often left the decision to use force to the President, so the courts' doctrines of avoidance have left the interpretation of war powers to the President as well.

The resulting erosion of checks and balances for war powers is neither steady nor complete. Since the Vietnam War, Congress performed its constitutionally assigned role in authorizing Operation Desert Storm against Iraq in 1991, and military force against the perpetrators of the 9/11 attacks and their protectors in 2001. Congress also authorized war against Iraq in 2002. Even in these cases, however, presidents asserted that they did not need Congress's authorization, in effect denying that this check applies. More frequently since the Vietnam War – Grenada in 1983, Panama in 1989, Haiti in 1994, Kosovo and the Federal Republic of Yugoslavia in 1999 – Congress has evaded its constitutional duty to express clearly its decision about the use of force, and the courts stood aside, leaving the field to the President. Furthermore, confounding the intentions of its sponsors, the 1973 War Powers Resolution contributed to this erosion of the system for war powers insofar as it has been understood to give both political branches a “free pass”: the President to use force for sixty days without prior congressional authorization, and Congress to assume that it could discharge its constitutional duty by doing nothing.

The War Powers Initiative of the Constitution Project was convened to study how the United States should constitutionally and prudently make the decision to initiate the use of force abroad. (We did not discuss whether the United States should have used force in particular cases.) In this report, we make recommendations for improving war powers decision-making and explain the problems that prompted them. After briefly describing changing national security threats, we explore the constitutional role of each branch in the exercise of war powers, as well as the roles of international organizations and international law. We do not try to restate the constitutional law so much as to identify what we – or a majority of us – believe to be the baseline principles of war powers. We then explore questions about the form of congressional authorization of the use of force abroad and its legal effect at home. We next consider how and why the War Powers Resolution has

contributed to the erosion of the system of checks and balances in which war powers must be exercised. Finally, we close with recommendations for how the United States should decide to initiate the use of force abroad.

We did not all agree on each of the conclusions reached in this report. A substantial majority believes that the Constitution requires congressional authorization to initiate the use of force abroad except when force is used for a limited range of defense purposes. The dissenter believes that the President has constitutional authority to initiate the use of force abroad without such authorization whenever the President, in his or her sole judgment, thinks it necessary to defend against a threat to national security. We have, therefore, in some places tried to present both the majority and the dissenting views, and the dissenter has appended his separate views.

But we all agree on this: deciding on war in the 21st century requires no constitutional amendments and no new comprehensive War Powers Resolution (though we recommend what we think would be useful replacement legislation). Deciding on war constitutionally and prudently requires chiefly that Congress consistently perform its constitutional duty to decide whether to initiate the use of force abroad. If Congress does its duty, we all believe that the President will have ample reason to work with it to achieve a political consensus for the use of force, and the courts will have little war powers business outside their traditional and appropriate role of protecting civil and property rights affected by the exercise of war powers.



# CHANGING NATIONAL SECURITY THREATS

The focus of threats to our national security has shifted since 1789 from threats posed by foreign states, foreign invasion, and insurrection to threats posed by international terrorist organizations, the proliferation of weapons of mass destruction, and the collapse of government and order in failed states.

## 1. The Original Threats

When they wrote the Constitution, the framers were chiefly focused on the threats posed by European states (especially Great Britain, France, and Spain), domestic insurrection, and Native Americans. They had, of course, just fought a lengthy war with Great Britain and still looked uneasily at French military outposts to their west, English outposts to the north, and Spanish outposts to the south. When the framers gave Congress the authority to Declare War and to grant Letters of Marque and Reprisal to privateers who could augment public armed forces,<sup>2</sup> they envisioned chiefly war and reprisal against foreign states. But insecure in the authority and the strength of the new federal government they had created, they also provided for calling out the militia to suppress insurrections and to repel hostile attacks by Native Americans along the infant country's vast borders.<sup>3</sup>

## 2. Threats in the Nineteenth and Early Twentieth Centuries

Foreign states continued to pose the greatest threat to our national security throughout the 19th and early 20th centuries. The first war fought by the United States was the undeclared but congressionally authorized Naval War with France in 1798. The first declared war was against Great Britain in 1812. We declared war against Mexico and Spain before the end of the century, and then in 1917 against Germany and Austria-Hungary, which brought us into World War I. The threat of insurrection also materialized on a small scale in the Whiskey Rebellion of 1794 and then on a large scale in the Civil War in 1861.

In sheer numbers, however, the 19th century was dominated by lesser threats from pirates, smugglers, bandits, and other non-state actors. The framers had anticipated the threat from piracy by expressly giving Congress authority to define and punish piracies and other offenses against the law of nations.<sup>4</sup> Congress quickly enacted ten statutes authorizing Presidents Jefferson and Madison to use force against the Barbary pirates, before enacting general legislation authorizing presidents to use naval forces to suppress pirates.<sup>5</sup> As the century wore on, the breakdown of law and order in foreign states also increasingly posed threats to American diplomatic missions and private citizens. Presidents often acted unilaterally to respond to these threats by ordering the rescue and protection of Americans abroad when foreign governments could not or would not. In the early 20th century, Presidents also invoked the resulting claim of “protective intervention” to intervene on behalf of U.S. commercial and financial interests in Central and South America and the Caribbean.

## 3. Threats After World War II

After the formally-declared war against foreign states in World War II, the establishment of the United Nations and the North Atlantic Treaty Organization led to a change both in the characterization of international threats and the mechanism for responding to them. Although the Cold War was dominated by conventional foreign state threats posed by the Soviet Union and Warsaw Pact countries, new threats to “international [or regional] peace and stability” arose that indirectly affected U.S. interests.

Just as the threats were now often “internationalized” — that is, directed at international, not just national, security — so, too, was the President’s claim of authority. In Korea, an American President responded for the first time in our history with massive and sustained armed force to a threat posed by a foreign state without seeking a declaration of war or specific authorization from Congress. Instead, some proponents of the use

of force in Korea cited authorization from the United Nations Security Council. In 1990, some proponents of Operation Desert Storm cited similar authorization for the President to send almost 500,000 U.S. troops to oust Iraq from Kuwait before he obtained congressional authorizations. In 1999, President Clinton ordered U.S. airplanes to join “in coalition with our NATO allies” in launching air strikes on the Federal Republic of Yugoslavia without prior congressional authorization after they had been ordered by the NATO Secretary General.<sup>6</sup> In these cases, an asserted justification of the use of force abroad was that it was authorized by an international organization or by international law to enforce international peace and security.

#### 4. Current Threats

Over the last two decades the threat of international terrorism has come to dominate the national security debate. In the 1980s, this was seen as a new form of the old threat posed by foreign states, because most acts of international terrorism appeared to be state-sponsored. In 1986, Libya sponsored a terrorist bombing that took the life of a U.S. serviceman, and President Reagan retaliated with an air strike. The 1993 attack on the World Trade Center, the 1998 attacks on U.S. embassies in Africa, the 2000 attack on the *U.S.S. Cole*, and finally, the 9/11 attacks, signaled a qualitative change in the terrorist threat from state-sponsored terrorism to terrorism by non-state actors operating largely out of safe havens in failed states — states in which there is no central authority capable of maintaining order. Although foreign states still present threats as sanctuaries or hosts for such terrorists (Afghanistan), or, in some cases in their own right as actual or aspiring nuclear powers (North Korea and Iran), the continuing threat of terrorist attacks by international criminal groups with varying degrees of state support, training, or protection, holds first place among national security threats to the United States now and for the foreseeable future. The possibility that terrorists will acquire and deploy weapons of mass destruction to attack U.S. targets heightens the threat.

The changing threats to our national security, however, have not changed the allocation of constitutional war powers. While new threats may change the kind of force that is authorized, the identity of the enemy, or the optimal form of authorization, they require no change in the principles by which our government should decide whether to initiate the use of force abroad. The system of checks and balances is no less necessary today for the constitutional exercise of war powers than it was in 1789, as we discuss next.



# **THE CONSTITUTIONAL UNDERSTANDING: WAR POWERS IN THE SYSTEM OF CHECKS AND BALANCES**

The Constitution provides four major checks on the exercise of war powers: collective judgment, spending limitations, unitary civilian command, and judicial review. The decision to use armed force abroad, except for a limited range of defensive purposes, must be made in advance by the collective judgment of Congress and the President in order to promote deliberation, political consensus, and political accountability for the use of force. Congress at all times controls the power of the purse, which it can use to terminate a use of force, conditioned only by the Commander in Chief's inherent authority to remove our troops safely. As this condition illustrates, Congress's war power cannot intrude on the Commander in Chief's tactical command of the day-to-day operations of the armed forces. Finally, the courts are available to decide the question of authority for use of force, both incidentally to deciding the legal effects of war and uses of force on civil and property rights, and directly when there is no reasonable prospect that further action by either or both of the political branches would avoid the question. The following discussion explores these checks by examining the constitutional role of each branch in turn, as well as the roles of international organizations and international law in the operation of our war powers.

## 1. The Congress’s Constitutional Role in War Powers

**Collective Judgment** – The framers shared the view that an absolute monarch would be prone to squandering his subjects’ lives and money on reckless military adventures. “Absolute monarchs,” John Jay wrote in *The Federalist Papers*, “will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”<sup>7</sup>

The best precaution against unilateral war-making by the executive was to require a collective decision to go to war. “It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large,” James Wilson later explained to the Pennsylvania ratifying convention.<sup>8</sup> Moreover, vesting this power in the whole Congress meant that the popularly-elected House, the body most directly responsive to the voters, had to act and so helped to assure the widest possible political consensus for war. The Senate — originally chosen by state legislatures — could not alone provide this assurance. Since the people could not be asked directly whether the nation should go to war, requiring the assent of the House as well as the Senate was the next best thing. If presidents bent on war could not persuade the Congress, they presumably could not persuade the people either and would therefore lack the consensus required to assume the costs and risks of war.

In short, the framers insisted on a collective judgment for war because it was likely that a collective judgment would be superior to an individual judgment, would help assure that the United States would not go to war without a political consensus, and, by requiring a President to persuade Congress, would effectively make him or her explain why war was necessary to the public who would ultimately bear its cost. These reasons for insisting on a collective judgment for war are still valid today.

**“Declaring War” by Words or Action** – For the foregoing reasons, the Constitution assigns to the full Congress the power “[t]o declare War [and] grant Letters of Marque and Reprisal.”<sup>9</sup> According to international law in 1789, a state could declare war *either* by “word or action,” as the influential political theorist John Locke put it.<sup>10</sup> A state publicly announced the state of war “by word” by making a formal declaration of war and delivering it to the enemy. A state initiated a state of war “by action” simply by committing an act of war.

Congress is thus empowered to formally declare war, as it has eleven times in five conflicts

(it declared war individually on several foreign states in each world war) with bicameral approval and presentment of the declaration to the President for his signature.<sup>11</sup> Although Congress, as a legislative body, cannot itself also commit an act of war, it can authorize the President to act instead. The assignment of the Declaration power to Congress thus gives it not only the power to announce a state of war by formal declaration, but also to pass legislation authorizing the President to initiate war by using force.<sup>12</sup> Furthermore, the Constitution also vests in Congress the authority to grant Letters of Marque and Reprisal to privateers to use force or to seize enemy property in retaliation for an injury to the United States. The Constitution therefore assigns Congress control over a wide spectrum of force — not only the decision for what the framers called “perfect war,” pitting all the nation’s resources and armed forces against an enemy state, but also the decision to commit lesser acts of war as well as acts of reprisal.

While a substantial majority of the War Powers Initiative believe that this authority is exclusively legislative, the dissenter views it as at most concurrent. By the dissenting view, while Congress *can* authorize war by declaration or legislation, its authorization is not necessary for the President to use force against what he or she views as a threat to the vital national security interests of the United States, regardless of how large or long-lasting the use of force and regardless of how much time there is to seek congressional authorization. As Commander in Chief and sole organ for foreign affairs,<sup>13</sup> presidents have the constitutional authority to identify and respond to such threats, using such force as they deem necessary. Under the dissenting view, the declaration of war clause was intended to require Congress’s consent to certain acts — declaring war or legalizing captures — that had legal implications such as changing the rights of neutrals or the relationships between states; “declare” was not a code word for requiring Congress’s authorization for all uses of force. The framers, after all, voted to change the proposed constitutional text vesting war power in Congress from “make War” to “declare War,”<sup>14</sup> thus reducing the authority of Congress by authorizing the President to defend against sudden attacks without its consent. [James Madison’s notes of the debate on the Declaration Clause in the Constitutional Convention are appended as Appendix A.] By the dissenting view, presidents did not need congressional authorization for the wars against Iraq in 1991 and 2003, even though time permitted seeking such authorization, or for the use of military force in Afghanistan in 2001, because in these cases they were responding to what they considered to be threats to our vital national security interests. By contrast, under the dissenting view, President Clinton did need congressional authorization for the air campaign against the Federal Republic of Yugoslavia (FRY) in 1999, because he had not made the case that the FRY threatened a vital national security interest of the United States.

The majority of the War Powers Initiative believes that the dissenter's theory of constitutional war powers is inconsistent with the framers' contemporary usage and understanding of "declare war," the system of checks and balances in which war powers must be exercised, and historical practice up until the Korean War. The dissenter's theory would allow precisely what the framers tried to guard against: a single person making the life-or-death decision to use force on a massive and sustained scale even when there has been no attack on us and there is ample time for a collective, deliberative, and accountable decision by the legislature. The dissenter's differentiation of cases adds an additional reason for rejecting his view. President Clinton justified the air campaign against the FRY as essential to preserving the credibility of NATO, "the cornerstone on which our security has rested for 50 years," and to preventing "key U.S. allies [from being] drawn into a wider conflict, a war we would be forced to confront later, only at far greater risk and greater cost."<sup>15</sup> While one can disagree with President Clinton's assessment of the threat to our national security posed by the war in the Balkans, there is no standard for deciding between the President's assessment and the dissenter's contrary assessment, and therefore no basis under the dissenting view for determining when the President's unilateral use of force is authorized. That is why, the majority believes, that the Constitution entrusts the threat assessment in deciding to initiate the use of force abroad to the collective judgment of the political branches, on the premise that, absent any agreed standard, the many are more likely to get it right than just one. The dissenting view rejects the premise and entrusts the threat assessment and resulting decision on force entirely to a single person (unless, apparently, the President's threat assessment is wrong by some subjective and undefined standard).

While the Constitution does not prescribe the form of congressional approval for the use of force abroad, it does require Congress to enact the approval either by formal declaration or statute. The desirability of deliberation, political consensus, and political accountability also suggests that authorization for the use of force should be as specific as a formal declaration. In other words, to achieve the purposes of the Declaration Clause, an authorization must be clear and explicit; authorization by general implication does not achieve these purposes. Joint resolutions or other statutes expressly authorizing the use of force ("use-of-force" statutes) and appropriations specifically earmarked for the use of force meet this standard. General appropriations for military personnel or munitions, or collateral legislation dealing with the draft, military pay, or military procurement often will not, depending on their wording, timing, and legislative history. Congressional actions that do not satisfy the Article I requirements for the enactment of law (bicameral approval and presentment to the President), such as simple or concurrent resolutions (but not joint resolutions), cannot change legal rights and duties outside the legislative



branch, according to the Supreme Court.<sup>16</sup> They cannot therefore operate in place of formal declarations or use-of-force statutes to satisfy the Declaration Clause either.

The dissenting member of the War Powers Initiative agrees that the principles in the foregoing paragraph are prudent, but not that they are constitutionally mandated. Because the President does not need advance congressional authorization to protect vital national security interests in the first place, under the dissenting view, it does not matter what form Congress chooses to express its constitutionally unnecessary, albeit politically desirable, concurrence. The dissenter therefore treats formal declarations, specific use-of-force statutes, and lesser forms of congressional action – including simple and concurrent resolutions – as constitutionally (if not always prudentially) equivalent for purposes of expressing Congress’s view about the President’s decision to use force to protect vital national interests.

The majority of the War Powers Initiative rejects the dissenting view as inconsistent with the purpose of the Declare War Clause, Article I’s process for making law affecting duties and relations outside the legislative branch, and the fundamental constitutional and democratic premises of accountability and transparency. All members of the War Powers Initiative agree that a clear statement rule of authorization is prudent. The majority also believes that the clear statement rule serves the constitutional purposes of legislative deliberation and political accountability in decisions to initiate the use of force abroad and is therefore a logical corollary of the Declare War Clause, fairly construed, and Article I in which it appears.

The country’s first war — the Naval War (or “Quasi-War”) with France from 1798 to 1800 — illustrates several of the foregoing principles of war authorization. Uneasy about going to war with an erstwhile ally and world-class military power that was still popular with large segments of the population, President John Adams approached Congress cautiously for limited authority to defend against French attacks on American shipping. After lengthy debate on the merits, Congress first passed a statute simply authorizing defensive measures off the coast. When these proved insufficient, and “the temper of the people rose...in resentment of accumulated wrongs,”<sup>17</sup> Congress escalated gradually by enacting a statute authorizing the President to seize armed French vessels on the high seas. As a result, the country was “now in a state of war,” as Rep. Edward Livingston (D-N.Y.) said during debates in 1798; “... let no man flatter himself that the vote which he has given [for the use-of-force statute] is not a declaration of war.”<sup>18</sup> Though war was never formally declared, the Supreme Court later unanimously found that Congress had lawfully authorized a limited (“imperfect”) naval war.<sup>19</sup>

***The Appropriations Power*** – The Naval War with France also highlighted another of

Congress's war powers, because Congress had to enact appropriations for naval vessels needed for the effort. The authority "to raise and support Armies" and "to provide and maintain a Navy"<sup>20</sup> gives Congress a powerful check on war and the use of force, by giving it sole authority to finance the armed forces and munitions needed to conduct war. As Nathaniel Gorham stressed at the Philadelphia Convention, by these provisions, "the means of carrying on the war would not be in the hands of the President, but of the Legislature."<sup>21</sup> To the same effect, Thomas Jefferson wrote, "We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."<sup>22</sup> The appropriation power not only augmented the prior check of advance authorization by Congress, it also provided a subsequent check by enabling Congress to stop the use of force by cutting off its funding. Today, that check is augmented by the Anti-Deficiency Act<sup>23</sup> which prohibits an expenditure or obligation of funds not appropriated by Congress and by legislation that criminalizes violations of the Act.<sup>24</sup>

***Limits on the Congressional War Power*** – The congressional war power is not unlimited. It is always subject to other provisions of the Constitution, and cannot, for example, be used to deny rights guaranteed by the Bill of Rights. It cannot be used to assume day-to-day tactical command of the armed forces, which would violate Article II's designation of the President as the Commander in Chief of the armed forces. Furthermore, the congressional war power is also affected by practical and political limits: limits on the information available to Congress in making a decision to use force, limits on the time for deliberation, and limits on the political feasibility of cutting off funds for U.S. troops in the field. Finally, the creation of a huge military capability — ironically the standing army that most of the framers and the members of the First Congress so stoutly resisted — has left the appropriations power as largely an ex post control on the President.

## **2. The President's Constitutional Role in War Powers**

***Tactical Command*** – The core of the President's war power is summarized in a single sentence: he "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...."<sup>25</sup> The framers had experienced the dangerous inefficiencies of command by committee during the early years of the Revolutionary War. "The Congress are not a fit Body to act as a Council of war," Samuel Chase wrote. "They are too large, too slow, and their Resolutions can never be kept secret."<sup>26</sup>

The lesson was clear: a legislative body could declare war, but not make it. Accordingly, the framers voted to change the proposed constitutional text vesting war power in Congress from “make War” to “declare War.”<sup>27</sup> Only a commander in chief could make the expeditious and coordinated tactical decisions necessary to “make war” successfully. At the same time, only a civilian commander in chief could assure the civil supremacy and political accountability which the framers hoped would differentiate the American war power from that exercised by monarchs and military despots.

The Commander in Chief Clause therefore impliedly assigns to the President the power to conduct war. The President, not Congress, makes all day-to-day tactical decisions in the combat deployment of armed forces. Indeed, even when it ends a use of force by cutting off funds, Congress cannot constitutionally interfere with the Commander in Chief’s tactical decisions for the safe withdrawal of the armed forces. But as powerful as the command authority is, the framers still intended that the Commander in Chief “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy...,” as Alexander Hamilton explained in the *Federalist Papers*.<sup>28</sup> By making the President the Commander in Chief in Article II, the framers addressed what they recognized as a defect in the conduct of the Revolutionary War. They did not compromise their insistence in Article I on collective judgment in the decision for war.

Nor did they give the Commander in Chief any constitutional right to ignore the terms of a congressional authorization for the use of force. When Congress gives the President the authority to conduct war, he or she must conduct it within that authority, just as the President must follow any law that is constitutionally made. As Justice Paterson said in a case construing the statutory authority for the country’s first war against a foreign state, “[a]s far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations.”<sup>29</sup> A year later, Chief Justice John Marshall underscored the point in another case arising out of that war: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.”<sup>30</sup> In fact, in the war with France, Congress limited both the kind of force the President could use (the navy only) and the areas where he could use it (our coastal waters, at first, and then the high seas). When a presidential order to the Navy later exceeded the statutory limitations, the Supreme Court unanimously found that the statute controlled.<sup>31</sup>

***Defensive War Powers*** – At the same time, the framers knew that the decision for war is not always ours to make. When foreign states make war against us, the President is

empowered as Commander in Chief to fight it. He must defend, with force if necessary. Indeed, James Madison’s notes of the debate accompanying the change from “make” to “declare War” explained that this would “leav[e] to the Executive the power to repel sudden attacks,”<sup>32</sup> a power that, in any case, may be implied by his oath to “preserve, protect, and defend the Constitution of the United States.”<sup>33</sup> As Commander in Chief, the President must decide what force is necessary to respond to actual attack.<sup>34</sup>

Historical practice and logic have given meaning to the defensive war power to “repel sudden attacks,” inferred from the Commander in Chief clause.<sup>35</sup> In addition to repelling attacks, this power extends arguably also to *imminent* attack when there is no time, as a practical matter, for Congress to decide. In addition, Congress has historically acquiesced in the President’s use of limited force abroad, without specific prior congressional authorization, to protect and rescue Americans when local authorities cannot or will not protect them. The power of “protective intervention” can be viewed as part of the constitutional common law demarcating the President’s defensive war power,<sup>36</sup> although Congress has also legislated to regulate the power to rescue hostages.<sup>37</sup>

The modern overlapping threats of terrorism and the proliferation of weapons of mass destruction (WMD) pose a challenge to our understanding of constitutional war powers because of the nature and sources of these threats. Terrorist attacks usually are launched without warning when it is too late to defend against the actual attack, are intended to produce civilian casualties, and are carried out remotely or by suicide attackers, leaving no identifiable targets for retaliation in either case. The 9/11 attacks demonstrate that even without WMD, terrorists can inflict mass civilian casualties. With WMD, of course, the magnitude of an attack can be even larger. If the source of the attacks or WMD is a traditional functioning state, the state may be vulnerable to traditional diplomatic, economic, and military deterrence and pressure. If the source is a failed or pathological (“rogue”) state, however, such deterrence — indeed, even nuclear deterrence — may be less effective. If the source is an international terrorist group such as al Qaeda, or one of its decentralized offshoots, traditional deterrence will fail. When traditional diplomatic, economic, and military deterrence is ineffective, the United States must be proactive, and its best strategy may be to strike first in self-defense.

Proactive counter-terrorist measures range from intelligence collection, covert operations, and clandestine operations, to open military operations. Ordinary counter-terrorist intelligence collection is supported both by the President’s inherent foreign affairs powers and by statutory authorization. Covert operations, aimed at influencing “conditions abroad, where it is intended that the role of the United States Government

will not be apparent or acknowledged publicly,”<sup>38</sup> may involve the use of force against terrorists or their supporters. They are presently conducted under a statutory regime that impliedly authorizes them, subject to statutory requirements for written presidential findings and reports to the congressional intelligence committees.<sup>39</sup> Clandestine military operations are secret military operations that are not intended to be plausibly deniable and therefore arguably fall outside this statutory regime. Sometimes characterized as “preparing the battlefield,” they have traditionally been ancillary to or preparatory for open military operations (the Department of Defense has explained that the “focus of [clandestine] activity is primarily in support of military operations, planned or undertaken, or their aftermath”).<sup>40</sup>

If such open military operations are constitutionally authorized, either by statute or under the President’s defensive war power, then so is any clandestine operation that is ancillary to or preparatory for them. Any clandestine deployment of Special Operations forces in Afghanistan in 2001 or in Iraq in 2002 preparatory to military operations, for example, would have been authorized, respectively, by the 2001 and 2002 use-of-force resolutions by Congress. The 2001 joint resolution, however, authorized force only against persons, groups, or states that had participated in or aided the 9/11 attackers.<sup>41</sup> Clandestine operations against other terrorists are not authorized by this resolution. Nor do such clandestine operations fit comfortably under the traditional label, “preparing the battlefield.” First, such operations are not “preparing the battlefield” for future military operations; they are an end in themselves. A targeted killing of a suspected terrorist leader by a Predator missile does not “prepare” any battlefield, nor is it accurately described as somehow ancillary to a war on terrorism. It is at the military heart of that war. Second, clandestine operations need not occur on a “battlefield” as the term has traditionally been understood. In the global war on terror, neither clandestine nor open counter-terrorist operations have any clear geographic or, for that matter, temporal limits.

To the extent that even a clandestine operation without statutory authorization directs armed force at a specific imminent terrorist threat, all members of the War Powers Initiative agree that it falls within the President’s defensive war power. Absent a specific imminent terrorist threat, on the other hand, a majority of the War Powers Initiative conclude that a clandestine operation that uses armed force against a foreign target may constitute a use of force on such a scale that it requires prior congressional approval under our Constitution. Although there is no bright line for determining which clandestine operations fall on this end of the spectrum of counter-terrorist actions, the following factors, among others, are significant in that determination:

- ▶ the nature of the target and the degree to which the target is identified with a state capable of military response,
- ▶ the scope and duration of the operation,
- ▶ the risk of violent response that the clandestine operation presents,
- ▶ the characterization of the operation under international law,
- ▶ the likely international consequences of the operation,
- ▶ the resources needed for the operation, and
- ▶ the risk of both U.S. and foreign casualties posed by the operation.

Even if these factors suggest that congressional authorization is required for a clandestine counter-terrorist operation, however, the need for secrecy and speed may make specific authorization of clandestine counter-terrorist operations impractical. The majority of the War Powers Initiative therefore believes that Congress may authorize such operations more generally, as it did anti-pirate operations at the start of the nineteenth century,<sup>42</sup> although it must still follow the rule of clear statement. The dissenter agrees that the President should consider the foregoing factors, but not that the President needs congressional authorization to deploy clandestine force of any size and duration to meet whatever he or she deems a terrorist threat to the national security.

***Peacetime Deployments*** – Finally, the President does not command the armed forces only in war. He or she is authorized to deploy them for peaceful purposes ranging from humanitarian relief, non-violent peacekeeping, and training, to pre-positioning for possible military action, as long as the deployment does not take the decision for initiating the use of force from Congress. Many of these peaceful deployments are expressly authorized by Congress. For example, the “noncombatant assistance” provision of the United Nations Participation Act<sup>43</sup> authorizes the President to “detail” to the United Nations up to 1000 members of the U.S. armed forces in a “non-combatant capacity,” and multiple statutes authorize various uses of the armed forces for humanitarian and civic assistance abroad.<sup>44</sup> Even absent specific advance statutory authorization from Congress, there is an argument that Congress has acquiesced in such uses of the armed forces by the President by adopting collateral facilitating legislation, appropriating funds for such uses after the fact, and not objecting to them when it had the opportunity to do so.<sup>45</sup>

It is more doubtful, however, that Congress can be said to have acquiesced generally in any executive practice of deploying the armed forces abroad for “peace-enforcement” or for other peace or stability operations that expressly contemplate the use of force (other than for force-protection).<sup>46</sup> For example, Congress responded critically to the President’s use of armed forces in Somalia to track down a local warlord and eventually only authorized

the deployment subject to time limitations and other restrictions. Some of the restrictions adopted were made applicable more generally “to any significant... peacekeeping, or peace-enforcement operations.”<sup>47</sup>

***Limits on the President’s War Power*** – In sum, although the President’s authority as Commander in Chief is significant, it is also limited. The President may constitutionally use force abroad for a range of defensive purposes, including some counter-terrorist operations, depending on their scope and duration and other factors listed above. But the President otherwise cannot constitutionally conduct war, or preventive war, without obtaining prior congressional authorization. Beyond this range of defensive war powers, the burden lies on the President to obtain the authorization. The constitutional rule is that the President can lawfully fight wars for other than a range of defensive purposes only if Congress has authorized it, not that the President may fight it *until* Congress has stopped it. Moreover, when Congress has authorized the use of force, the President is constitutionally required to abide by the terms of the authorization, as well as the Constitution, laws, and treaties of the United States. Finally, presidents cannot spend money for war except pursuant to appropriation, and they are wholly dependent on Congress for appropriations. Thus, even though the President is constitutionally authorized to repel actual and forestall imminent attacks, the duration and scope of even such defensive operations may be limited by the availability of appropriated funds, as well as by the practical need for political support when the operations are extended.

### **3. The Courts’ Constitutional Role in War Powers**

***The Judicial War Powers Role*** – Whether the use of force abroad has been constitutionally authorized, whether the terms of an authorization have been violated, and how the exercise of war powers lawfully affects civil and property rights are questions of constitutional, statutory, common, and treaty law. In a proper case, they are therefore within “[t]he judicial power [which] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority...”<sup>48</sup> Nothing on the face of Article III makes them “political questions” beyond the judicial power.

The federal courts have therefore properly exercised their power from time to time to decide whether war has been lawfully authorized. The Naval War with France is again instructive. It presented the legal question whether France had lawfully been made “the enemy” in the absence of a formal declaration of war. The Supreme Court, which included a framer of the Constitution, unanimously held that Congress had, without declaring

war, constitutionally authorized the incremental escalation of naval force against French vessels in a “limited” or “imperfect” war, thus making France the enemy.<sup>49</sup> None of the Justices doubted the suitability of the question for exercise of the judicial power.

Slightly over half a century later, the Supreme Court was asked to decide whether the Civil War constituted a state of war authorizing the President to institute a naval blockade of the Confederacy pursuant to the international law of war.<sup>50</sup> Although the Court was closely divided, ruling 5-4 that the President had a right under the law of war to institute the blockade, even the dissenters did not find that the question lay beyond the judicial power. They simply decided it the other way, concluding that prior congressional authority was necessary.

A century later, the courts were asked to decide whether the Vietnam War was constitutionally authorized. Holding that “the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation,”<sup>51</sup> the United States Court of Appeals for the Second Circuit found that the standard was satisfied by Congress’s enactment of the Tonkin Gulf Resolution, authorizing the use of force, and of multiple specific appropriations earmarked for conducting military activities in Vietnam.<sup>52</sup>

***Political War Powers Questions*** – The Vietnam-era cases, however, also help illuminate war powers questions that the courts will not decide. Although the Second Circuit found that Congress had constitutionally authorized the Vietnam War, it held that the choice between authorizing by “an explicit declaration on the one hand and a resolution and war-implementing legislation, on the other,” that is, between the formal declaration and a statutory authorization, presented a political question that is non-justiciable.<sup>53</sup> Congress may constitutionally do either, as we noted. That court also held in a later case that whether a “specific military operation constitutes an ‘escalation’ of the war or is merely a new tactical approach within a continuing strategic plan” is a political question that courts lack manageable standards and competency to decide.<sup>54</sup> It goes without saying that courts have no business deciding *whether* we should go to war, a quintessentially political decision that the Declaration Clause assigns to the political branches alone. Unfortunately, in recent decades, courts have not always taken care to distinguish one war powers question from another, confusing the justiciable question of whether war is constitutionally authorized with the non-justiciable question of whether we should go to war.<sup>55</sup>

The cases arising out of the Naval War with France are instructive for another reason. In them, the Supreme Court decided the legality of the Naval War incidentally to deciding private rights to prize money from vessels captured from the French. It did not directly



adjudicate a clash between the branches. As a prudential matter, courts are unlikely to adjudicate such a dispute as long as there remains a reasonable possibility that further action by either branch or both will moot the question of authority for force. “[A] dispute between Congress and the President is not ready for judicial review,” Justice Powell asserted in *Goldwater v. Carter*,<sup>56</sup> “unless and until each branch has taken action asserting its constitutional authority.” Therefore, he concluded, the “Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”<sup>57</sup>

In 1990, for example, a federal court rejected the claim that the authority for Operation Desert Storm presented a political question, but declined to decide that authority because, in the court’s view, the political branches had not yet reached an impasse in that neither branch had yet taken final action presenting an unavoidable dispute of authority.<sup>58</sup> In contrast, the branches are at an impasse when Congress passes a law prohibiting the use of appropriations for a specified combat operation, but the President continues to use appropriated funds for the operation. In *Holtzman v. Schlesinger*,<sup>59</sup> a member of Congress brought suit for an injunction against the Secretary of Defense in these circumstances, and the district court actually issued an injunction against continued military activities in Cambodia. The Court of Appeals subsequently reversed because the appropriations cutoff date set out in the statute had not yet occurred.

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In sum, the federal courts have the constitutional power to decide whether the use of force has been lawfully authorized. That justiciable question should not be confused with the different non-justiciable political questions whether we *should* go to war or whether Congress must use formal declaration, use-of-force statute, or specific appropriation as the form of authorization. The courts can and have decided the authority question incidentally to deciding the legal effects of the exercise of war powers, especially on civil and property rights. They also have the constitutional authority to decide that question directly in a dispute between the branches, but will not, as a practical matter, while there remains a reasonable possibility that further action by either branch or both will avoid the question.

#### **4. The Role of International Organizations and International Law in War Powers**

*International Authorization As a Substitute?* – The Supremacy Clause of the Constitution asserts that “all Treaties made, or which shall be made, under the Authority of the United

States, shall be the supreme Law of the Land....”<sup>60</sup> The United Nations Charter is a treaty to which the United States is a party. Although no administration since the Truman administration has formally relied on treaty authority to use force abroad without advance congressional authorization,<sup>61</sup> some defenders of uses of force have asserted that an authorization from the United Nations Security Council is a constitutional substitute for congressional authorization because the President has the constitutional authority to execute a treaty obligation as part of the law of the land.<sup>62</sup> Others have even implied that authorization by regional collective defense organizations such as the North Atlantic Treaty Organization can operate with like effect.

These claims are wrong. United Nations Security Council or NATO approval of the use of force by the United States is not a constitutional substitute for congressional approval. That a use of force is lawful under international law does not make it constitutional. Treaties are submitted for the advice and consent of the Senate alone. If a mechanism created by treaty could substitute for congressional approval, only the Senate, the treaty organization, and the President through his selected representative to that organization would decide on the use of force, without the concurrence of the House of Representatives. This is not the collective judgment on which the framers insisted in the Declaration Clause, and it disregards their refusal to give the war power to the Senate alone.<sup>63</sup> Thomas Jefferson correctly dismissed the treaty-as-substitute claim by emphasizing that “the Constitution expressly requires the concurrence of all three branches [both houses and the President] to commit us to a state of war.”<sup>64</sup>

***The “Constitutional Processes” Condition to Collective Security***—Any treaty-as-substitute claim also disregards the terms of the United Nations Charter and every collective defense treaty subsequently ratified by the United States. They all condition the U.S. obligation to use force at the request of the treaty organization, or in defense of a treaty partner who is attacked, on compliance with our own “constitutional processes.”<sup>65</sup> As Secretary of State Dean Acheson asserted in the NATO Treaty ratification hearings, this condition “obviously mean[s] that Congress is the body in charge of that constitutional procedure.”<sup>66</sup>

***The United Nations Participation Act Process*** – Finally, the treaty-as-substitute claim is also inconsistent with the “use of armed forces” section of the United Nations Participation Act,<sup>67</sup> which spelled out the way in which Congress intended the constitutional process to work for using force on behalf of the United Nations. Under that act, the President would negotiate a special agreement with the United Nations Security Council for making U.S. armed forces available and then submit the agreement to Congress for approval by appropriate legislation. By approving such an agreement, Congress could “pre-authorize”

the use of our armed forces on behalf of the United Nations. This process has never been used because the President has never negotiated a special agreement under the United Nations Charter.

Legislative approval of a special agreement was originally intended as the process by which the United States would meet any obligation it had to contribute to U.N.-authorized combat operations. In any case, the Act's insistence on congressional authorization for special agreement forces suggests at least that Congress would also expect to approve any ad hoc alternative for providing force to the United Nations for combat operations.<sup>68</sup> This is not to say that approval of the U.S. use of force by an international organization, and its authorization under international law, may not be politically desirable in a particular case. In fact, obtaining such approval abroad may be instrumental in securing political consensus at home for the use of force. However, that approval is not constitutionally sufficient for the use of force abroad. Instead, it is the Constitution, and the gloss that history has placed upon it,<sup>69</sup> that determines the lawfulness under our domestic law of our use of force abroad.



# THE FORM AND EFFECT OF AUTHORIZATIONS FOR THE USE OF FORCE

War powers debates have historically been about whether the President is authorized to use force. But this is the beginning, not the end, of a decision to exercise the war power. Fully informed debate should also address the form and domestic legal effect of authorization. Whether the use of force is based upon the President's inherent defensive war authority, a formal declaration, a use-of-force statute, or an appropriation affects political accountability for the decision to go to war, the scope of the force authorized, and the incidental common law or statutory authorities triggered by the authorization, which we will call "standby" authorities.

## 1. Declarations of War

The declaration of war against Germany in 1917 is illustrative of 20th century U.S. declarations. After a whereas clause recognizing repeated acts of war by Germany, it provided:

That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful

termination all of the resources of the country are hereby pledged by the Congress of the United States.<sup>70</sup>

The declaration leaves no doubt of the decision for war or of Congress's shared responsibility for it. It is also unambiguous about the scope of the force that it authorizes. Declarations have typically authorized the President "to employ the entire land and naval [or military] forces of the United States," "the resources of the Government," and "all of the resources of the country" to "carry the war against the [enemy] Government" to successful termination.<sup>71</sup> A declaration authorizes what we would today call total war, with the full and unlimited range of armed force and national resources, instead of a limited or what the framers called an "imperfect war."

Furthermore, a formal declaration triggers a wide range of standby authorities. These include over thirty statutory authorities keyed to "declared war" or "declaration of war," authorizing troop call-ups and mobilization, trade sanctions, preventive detention of enemy aliens, disposition of defense stockpiles, warrantless surveillance, and conscription, among other powers.<sup>72</sup> An example is the Alien Enemy Act, which authorizes the President to order the detention of male enemy aliens over the age of fourteen "[w]henver there is a declared war between the United States and any foreign nation or government...."<sup>73</sup> Another 140 standby statutes are triggered by "war" alone or "time of war," or "national emergency" associated with war.<sup>74</sup> Thus, the President, for example, may extend enlistments in the reserves that are in effect "at the beginning of a war or of a national emergency declared by Congress" until six months after the war or emergency has ended.<sup>75</sup> In addition, a declaration triggers the full breadth of authority under the common law of war. This may include, for example, authority for the military to detain and try enemy combatants.<sup>76</sup>

## 2. Use-of-Force Statutes

Congress, however, has not formally declared war since World War II. Instead, it used specific use-of-force statutes — joint resolutions approved by both houses of Congress and presented to the President for his signature — to authorize the use of force in Vietnam in 1964, the Persian Gulf in 1991, Afghanistan in 2001, and Iraq in 2002. These and most use-of-force statutes were contemporaneous authorizations for the use of force, but a few pre-authorized a defined use of force against a generic category of targets or in a defined geographic area,<sup>77</sup> and one ratified a prior use of armed force.<sup>78</sup>

While use-of-force statutes have been no less clear than declarations, they are typically narrower in scope. For example, in the Naval War with France, Congress at first only

authorized American naval vessels to capture French vessels “found hovering on the coasts of the United States for the purpose of committing depredations on” our shipping.<sup>79</sup> The 1964 Tonkin Gulf Resolution was far more generous in authorizing “all necessary measures” and “all necessary steps, including the use of armed force.”<sup>80</sup> It is therefore often cited with regret by members of Congress as the benchmark of excessive authorization. But even this authorization seems to fall short of the declarations’ “entire naval and military force” and “all the resources of the country.” More recently, the 2001 use-of-force statute authorized the President to use

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.<sup>81</sup>

Although this use-of-force statute is unusual in that it targets persons and organizations rather than named foreign states, it does not authorize the use of force against terrorist organizations that were not implicated in the 9/11 attacks such as Hamas or Hezbollah, or against Saddam Hussein’s Iraq, unless Iraq aided and abetted or harbored those responsible for the 9/11 attacks.

Not only is the scope of the force authorized by use-of-force statutes typically narrower than that authorized by formal declaration, so is their legal effect. Although presidents as Commander in Chief may draw some powers from international law and the law of war when war is authorized by use-of-force statutes rather than by declaration, the extent of the ancillary power they get is unclear. A declaration of war arguably triggers a full range of common law-of-war authorities as well as all standby statutes keyed to “declared war,” “war,” or “time of war.” Use-of-force statutes, on the other hand, clearly do not trigger the smaller number of standby authorities keyed just to declaration or “declared war.” For example, the President does not acquire power under the Alien Enemy Act<sup>82</sup> to detain enemy aliens from a use-of-force authorization. Moreover, it is sometimes unclear whether a use-of-force statute triggers standby authorities keyed to “war” or “time of war,”<sup>83</sup> because the nature of the ensuing hostilities are unclear. After the “Tanker War” in the Persian Gulf in 1988, for example, a question arose about the availability of a sovereign immunity defense for combatant activities “during time of war” to a claim against the government under the Federal Tort Claims Act. The court found that “during the ‘tanker war’ a ‘time of war’ existed,” even though another court had concluded that it lacked the expertise and evidentiary access to decide whether the same war involved

“hostilities” within the meaning of the War Powers Resolution.<sup>84</sup>

In short, the domestic legal effect of use-of-force statutes may be ambiguous unless Congress spells it out in the authorization or clarifies the triggering event in standby statutes.

### 3. Appropriations and Other Statutes

Joint resolutions for the use of force are statutes, but so are appropriations. In the early years of the Republic, authorizations for the use of force were sometimes inferred from appropriations for naval construction, “Indian” suppression, and anti-pirate operations.<sup>85</sup> Much later, courts also inferred authorization for the Vietnam War from appropriations.<sup>86</sup> For example, a Vietnam-era appropriation specifically stated that it was to be used “upon the determination by the President that such action is necessary in connection with military activities in Southeast Asia.”<sup>87</sup> Another declared Congress’s “firm intention to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam.”<sup>88</sup> A federal court found that these specific appropriations left little doubt that Congress had authorized using force in Vietnam.<sup>89</sup>

In contrast, more general military appropriations leave ambiguous whether and how much force is authorized or whether standby common law or statutory authorities have been triggered. In addition, appropriations provisions are often bundled in a way that makes inferences of use-of-force authorization problematic. They do not necessarily focus legislative deliberation on the need for force in the same way that declarations or use-of-force statutes can, and they are less likely, too, to state the reasons for using force.<sup>90</sup> The Supreme Court has insisted that an appropriation “plainly show a purpose to bestow the precise authority which is claimed” before it can be construed as an authorization for government curtailment of civil liberties.<sup>91</sup> An equally clear statement in military appropriations should be required before they can be construed to authorize or ratify the use of force that may take lives.<sup>92</sup> Requiring anything less would defeat the constitutional objective of political accountability and its corollaries of transparency and deliberation.

\* \* \*

In sum, while Congress has the unreviewable discretion to choose among declaration, use-of-force statute, and appropriation or other statute to authorize the use of force abroad, only legislation that “plainly show[s] a purpose to bestow the precise authority which is claimed” can express the collective judgment required by the Constitution. This clear statement rule is essential both to promote Congress’s political accountability for



the decision to use force and to protect against executive usurpation of the congressional war power by exploiting statutory ambiguity. Declarations of war, use-of-force statutes, and specifically earmarked appropriations meet this clear statement standard. General appropriations and most collateral legislation usually do not.

Even legislation that meets the standard, however, may have unclear “domino” effects because of the ambiguity of haphazardly accumulated standby legislation and the vagaries of the common law of war. Congress has not systematically revisited and clarified the nearly 200 statutory standby authorities triggered variously by declared war, “war” alone, or national emergency, nor codified potentially far-reaching common law of war authorities (for example, for military detention and trial). Consequently, even when Congress decides to authorize the use of force, it leaves the job half-finished if it fails to consider the domestic legal effects of the authorization. The authorization may have unforeseen and unintended domestic legal consequences by the operation of standby authorities.



# THE WAR POWERS RESOLUTION: A FLAWED FIX

The problems we have highlighted in the operation of war powers are not new. Many surfaced during the Vietnam War. In response, Congress enacted the War Powers Resolution<sup>93</sup> (“WPR”) in 1973 over President Richard Nixon’s veto. The WPR attempted to create a common procedural framework for deciding when United States armed forces can be “introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,” in order

to fulfill the intent of the framers...and insure that the collective judgment of 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.<sup>94</sup>

The WPR, as implemented, has neither fulfilled the original intent nor facilitated the collective judgment of the political branches. Its heart is the “sixty-day clock”: a provision (intended to be self-executing) requiring a President to withdraw the armed forces within sixty days (or ninety if he or she deems it militarily necessary) after deployment unless the President has obtained congressional authorization by declaration or specific use-of-force legislation. The WPR has failed for multiple reasons. It defines the President’s defensive war powers too narrowly; its consultation and reporting provisions leave loopholes that

presidents have exploited; its never-used provision for two-house veto of a use of force is probably unconstitutional after the Supreme Court’s 1983 decision striking down a one-house veto;<sup>95</sup> and the sixty-day clock at its heart has been misconstrued to give the President a sixty-day “free pass” to use force without congressional authorization and to allow Congress to do nothing, as explained below.

## 1. The Scope of the WPR

The WPR boldly asserts that

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into [actual or imminent hostilities]... are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack on the United States, its territories or possessions, or its armed forces.<sup>96</sup>

Although this statement appears only in the WPR’s non-operational statement of purpose and policy, it places the operational provisions under a constitutional cloud from the start by omitting the President’s constitutional war powers to defend against imminent attacks and to rescue and protect Americans abroad. The WPR is therefore underinclusive by failing to acknowledge well-accepted defensive presidential war powers within the scope of the President’s authority to “repel sudden attacks” and affirmed by historical practice.

## 2. Consulting and Reporting Under the WPR

The WPR requires a President “in every possible instance...[to] consult with Congress”<sup>97</sup> before, and to report to it within forty-eight hours after, deploying U.S. armed forces into actual or imminent hostilities, foreign territory, airspace, or waters, or in numbers which “substantially enlarge” combat-equipped U.S. forces already located in a foreign nation.<sup>98</sup> All reports must set forth the circumstances necessitating the introduction of forces, the authority for the introduction, and the “estimated scope and duration of the hostilities or involvement,”<sup>97</sup> but only a report of a deployment into actual or imminent hostilities (a “hostilities report”) starts the sixty-day clock running.

Although President Nixon conceded that the consulting and reporting requirements were “constructive measures...[which] would foster [inter-branch cooperation in exercising war powers]...by enhancing the flow of information from the executive branch to the

Congress,”<sup>98</sup> presidents have consistently exploited ambiguities in these requirements to render them effectively meaningless. The WPR neither defines “consult” nor indicates whom the President is to consult, so presidents have often purported to “consult with Congress” by simply notifying a few selected members, sometimes only hours before forces engaged in hostilities.<sup>99</sup> Because only “hostilities reports” start the sixty-day clock, all presidents after President Ford have submitted reports that are strategically silent about the subsection under which they are submitted. Moreover, even when these reports have described the circumstances, their identification of the authority for the deployment and their assessment of the scope and duration of hostilities are usually perfunctory boilerplate. Periodic follow-up reports required by the WPR have rarely filled in the details.

### 3. The Sixty-Day “Free Pass”

The failure of the consulting and reporting requirements, however, is not primarily attributable to flaws in their drafting. Instead, it results from their tie-in to the sixty-day clock at the heart of the WPR. The clock starts running when a “hostilities report” is submitted or required to be submitted.<sup>100</sup> Critics of the WPR have agreed with President Nixon that the sixty-day clock is both bad constitutional law and bad policy because it gives Congress “the ability to handcuff every future President merely by doing nothing and sitting still.”<sup>101</sup> Presidents have therefore consistently defeated the intended automaticity of the sixty-day clock by denying that hostilities are occurring or imminent, or by refusing to identify the provision under which the report is submitted, leaving a clock-stopping ambiguity about whether they have submitted a “hostilities report” or whether one was “required to be submitted.”

Ironically, at the same time, deployments without congressional authorization have sometimes been defended on the grounds that the WPR *authorizes* the President to use forces in hostilities for sixty days and does not require their withdrawal before that time (absent a two-house veto that is probably unconstitutional<sup>102</sup>). Even though the WPR expressly disclaims any intent to confer authority that presidents would lack in its absence,<sup>103</sup> the impression persists that it gives them a sixty-day “free pass” or that it “presupposes” that they have inherent authority to use force for at least sixty days.<sup>104</sup>

In fact, the defect at the heart of the WPR is that it has given *both* the President and Congress a putative free pass. In the actual contemporary exercise of war powers, perception has become reality as both the media and many members of Congress overlook the WPR’s disclaimer of authority. Thus, some proponents of unilateral

presidential action invoke the putative sixty-day free pass as license to use force abroad without constitutionally required advance authorization from Congress. Congress, for its part, takes false comfort that it has somehow fulfilled its constitutional duty to decide on uses of force abroad by doing nothing.

The use of force for other than a limited range of defensive purposes is unconstitutional unless the President obtains advance congressional authorization. However, President Nixon was also right in concluding that “Congress can[not] responsibly contribute its considered, collective judgment on such grave questions without full debate and without a yes or no vote.”<sup>105</sup> The putative sixty-day free pass lets Congress postpone making the collective judgment, permanently when a use of force is concluded before the deadline, as was the invasion of Grenada in 1983 and the invasion of Panama in 1989, or so long that it is faced with ratifying a *fait accompli*, as it arguably did by passing specific supplemental appropriations for the air campaign against the Federal Republic of Yugoslavia in 1999 fifty-eight days after it began.

#### 4. The Clear Statement Rule

The WPR not only requires congressional authorization for the introduction of United States armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, absent a declaration of war or a national emergency created by an attack; it also specifies the form of the authorization. It prohibits the inference of authority from any provision of any statute (including an appropriation) “unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter....”<sup>106</sup> It also prohibits any inference from a treaty, unless that treaty is implemented by legislation of the same specificity.<sup>107</sup> Although scholars have disagreed about whether the WPR obligates Congress to use the “magic words” of an actual cross-reference to the WPR,<sup>108</sup> the WPR’s insistence on specific authorization simply reaffirms the constitutionally-derived clear statement rule.

\* \* \*

In sum, the WPR combines several elements of a sensible process for making war powers decisions (including reporting, consultation, and a clear statement rule) with a constitutionally under-inclusive definition of the President’s defensive war powers and a constitutionally problematical sixty-day clock. Consequently, presidents have given only

lip service to even the beneficial parts of the process and ignored or rejected the rest. Congress, in turn, has sometimes taken the sixty-day clock as an excuse to do nothing, instead of reaching a collective judgment about uses of force. The courts, mindful that Congress often looks the other way when the President has abused the WPR process, have looked away themselves.<sup>109</sup>

The WPR is sometimes said to have “pricked the conscience” of the political branches in use-of-force situations by prompting some information flow and dialogue, at least about compliance with WPR procedures, if not about the merits of a use of force. Even if this is true, the benefit is substantially outweighed by the WPR’s underinclusive view of the President’s defensive war powers and the interpretation of the sixty-day clock to give a free pass to the political branches, as well as by the continuing disrespect for the rule of law bred by the general desuetude of this law.





# RECOMMENDATIONS

**1. Congress must perform its constitutional duty to reach a deliberate and transparent collective judgment about initiating the use of force abroad except when force is used for a limited range of defensive purposes.**

There is no automaticity in the war power decision-making process intended by the framers, no substitute for the particularized consideration of whether to initiate the use of force abroad. Congress should not wait for the President to ask it for its judgment on initiating a use of force. Instead, it should involve itself early in the decision-making process, demand and acquire relevant information, and reach a collective judgment by a roll call vote after full and public debate.

**2. The President must seek advance authorization from Congress for initiating the use of force abroad except when force is used for a limited range of defensive purposes.**

The Constitution requires the President to obtain the authorization of Congress for initiating the use of force abroad except when it is used for a limited range of defensive purposes: to defend against actual attack on the United States or its armed forces, to forestall a reasonably imminent attack, to protect or rescue Americans abroad, and, in exceptional circumstances, to defend against urgent and severe threats to the United States when time does not permit obtaining advance congressional authorization.

Even in such a case, the President should seek authorization from Congress as soon as circumstances do permit.

Neither consulting nor notifying Congress is a substitute for its collective judgment expressed in authorizing legislation. In any case, all members of the War Powers Initiative agree that it is in the President's institutional interests and in the national interest for the use of force abroad to be supported by the collective judgment of Congress and the President, because such a judgment reflects a political consensus that makes them jointly responsible for the resulting costs. To persuade a majority of both houses of Congress to make the collective judgment that the use of force is in the national interest, a President must, in effect, persuade the people. If he cannot persuade the people's representatives, he is unlikely to persuade the people who elected them.

**3. To obtain the informed collective judgment of Congress on initiating the use of force abroad, the President should supply Congress with timely and complete information about a use of force, when circumstances permit, and Congress should also use its own investigatory tools to determine the reliability and completeness of the information on which it relies to reach a collective judgment.**

Congress cannot perform its constitutional war powers duty if it is uninformed. The corollary to the President's constitutional duty to obtain advance authorization from Congress for initiating the use of force abroad is that he must supply Congress with timely and complete information, when circumstances permit, to enable it to reach an informed collective judgment. Such information should include not only the circumstances and specific legal authority for the use of force, but also the anticipated contributions from other nations, the goals of the operation, its anticipated costs, and a plan for funding it.

As soon as time allows, such information should ideally include a timely copy of a formal legal opinion of the Attorney General or the Assistant Attorney General for the Office of Legal Counsel to the President on the authority for the use of force.<sup>110</sup> Especially given the paucity of judicial opinions on war powers, the published war powers opinions of the Office of Legal Counsel can form an important body of legal analysis, even if often one-sided, against which to measure the authority for uses of force.

The President should also supply to Congress a copy of a written assessment by the Comptroller of the Department of Defense to the President of the anticipated costs of the military operation and how they will be funded, or its equivalent. Several controversial U.S. military operations abroad have proven the military adage, "Going in is easy; getting out

is the hard part.” Even if detailed statutory specification of an “exit strategy” or schedule is impractical and unwise, an insistence on a good faith estimate of the costs of a proposed use of force may prompt a beneficial exploration of its possible duration and aftermath. It is also a proper exercise of Congress’s appropriations power.

Finally, Congress must not be passive in accepting information from the executive branch to justify initiating the use of force abroad. History shows that such information can be inaccurate, misleadingly incomplete, or even false. Congress should therefore employ its own investigative tools to determine the reliability and completeness of information it uses to decide on initiating the use of force abroad.

**4. Congress should authorize initiating use of force abroad only by declaration of war or a specific statute or appropriation, except that it can more generally authorize clandestine counter-terrorist operations that require secrecy and speed provided that such authorization states clearly the purposes and scope of the authorization.**

The Declare War Clause gives Congress the choice between authorizing the use of force abroad by declaration of war or by legislation. Public accountability for the decision to use force requires that Congress speak as clearly in legislation as it does in a declaration. Under this constitutionally-derived clear statement rule, which is restated in the WPR, authorization for the use of force abroad should not usually be inferred from a general defense appropriation, let alone from other legislation regarding military procurement, conscription or other collateral subjects.

However, the nature and source of terrorist attacks and threats posed by WMD, and the need for secrecy and speed in clandestine operations against them, may justify more general authorization of some counter-terrorist operations that are not already authorized by the President’s defensive war power. Even in such cases, Congress must always state the purposes and scope of its authorization as clearly as the circumstances permit in order to satisfy the constitutional objectives of legislative deliberation and political accountability.

**5. Although Congress can condition its authorization for the use of force on compliance with international law or treaty obligations, or consultation with international organizations, it should not and cannot delegate the use-of-force decision to an international body. Authorization by a treaty organization, international body, or international law is not a constitutional substitute for authorization from Congress.**

Although treaties are part of the supreme law of the land, authorization by a treaty organization such as the North Atlantic Treaty Organization or by an international body such as the United Nations Security Council for the use of force to preserve international or regional peace and security is not a constitutional substitute for authorization by Congress. Whether or not initiating the use of force abroad by the United States is lawful under international law or authorized by a treaty to which the United States is a party or by an international organization of which it is a member, under our Constitution only Congress can authorize initiating the use of force abroad except for a limited range of defensive purposes.

Congress can also condition the use of force on compliance with international law or with treaty obligations. Furthermore, it can express its sense that the President should consult with an international organization before he or she orders the use of force abroad. But it cannot delegate to any international body the decision whether to use force.

**6. Congress should replace the War Powers Resolution with legislation that fairly acknowledges the President’s defensive war powers, omits any arbitrary general time limit on deployments of force, reaffirms the constitutionally-derived clear statement rule for use-of-force bills, and prescribes rules for their privileged and expedited consideration.**

The War Powers Resolution is a flawed shortcut for Congress’s exercise of its constitutional war powers. Its under-inclusive statement of purpose and policy, coupled with the link of its consultation and reporting provisions to the constitutionally problematical sixty-day clock, have given presidents an excuse to ignore the WPR and Congress an excuse to do nothing. Any war powers bill intended to replace the largely ineffective WPR should align the bill’s scope with the President’s defensive war powers and eliminate the sixty-day clock.

Such legislation, however, should also preserve and strengthen those elements of the WPR that promote the constitutional objectives of legislative deliberation and political accountability. Although the WPR’s consultation and reporting provisions have not worked as intended because of their association with the sixty-day clock, they are elements of the improved information flow between the executive and Congress that is the object of our Recommendation 3. Any new war powers bill should reflect that recommendation. Similarly, the WPR’s clear statement rule is consistent with our Recommendation 4. A statutory clear statement requirement is an important reminder to Congress of its obligation of specificity in formulating use-of-force authorizations.

Finally, the WPR attempts by several largely unused legislative procedures to address the inefficiency of the ordinary legislative process for considering sometimes time-urgent use-of-force bills.<sup>111</sup> In any war powers bill intended to replace the WPR, Congress should consider adopting expanded statutory requirements and internal rules for privileged and expedited consideration of all use-of-force resolutions.<sup>112</sup> These should include automatic committee referral; tight deadlines for committee discharge and reporting to the full house; procedures for privileging a bill to make it the pending business of a house and setting deadlines for a vote; expeditious referral to the other house; and expeditious procedures for resolving disagreements between the houses.

**7. Congress should update and clarify the almost 200 standby statutory authorities, triggered variously and often ambiguously by “declared war,” “war” alone, “time of war,” or “national emergency,” and it should codify selected laws of war.**

An authorization for the use of force affects not just the foreign target. By virtue of almost 200 statutes providing standby domestic legal authority, each authorization triggers “domino” domestic legal effects. Unfortunately, not all of these are known to or intended by Congress because the domestic standby statutes have accumulated haphazardly over many years and have not been updated or clarified to fit the contemporary congressional preference for using use-of-force authorizations rather than declarations of war. Congress has not codified important aspects of the law of war, especially regarding the scope and procedures for military detention and military trial of enemy combatants – law which has recently been invoked by the President to detain even U.S. citizens in conjunction with the 2001 use-of-force authorization.

In 1976, Congress tackled a similar statutory problem of accumulated national emergencies with unintended domino effects by enacting the National Emergencies Act.<sup>113</sup> That act, however, dealt only with national emergency standby legislation, not all war-related standby legislation. Congress should undertake a comparable inventory and updating of all war-related and national emergency legislation, codify and elaborate those parts of the law of war that have supposed domestic legal effects, clarify the statutory triggers in light of contemporary war powers practice and the ongoing “war on terrorism,” and require notice to it from the executive of selected standby authorities that the President invokes pursuant to an authorization for the use of force. In the alternative, Congress should itself identify and address the chief domino effects of each proposed use-of-force bill as it considers the authorization.

**8. Congress does not complete its war powers duties by authorizing a use of force abroad. It should also conduct appropriate and regular oversight of the strategic use of force, monitor the domino domestic legal effects of the authorization, and, when appropriate, revise or rescind the authorization or standby legal authorities the authorization triggers.**

While the President makes tactical command decisions in an authorized war, the enactment of the authorization does not end Congress's war power duties. They continue as long as the use of force continues. Congress should not only conduct continuing oversight of the strategic uses of force, but also collect the information necessary to decide on supplemental appropriations and the domino legal effects of the authorization. New information, or changes in the facts on the ground, may require Congress by ordinary legislative process, in fulfillment of its continuing war powers duties, to revise or rescind the original authorization, to restrict appropriations, or to revise or rescind standby legal authorities, leaving the President to modify or end the use of force abroad consistent with his or her duty as Commander in Chief to protect the forces themselves.

**9. To preserve the system of checks and balances of which war powers are part, the federal courts should, in appropriate cases, decide whether authority exists for the use of force abroad.**

The federal courts have historically, if infrequently, decided the authority for uses of force abroad, as well as the domestic legal effects of war and authorizations for use of force. If courts, on vaguely reasoned claims of non-justiciability, avoid deciding such issues in cases properly before them, they remove a vital check from the constitutional system of war powers. Whether a use of force is constitutionally authorized is not a political question beyond the judicial power. When plaintiffs have standing, the courts should not erect insuperable prudential obstacles to deciding this question incidentally to private rights disputes, or to deciding it directly in the rare case in which there is no reasonable expectation that further action by the political branches will avoid the question.

### **Separate Statement of Susan E. Rice**

I believe that on numerous occasions Congress has acquiesced in the President's deployment of armed forces not just for peaceful humanitarian missions, but also for peace-enforcement or "stability" missions. From a policy point of view, particularly in time-sensitive circumstances, such acquiescence is desirable.

### **Separate Statement of Edwin D. Williamson<sup>1</sup>**

I agree with the fundamental principle enunciated in the Report — Congress should be given the opportunity to approve the use of force (and in so doing, Congress should act deliberately and transparently). My disagreement with the Report lies in the reasons underlying the principle that Congress should participate in decisions to use force. In the Report's view, this participation is a legal requirement, mandated by the Constitution. In my view, this participation is a recommendation — as a political matter, it is prudent for the President to make sure that Congress is committed politically before he or she commences a use of force. In other words, the President is not *required* to get Congress's approval before using force for the purpose of defending against threats to our vital national interests, but history has shown that it has been wise for the President to have obtained the political support of Congress for major uses of force.

The Report's basic conclusion is that "congressional authorization is required before the President initiates the use of force abroad except when that force is used defensively: to defend against actual attack on the United States or its armed forces, to forestall a reasonably imminent attack, to protect or rescue Americans abroad, and, in exceptional circumstances, to defend against urgent and severe threats to the United States when time does not permit obtaining advance congressional authorization." (Report at 1–2.) In my

view, this conclusion too narrowly states the President's Chief Executive and Commander in Chief authorities and would be disputed, I believe, by the Executive branch of our government, regardless of which political party were in power. Instead, I believe that the President can use force to defend against any threat to the vital national interests of the United States. The President does not have to seek authority from Congress in the absence of an actual or imminent attack when he or she is acting defensively against such a threat. Furthermore, the Commander in Chief authority of the President goes beyond deciding "day-to-day tactics." It includes making broad strategic decisions about whether to use force, *provided* that use is for such defensive purposes.

The Report goes on to summarize the constitutional requirement as follows: "In short, [1] the decision of the United States to use force abroad, except for a limited range of defensive purposes, requires a collective judgment of the political branches; [2] the conduct of hostilities requires undivided command by the Commander in Chief; and [3] the continuation of hostilities ultimately requires continued appropriation by Congress." (Report at 2.) I would agree with this statement if the clauses I have designated [2] and [3] were elaborations on clause [1]; I would disagree if clause [1] is a separate statement of principle and the "limited range of defensive purposes" is limited to that narrow set of purposes mentioned in my preceding paragraph.

From these basic differences that I have with the Report, it follows that I disagree with some of the Report's legal analyses (e.g., the historical role of the courts in war powers decision-making, including the Report's heavy reliance on the French Naval War cases<sup>2</sup>) and with several of the Report's recommendations (e.g., Recommendation 9 – i.e., I believe that whether a use of force is constitutionally authorized is a political question beyond the judicial power).

The Report does a good job of outlining the changes in the nature of the threats against the United States, from the time of the writing of the Constitution to today. This brief outline demonstrates that what constitutes a "sudden attack" on the United States has changed. (See Report at 5–7.) The constitutional principle is not changing, but the facts to which it is applied are.<sup>3</sup>

The Report more or less acknowledges this change, with its statement that "[t]he modern overlapping threats of terrorism and the proliferation of weapons of mass destruction (WMD) pose a challenge to our understanding of constitutional war powers because of the nature and sources of these threats." (Report at 16.) Whether the President can respond to terrorism or proliferation depends, apparently, on whether the threat is "specific" and



“imminent.” (Report at 17.) The Report then sets forth a list of factors that affects the determination of the President’s power to use force without congressional authorization. I certainly agree that the President, in making his decision, should consider those factors, but one must recognize that these factors are not always going to be crystal clear and there may be limits (national security as well as practical) on what the President can say, predict or promise. In questions of doubt, I believe that the President must be free to act.

The Report’s criticism of my understanding of the allocation of constitutional war powers focuses on two concerns: leaving the decision-making for such an important issue to one person and the lack of a standard for deciding whether the Presidential assessment of a threat is correct. As to the first concern, I would argue that the single decision-maker (who is, after all, an elected official) issue has long been ceded, even by the Report. The Constitutional Convention debate may be inconclusive on some points, but all agree that in changing Congress’s power from “making” war to “declaring” war, the President was given the authority to initiate the use of force in at least some defensive cases (what the Report and I disagree about is what those cases are).

As to the concern that my understanding lacks a standard for deciding whether a Presidential assessment is correct, I would argue that that has not been a problem, at least recently. In three of the last four major uses of force (the Persian Gulf in 1991, Afghanistan in 2001, and Iraq in 2003), while the President in fact sought (and obtained) specific authority from Congress for the use of force, he made it clear in his signing statement that such authority was not necessary and laid out the basis for that position — the defense of vital U.S. interests. In the fourth (Kosovo), the President did not seek authority from Congress to conduct an extensive air campaign against the former Yugoslavia — incidentally the only use of force not authorized by Congress that has exceeded the 60-day period provided in the War Powers Resolution.<sup>4</sup> According to the Report, “[w]hile one can disagree with President Clinton’s assessment of the threat to our national security posed by the war in the Balkans, there is no standard for deciding between the President’s assessment and the dissenter’s contrary assessment, and therefore no basis under the dissenting view for determining when the President’s unilateral use of force is authorized.” (Report at 12.) I do not believe the Kosovo example supports the Report’s conclusion, for the simple reason that President Clinton did not claim that the United States’ vital interests were in any way threatened, and no arguments were put forward in the United Nations Security Council or NATO to justify the use of force on defensive grounds.<sup>5</sup> President Clinton’s justifications for the air campaign (see Report at 12) should be compared not only with what the Presidents Bush said about what was at stake in the two Iraq crises and the terrorism threat, but also with what those on the other

side of the political aisle said (e.g., Senator Mitchell in 1987: “The United States must maintain a military presence to defend our interests in the [Persian Gulf] region....[T]wo facts are indisputable: the United States has vital interests at stake in the Gulf, and our troops are already there.”).<sup>6</sup> Had President Clinton made a defensive claim to justify the air campaign, then the Report’s contention could have been tested, but he did not.

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1. As the Legal Adviser of the U.S. State Department during the administration of George H. W. Bush, Mr. Williamson participated in that administration’s formulation of the legal position on the President’s power to use force.
  2. For an excellent discussion of these cases, see J. Gregory Sidak, *The Quasi War Cases*, 28 HARV. J.L. & PUB. POLICY 465 (2005). The author concludes that these cases, which involved the interpretation of statutes passed by Congress, “established no significant interpretation of the constitutional allocation of the war powers among Congress and the President.” *Id.* at 483. The author also interestingly contrasts Chief Justice Marshall’s much quoted dictum in *Talbot v. Seaman* (Report at 15) with Marshall’s “equally sweeping, yet inaccurate, statements” (*Id.* at 489), such as his statement in a speech in the House only a year before writing the opinion in *Talbot*, in which he described the President as “the sole organ of the nation in its external relations,” which was quoted in *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).
  3. For examples of what I believe to be the modern day equivalent of a “sudden attack,” I would refer the reader to President George W. Bush’s National Security Strategy (September 2002), his second inaugural address, and the report of the 9/11 Commission.
  4. The fact that the traditional supporters of the War Powers Resolution did not voice any significant criticism of President Clinton’s running out the WPR’s “60-day clock” indicates to me that that most of them must now agree with the traditional critics of the WPR that that portion of the WPR is a dead letter.
  5. I believe that the air campaign required Congressional approval and, in the absence of Security council approval, violated both the U.N. Charter and the NATO Treaty, unless justified on defensive grounds. In December 2000, the Justice Department’s Office of Legal Counsel finally got around to committing to writing its oral legal opinion upholding the President’s spring of 1999 use of force. Authorization for Continuing Hostilities in Kosovo, Memorandum for the Attorney General, U. S. Department of Justice, Office of Legal Counsel (December 19, 2000). The opinion found that Congress’s emergency appropriation of funds for the air campaign constituted authorization for it. The opinion concluded that the WPR’s stricture against inferring authorization of the use of force from such a congressional activity that did not “state that it is intended to constitute specific statutory authorization with the meaning” of the WPR was not a bar to Congress’s doing just that — authorizing a use of force without such a statement.
  6. 133 CONG. REC. S13327 (1987) (Statement of Sen. Mitchell).

# APPENDIX A

## James Madison's Notes of Debate at the Constitutional Convention, Aug. 17, 1787<sup>1</sup>

“To make war”

Mr Pinkney opposed the vesting of this power in the Legislature. Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. 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. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, and another peace.

Mr Butler. The Objections agst the Legislature lie in a great degree agst 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. Madison and Mr Gerry moved to insert “*declare*,” striking out “*make*” war; leaving to the Executive the power to repel sudden attacks.

Mr Sharman thought it stood very well. The Executive shd. be able to repel and not to commence war. “*Make*” 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. there is a material difference between the cases of making war and making peace. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration. peace attended with intricate & secret negotiations.

Mr. Mason was agst 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.>

N. H. no. Mas. abst. Cont. no.<sup>[2]</sup> Pa ay. Del. ay. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo- ay.  
[Ayes—7; noes—2; absent—1.]

Mr. Pinkney’s motion to strike out the whole clause, disagd. to without call of States.

Mr Butler moved to give the Legislature power of peace, as they were to have that of war.

Mr Gerry 2ds. him. 8 Senators may possibly exercise the power if vested in that body, and 14 if all should be present; and may consequently give up part of the U. States. The Senate are more liable to be corrupted by an Enemy than the whole Legislature.

On the motion for adding “and peace” after “war”

N. H. no. Mas. no. Ct. no. Pa. no. Del. no. Md. no. Va. no. N. C. <no> S. C. no. Geo. no.  
[Ayes—0; noes—10.]

Adjourned

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<sup>1</sup> 2 MAX FARRAND, THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 318-19 (rev. ed. 1937).

<sup>2</sup> On the remark by Mr. King that “*make*” might be understood to “conduct” it which was an Executive function, Mr. Elseworth gave up his objection <and the vote of Cont. was changed to – ay> [Footnote in the original]

# **APPENDIX B**

## **THE WAR POWERS RESOLUTION 50 U.S.C. §§ 1541-1548 (2000)**

### **§ 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.

**§ 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.

**§ 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.

#### **§ 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 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 section, 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.

**§ 1545. Congressional priority procedures for joint resolution or bill**

(a) Time requirement; referral to Congressional committee; single report

Any joint resolution or bill introduced pursuant to section 1544(b) of this title at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote

Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within



three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee

Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) of this section and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 1544(b) of this title. The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses

In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 1544(b) of this title. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

**§ 1546. Congressional priority procedures for concurrent resolution**

(a) Referral to Congressional committee; single report

Any concurrent resolution introduced pursuant to section 1544(c) of this title shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote

Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee

Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) of this section and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses

In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

**§ 1546a. Expedited procedures for certain joint resolutions and bills**

Any joint resolution or bill introduced in either House which requires the removal of United States Armed Forces engaged in hostilities outside the territory of the United States, its possessions and territories, without a declaration of war or specific statutory authorization shall be considered in accordance with the procedures of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976, except that any such resolution or bill shall be amendable. If such a joint resolution or bill should be vetoed by the President, the time for debate in consideration of the veto message on such measure shall be limited to twenty hours in the Senate and in the House shall be determined in accordance with the Rules of the House.

**§ 1547. Interpretation of joint resolution**

(a) Inferences from any law or treaty

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.

(b) Joint headquarters operations of high-level military commands

Nothing in this chapter shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to November 7, 1973, and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) Introduction of United States Armed Forces

For purposes of this chapter, the term “introduction of United States Armed Forces” includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Constitutional authorities or existing treaties unaffected; construction against grant of Presidential authority respecting use of United States Armed Forces

Nothing in this chapter—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this chapter.

**§ 1548. Separability**

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to any other person or circumstance shall not be affected thereby.

# ENDNOTES

1. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed. 1961).
2. U.S. CONST. art. I, § 8, cl. 11.
3. U.S. CONST. art. I, § 8, cl. 15.
4. U.S. CONST. art. I, § 8, cl. 10.
5. 33 U.S.C. §§ 381-82, 386 (2000) (authorizing the President to use naval force to protect U.S. merchants from pirates).
6. See Letter from William J. Clinton to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 35 WEEKLY COMP. PRES. DOC. 527 (Mar. 26, 1999); NATO Press Release (Mar. 23, 1999).
7. THE FEDERALIST NO. 4, at 45 (John Jay) (Clinton Rossiter ed. 1961).
8. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 528 (Jonathan Elliot ed. 1888).
9. U.S. CONST. art. I, § 8, cl. 11.
10. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 16, at 278 (Cambridge Univ. Press 1960).
11. Every declaration of war has been signed into law by the President. See DAVID M. ACKERMAN & RICHARD F. GRIMMETT, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 4-6 (Cong. Research Serv. RL31133, Jan. 14, 2003).
12. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).
13. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (dictum).
14. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (rev. ed. 1937).
15. Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 516 (Mar. 29, 1999).
16. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 953 (1983) (requiring bicameral approval and presentment to the President for legislative action that has “the purpose and effect of altering legal rights, du-

- ties, and relations of persons...outside the legislative branch”).
17. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 45 (1800) (Chase, J.).
  18. 8 ANNUALS OF CONG. 1519 (1798).
  19. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 45 (1800).
  20. U.S. CONST. art. I, § 8, cls. 12 & 13.
  21. FARRAND, *supra* note 14, at 549.
  22. 15 THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd ed. 1958).
  23. 31 U.S.C. § 1341 (2000).
  24. *Id.* § 1350.
  25. U.S. CONST. art. II, § 2, cl. 1.
  26. LETTER FROM SAMUEL CHASE TO RICHARD HENRY LEE (MAY 17, 1776), LETTERS OF DELEGATES TO CONGRESS, MAY 16 – AUGUST 15, 1776, at 22 (P. Smith ed. 1979).
  27. FARRAND, *supra* note 14, at 318-19.
  28. THE FEDERALIST No. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed. 1961).
  29. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 45 (1800).
  30. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 8 (1801).
  31. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).
  32. FARRAND, *supra* note 14, at 318-19.
  33. U.S. CONST. art. II, § 1, cl. 7.
  34. *The Prize Cases*, 67 U.S. (2 Black) 635, 659 (1863).
  35. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (“a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our Government, may be treated as a gloss on ‘executive power’ vested in the President by [§]1 of Art. II”).
  36. *See Peter Raven-Hansen, Constitutional Constraints: The War Clause*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR 37-38 (Gary M. Stern & Morton H. Halperin eds. 1994).
  37. 22 U.S.C. § 1732 (2000) (the “Hostage Act”).
  38. 50 U.S.C. § 413b(e) (2000).
  39. 50 U.S.C. § 413b(b) (2000 & Supp. 2004).
  40. U.S. Dep’t of Defense Background Briefing on Strategic Support Teams, at 9 (Jan. 24, 2005), *available at* <http://www.fas.org/irp/news/2005/01/dod012405.html>.
  41. Pub. L. No. 107-40, 115 Stat. 224 (2001).
  42. *See supra* note 5.
  43. 22 U.S.C. § 287d-1 (2000).
  44. *See, e.g.*, 10 U.S.C. § 401 (2000) (authorizing use of military “to carry out humanitarian and civic assistance activities” abroad); 10 U.S.C. § 402 (2000) (authorizing use of military to transport humanitarian supplies); 10 U.S.C. § 404 (2000) (authorizing President to order Secretary of Defense to provide “disaster assistance outside the United States to respond to manmade or natural disasters when necessary to prevent loss of lives”); 22 U.S.C. § 2292 (2000) (authorizing President to assist any foreign country or international organization with “disaster relief and rehabilitation”); 22 U.S.C. § 2292l (2000) (authorizing substantially the same for developing countries in Africa).
  45. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981) (emphasizing congressional acquiescence in longstanding executive practice of foreign claims settlements by its failure to disapprove the practice and by enacting collateral legislation). *See generally* Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64

- B.U. L. REV. 109 (1984); Raven-Hansen, *supra* note 36, at 31-32.
46. See separate statement of Susan Rice.
  47. See Dep't of Defense Appropriations Act, 1994, §§ 8151(a)(4)-(5), 8153(1)(a), Pub. L. No. 103-139, 107 Stat. 1418 (Nov. 11, 1993).
  48. U.S. CONST. art. III, § 2, cl. 1.
  49. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).
  50. *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).
  51. *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971), *citing* *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970).
  52. *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).
  53. *Id.* at 1043.
  54. *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973).
  55. See *Ange v. Bush*, 752 F. Supp. 509, 518 n. 8 (D.D.C. 1990) (characterizing the question presented as “whether to deploy United States troops”).
  56. 444 U.S. 996, 996 (1979) (Powell, J., concurring).
  57. *Id.*
  58. *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).
  59. 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd sub nom.* *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).
  60. U.S. CONST. art. VI, § 1, cl. 2.
  61. Among other arguments of inherent executive power, the Truman Administration asserted that the President had broad authority to send troops abroad in order to “execute” treaties such as the United Nations Charter and the North Atlantic Treaty without prior congressional authorization. See Jane Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 636-37 (1993), *citing* Joint Comm. of the Senate Comms. on Foreign Relations and on Armed Services, REPORT ON THE POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES 2, 11-12, 20-21, 25, 27, 82d Cong., 1st Sess., (Comm. Print 1951).
  62. See *The Constitutional Roles of Congress and the President in Declaring and Waging War, Hearings Before the Senate Judiciary Comm.*, 102d Cong., 1st Sess. 230, 237-41 (1991) (statement of Eugene Rostow, Distinguished Fellow, United States Institute of Peace).
  63. See FARRAND, *supra* note 14, at 318-19.
  64. 14 THE WRITINGS OF THOMAS JEFFERSON 445 (Andrew A. Lipscomb & Albert E. Bergh ed. 1904).
  65. Michael Glennon, *U.S. Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509 (1986). The United Nations Charter also makes “special agreements,” by which member states make their armed forces available to the Security Council, subject to ratification by the states’ “respective constitutional processes.” U.N. CHARTER, art. 43, § 3, 59 Stat. 1031, T.S. No. 993 (June 26, 1945). See also 22 U.S.C. § 287d (2000).
  66. Glennon, *supra* note 65, at 532.
  67. 22 U.S.C. § 287d (2000).
  68. See Stromseth, *supra* note 61, at 597.
  69. See *supra* note 35.
  70. Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1.
  71. See ACKERMAN & GRIMMETT, *supra* note 11, at 80-86.
  72. See *id.* at 44-48.
  73. 50 U.S.C. § 21 (2000).
  74. See ACKERMAN & GRIMMETT, *supra* note 11, at 48-74.
  75. 10 U.S.C. § 12103 (2000).
  76. See *Ex Parte Quirin*, 317 U.S. 1 (1942).

77. See 33 U.S.C. §§ 381-382, 386 (2000) (authorizing use of naval force against pirates); Pub. L. No. 4, ch. 4, 69 Stat. 7 (1955) (authorizing the President to employ armed forces to secure and protect Formosa and the Pescadores against armed attack).
78. Act of July 13, 1861, §§ 5 & 6, *quoted in* The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863) (finding legislative sanction for President Lincoln’s proclamation of a naval blockade in the Civil War in “Congress ‘*ex majore cautela*’ [out of caution]...passing an act ‘approving, legalizing, and making valid all the acts, proclamations, and orders of the President...as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States.”) (italics in original).
79. Act of May 28, 1798, ch. 48, 1 Stat. 561.
80. Pub. L. No. 88-408, 78 Stat. 384 (1964).
81. Pub. L. No. 107-40, 115 Stat. 224 (2001).
82. 50 U.S.C. § 21 (2000).
83. See ACKERMAN & GRIMMETT, *supra* note 11, at 27.
84. Compare *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) (construing the Federal Tort Claims Act) *with* *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (construing the War Powers Resolution, which it also found to lack a judicially manageable standard for deciding whether “hostilities” existed).
85. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976); John C. Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 291 (1996). *But see* LOUIS FISHER, PRESIDENTIAL WAR POWER 17-19 (2004).
86. See *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971).
87. Pub. L. No. 89-18, 79 Stat. 109 (1965).
88. Pub. L. No. 90-5, 81 Stat. 5 (1967).
89. See *Orlando v. Laird*, 443 F.2d 1039, 1042 n.2. (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971).
90. See WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 123 (1994).
91. *Ex Parte Endo*, 323 U.S. 283, 303 n.24 (1944).
92. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2655 (2004) (Souter and Ginsburg, JJ., concurring in part, dissenting in part, and concurring in the judgment), *id.* at 2671 (Scalia and Stevens, JJ., dissenting) (applying *Endo* clear statement rule to use-of-force statute).
93. 50 U.S.C. §§ 1541-1548 (2000). The War Powers Resolution is appended as Appendix B.
94. 50 U.S.C. § 1541(a) (2000).
95. See *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983). *But see* *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm’n*, 673 F.2d 425, 459 (D.C. Cir. 1982), *summarily aff’d*, 463 U.S. 1216 (1983) (suggesting that foreign affairs vetoes may be different from domestic affairs vetoes).
96. 50 U.S.C. § 1541(c) (2000).
97. 50 U.S.C. § 1542 (2000).
98. 50 U.S.C. § 1543 (2000).
99. *Id.*
100. Richard M. Nixon, *Veto of the War Powers Resolution*, 5 PUB. PAPERS 893 (Oct. 24, 1973).
101. Nixon, *supra* note 100.
102. See *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).
103. 50 U.S.C. § 1547(d)(2) (2000).
104. See *Deployment of United States Armed Forces Into Haiti*, 18 Op. Off. Legal Counsel 173, 176 (1994).
105. Nixon, *supra* note 100.
106. 50 U.S.C. § 1547(a)(1) (2000).
107. 50 U.S.C. § 1547(a)(2) (2000).



108. See *War Powers, Libya, and State-Sponsored Terrorism: Hr'g Before the Subcomm. on Arms Control, Int'l Security and Sci. of the House Comm. on Foreign Affairs*, 99th Cong., 2d Sess. (1986) (testimony of Abraham Sofaer, Legal Adviser to the Department of State), reprinted in 80 AMER. J. INT'L L. 636, 638 (1986). See generally BANKS AND RAVEN-HANSEN, *supra* note 90, at 129-31.
109. See, e.g., *Lowry v. Reagan*, 767 F. Supp. 333 (D.D.C. 1987); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).
110. See, e.g., *Authority of the President to Use United States Armed Forces for the Protection of Relief Efforts in Somalia*, 13 Op. Off. Legal Counsel 8 (1992); *Deployment of United States Armed Forces into Haiti*, 18 Op. Off. Legal Counsel 173 (1994); Office of Legal Counsel, *Proposed Deployment of United States Armed Forces into Bosnia* (Nov. 30, 1995) (mem. op.), available at <http://www.usdoj.gov/olc/bosnia2.htm>.111.
111. 50 U.S.C. §§ 1545-1546 (2000).
112. See, e.g., HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 176-77 (1990).
113. 50 U.S.C. §§ 1601-1651 (2000).





