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## ONCE MORE UNTO THE BREACH: AMERICAN WAR POWER AND A SECOND LEGISLATIVE ATTEMPT TO ENSURE CONGRESSIONAL INPUT

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Jonathan T. Menitove\*

*Once again embroiled in an unpopular overseas armed conflict, the United States faces difficult questions concerning the constitutional use of military force. Records from the Constitutional Convention suggest the Framers intended to lodge America's power to go to war with the Congress. While American presidents' early use of military force displays deference to the legislature, more recent military actions illustrate the executive's dominance in making war. Notwithstanding a few early court decisions in Congress's favor, the judiciary has been unhelpful in restoring the constitutional Framers' vision for the administration of the war power. Congress, therefore, has been forced to act alone in attempting to revive the legislature's role in the decision to go to war. After several unsuccessful attempts, Congress's passage of the War Powers Resolution of 1973 appeared to finally re-inject congressional input in the war-making process. However, subsequent jurisprudence, scholarly debate, and presidential disregard for the law have revealed the War Powers Resolution's various inadequacies. Accordingly, this paper proposes that a new law—the War Powers Appropriations Act—be passed to protect the congressional war powers afforded by the Constitution. By protecting Congress's role via the legislature's constitutional power to appropriate funds, the War Powers Appropriations Act represents a solution that accomplishes the goal of forcing the executive to consult with Congress, while avoiding the potential pitfalls of unconstitutionality, inartful drafting, and presidential disregard.*

### INTRODUCTION

Observers of today's military efforts in Iraq might be experiencing a certain déjà vu reminiscent of the early 1970s and the American involvement in Vietnam. While the Vietnam War was unquestionably on a larger scale—both in terms of American casualties as well as the war's polarization of the American public—several parallels can be drawn. Both the Vietnam War and the current war in Iraq were initially met with overwhelming support and were authorized by the United States Congress,<sup>1</sup> both wars have suffered a steadily decreasing

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\* Harvard Law School, J.D. expected 2010; Yale University, M.A. 2007, B.A. 2007. I would like to thank Andrew L. Kaufman and David R. Mayhew for their support, guidance, and helpful comments.

1. Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia (Gulf of Tonkin Resolution), Pub. L. No. 88-408, 78 Stat. 384 (1964); Joint Resolution to Authorize the Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

degree of public support,<sup>2</sup> and both wars have tarnished the legacy of a departing American president.<sup>3</sup> Additionally, as Congress sought to obtain a greater role in each war's prosecution, both the Vietnam War and the current War in Iraq serve to highlight moments of constitutional awareness, whereby the balance of war power between Congress and the president has come under scrutiny.

Ever since the end of the American involvement in Vietnam, politicians, scholars, and commentators have continually debated war power issues, pitting the Constitution's delegation of the war power to Congress against the historical practice of presidents using force without congressional authorization.<sup>4</sup> As the American involvement in Vietnam drew to a close, Congress sought to address this issue with the passage of the War Powers Resolution of 1973,<sup>5</sup> a bill that once sought to protect Congress's role in war-making but has subsequently been discredited both by allegations that the Resolution is unconstitutional and that it is inartfully drafted, as well as by the fact that American presidents have consistently ignored the Resolution's provisions. Now, as American involvement in Iraq begins to conclude, the issue of war power reform has once again become politically salient, and the National War Powers Commission<sup>6</sup> assembled at the University of Virginia has already suggested potential legislation.<sup>7</sup> This Note seeks to contribute to the discussion concerning what legislation is necessary to restore balance between the legislative and executive branches when the United States wages war. It proposes that a new law—the War Powers Appropriations Act—be passed to protect the congres-

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2. See, e.g., Editorial, *L.B.J. and 1968*, N.Y. TIMES, Jan. 14, 1968, at E16; David Leonhardt & Marjorie Connelly, *81% in Poll Say Nation is Headed on Wrong Track*, N.Y. TIMES, Apr. 4, 2008, at A1.

3. See, e.g., Max Frankel, *Why the Gap Between L.B.J. and the Nation*, N.Y. TIMES, Jan. 7, 1968, at SM26; Editorial, *Mission Still Not Accomplished*, N.Y. TIMES, Mar. 20, 2008, at A26.

4. Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1217 (1984) ("Since the final years of the Vietnam War, politicians and commentators have sought to reconcile the constitutional delegation of war powers to Congress with the historical practice of presidential deployment of military forces in foreign conflicts without congressional approval.").

5. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973).

6. The National War Powers Commission assembled at the University of Virginia includes some of America's foremost foreign policy experts including Slade Gorton, Lee H. Hamilton, Carla A. Hills, John O. Marsh, Jr., Edwin Meese, III, Abner J. Mikva, J. Paul Reason, Brent Scowcroft, Anne-Marie Slaughter, Strobe Talbott, John C. Jeffries, Jr., and W. Taylor Reveley, III. See *National War Powers Commission Recommends War Powers Consultation Act of 2009*, UVA TODAY, July 8, 2008, <http://www.virginia.edu/uvatoday/newsRelease.php?id=5680> (on file with the University of Michigan Journal of Law Reform).

7. JAMES A. BAKER, III ET AL., NATIONAL WAR POWERS COMMISSION REPORT (2008) (on file with the University of Michigan Journal of Law Reform), available at <http://millercenter.org/policy/commissions/warpowers/report>.

sional war powers through a restructuring of the defense appropriations process. By protecting Congress's role via the legislature's constitutionally afforded power to appropriate funds, the War Powers Appropriations Act represents a solution that accomplishes the goal of forcing the executive to consult with Congress, while avoiding the potential pitfalls of unconstitutionality, inartful drafting, and presidential disregard.

Illustrating the need for the War Powers Appropriations Act demands that the issues concerning war power be confronted from constitutional, historical, and political perspectives. Accordingly, this Note proceeds with its argument in the following parts. The first part addresses the constitutional angle, establishing the Framers' intent to lodge America's power to go to war with the Congress. The second part details the historical evolution of presidents' use of war power, highlighting how presidents' early use of military force displays a deference to Congress, while more recent military actions reveal the executive's dominance in making war. The third part discusses the judiciary's involvement, noting how, while a few early court decisions expressly recognized Congress's war power, more recent jurisprudence has been unhelpful in restoring the constitutional Framers' vision regarding the balancing of war power between legislative and executive branches. The fourth part details the War Powers Resolution of 1973, the questions regarding its constitutionality, the problems posed by its inartful drafting, and U.S. presidents' blatant disregard for the Resolution's provisions. Finally, the Note presents the War Powers Appropriations Act as a means by which Congress could use its constitutional power of the purse to ensure congressional input in war-making decisions.

#### I. THE FRAMERS' INTENT: WAR POWER AND THE UNITED STATES CONSTITUTION

Delegate comments at the Philadelphia Convention, the text of Article I of the Constitution, and Framers' remarks all provide evidence of the Framers' intent to vest America's power to go to war with the legislature.

*A. Delegate Comments at the Convention Reveal the Intended Balance of the War Power Between the Legislature and President*

The delegates debated the proper balance between Congress and the president regarding the power to wage war, prompting various revisions to the Constitution's text. Under the Articles of Confederation, the Congress possessed both legislative and executive powers, permitting a relatively simple war power provision, namely that the "United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war."<sup>8</sup>

The initial draft of the Constitution, with its system of separated powers, afforded Congress the power "to make war."<sup>9</sup> At first, Charles Pinckney of South Carolina sought to shift this power to the Senate, which was smaller, more knowledgeable in foreign affairs, and—on account of its treaty power—best able to make peace.<sup>10</sup> Pierce Butler, also of South Carolina, sought to further condense the war power, calling 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."<sup>11</sup> Butler's motion received no recorded support,<sup>12</sup> and was met with strong opposition by Elbridge Gerry of Massachusetts—who was distrustful of "a motion to empower the Executive alone to declare war"—and George Mason, of Virginia, who believed the Executive could not safely be trusted with this authority.<sup>13</sup>

After both Pinckney and Butler's proposals were dropped, discussion centered on a motion made by James Madison of Virginia and Gerry to substitute the word "declare" for "make."<sup>14</sup> The purpose of such a change was not to shift the war power from the legislative to the executive branch.<sup>15</sup> Rather, as explained in the

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8. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 674 (1972) (quoting ARTICLES OF CONFEDERATION, art. VI, IX).

9. BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* 43 (1998); see also Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1773–74 (1968).

10. Lofgren, *supra* note 8, at 675; see also HALLETT, *supra* note 9, at 43.

11. HALLETT, *supra* note 9, at 43 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1911) [hereinafter RECORDS]); see also Lofgren, *supra* note 8, at 675.

12. Lofgren, *supra* note 8, at 675.

13. Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 39–40 (1972) (quoting 2 RECORDS, *supra* note 11, at 318–19).

14. HALLETT, *supra* note 9, at 43; see also Lofgren, *supra* note 8, at 675 (citing 2 RECORDS, *supra* note 11, at 318).

15. Note, *supra* note 9, at 1773 ("When the proposal to substitute 'declare' for 'make' was introduced, the debates over the issue indicate that the new wording was not intended

record by Rufus King of Massachusetts, the change was made out of concern that “make war” might suggest that Congress possessed the power to conduct war, which the Convention believed to be a function for the executive.<sup>16</sup> Elaborating on the change, James Wilson of Pennsylvania stated that Congress reserved the power to declare war, thus protecting the United States against the prospect of being “hurried” into war, while ensuring “that no ‘single man [can]. . . involve us in such distress.’”<sup>17</sup> Such comments suggest the Framers’ strong sense that war-making power was most appropriately allocated to Congress.

In addition to revealing the Framers’ preference for strong congressional war power, the “declare war” debate also showcases the delegates’ practical sensibilities. While Rufus King provided one rationale for the change, Madison and Gerry also sought the amendment in order to permit the president “the power to repel sudden attacks.”<sup>18</sup> Outside of this emergency situation, however, the record reflects the Convention’s desire for Congress to decide when the United States went to war.<sup>19</sup>

Not all delegates may have understood the textual substitution in the same way. Roger Sherman of Connecticut, who believed “[t]he Executive [should] be able to repel and not to commence war,” considered the change unnecessary, believing that “make war” already authorized the president to repel sudden attacks.<sup>20</sup> Additionally, there was a discrepancy in the vote tally recording the amendment’s passage. Madison recorded the measure as having an initial vote of 7-2 in favor of adoption, with the count moving to 8-1 in favor after Rufus King’s remarks defending the executive’s power to conduct war.<sup>21</sup> However, Max Ferrand—in his official journal of the Convention—recorded the first vote as 4-5 against with the 8-1 passage occurring after King’s comments.<sup>22</sup> If Ferrand’s

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to shift from the legislature to the Executive this general power to engage the country in war.”).

16. Berger, *supra* note 13, at 40.

17. *Id.* at 36 (quoting 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed., 2d ed. 1836)).

18. Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A Joint Decision Solution*, 77 GEO. L.J. 367, 374 (1988) (quoting Lofgren, *supra* note 8, at 675); see also LOUIS FISHER, PRESIDENTIAL WAR POWER 6–7 (1995); PETER IRONS, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION 6 (2005); Note, *supra* note 9, at 1773 (“At most, the sole reason for the substitution was to confirm the Executive’s power ‘to repel sudden attacks.’”).

19. See Note, *supra* note 9, at 1773 (“In all other cases the commitment of the country to a trial of force with another nation was to remain the prerogative of Congress.”).

20. See Lofgren, *supra* note 8, at 676.

21. *Id.* at 676–77 (internal citations omitted).

22. *Id.* (internal citations omitted).

account is more accurate, the change in language from “make war” to “declare war” could actually be perceived as an explicit broadening of presidential war power. At a minimum, these observations reveal that the content of the “declare war” debate meant different things to different delegates, thereby warranting additional exploration outside the “declare war” discussion to ascertain the Framers’ true intentions.

Delegate comments spoken outside the “declare war” debate reveal the Framers’ preference for Congress, and not the president, to administer the war power. Earlier in the Convention, as the delegates debated the construction of the executive branch, delegates were unequivocal in their preference that Congress and not the president control the war power. Charles Pinckney “was afraid the Executive powers of [the existing] Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, to wit an elective one.”<sup>23</sup> Similarly, John Rutledge of South Carolina wanted a single executive “‘tho’ he was not for giving him the power of war and peace.”<sup>24</sup> Finally, James Wilson also advocated for a single executive, but did not believe “the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a legislative nature. Among others that of war & peace &c.”<sup>25</sup> Thus, delegate comments outside the context of the “declare war” debate confirm the Framers’ intent to allocate the war power to Congress.

It can also be argued that these comments of the Framers are irrelevant to the contemporary administration of America’s war power. Of the 1,273 pages of the Constitutional Convention’s printed record, less than two cover the debate regarding the proper allocation of war power.<sup>26</sup> The war power debate occurred on only one day—August 17, 1787—as delegates debated the Committee on Detail’s draft reported on August 6.<sup>27</sup> One interpretation of the scant attention the Framers paid to war power is to say the issue was simply not that relevant, and that drawing broad conclusions from limited debate is an inappropriate basis for developing a legislative proposal reforming war power. An alternative explanation, however, might be that debate on war powers was

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23. Louis Fisher, *Historical Survey of the War Powers and the Use of Force*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 12 (Gary M. Stern & Morton H. Halperin eds., 1994) (citing 1 RECORDS, *supra* note 11, at 64–66).

24. *Id.* (same).

25. *Id.* (citing 1 RECORDS, *supra* note 11, at 65–66).

26. Peter Raven-Hansen, *Constitutional Constraints: The War Clause*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR*, *supra* note 23, at 30 (citing 2 RECORDS, *supra* note 11, at 318–19); Lofgren, *supra* note 8, at 675 (same).

27. See Lofgren, *supra* note 8, at 675 (citing 2 RECORDS, *supra* note 11, at 181–82).

brief on account of the Convention quickly reaching consensus on the issue.

A second potential methodological critique could argue that the Framers' thoughts on war power are inapplicable to contemporary geopolitics. Among those espousing this view include former Secretary of State Cyrus Vance, who believed that the Framers "lived in a very different world" and that their thoughts regarding America's fledgling military power spoken in the late eighteenth century should not govern contemporary foreign policy.<sup>28</sup> While Secretary Vance is undoubtedly correct that the United States has changed from a budding republic to a dominant world power, his remarks concerning the Constitution's inapplicability to "today's complex world" are likely misplaced.<sup>29</sup> Particularly in light of the various extra-constitutional measures employed during the Bush Administration's prosecution of the Global War on Terror, a return to constitutional principles in the realm of national security and war power is warranted. The Framers' comments at the Philadelphia Convention during the summer of 1787 evidence the intent to place the war power in the hands of Congress.

*B. The Text and Structure of the Constitution Support the Delegates' Intention to Vest the War Power in the Legislature*

In addition to the Framers' comments, the Constitution's structure reveals the delegates' intention to entrust Congress with managing the war power. Although the president is Commander-in-Chief, the constitutional structure denies him the ability to make war without Congress's consent. Congress has the power:

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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28. See Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 84 (1984).

29. *Id.*



To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . .<sup>30</sup>

These five clauses serve to place “ultimate power” over the nation’s military in the hands of Congress.<sup>31</sup>

While the president is only able to act with Congress’s consent, Congress is able to instigate hostilities without executive consent. In Article I, Section 8, the Framers afforded Congress the power to “[g]rant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>32</sup> This addition to Congress’s enumerated powers was made by Elbridge Gerry following the “declare war” debate, out of concern that any narrowing of Congress’s authority should not prohibit Congress’s peacetime granting of letters of marque and reprisal, which could potentially prevent the necessity of going to war.<sup>33</sup> Such letters could, for example, authorize sending military forces abroad to protect Americans overseas or retrieve unlawfully seized property, and the Framers fully understood that armed reprisals constituted acts of war.<sup>34</sup> As such, in addition to the Framers’ comments at the Constitutional Convention, the enumerated powers of Article I suggest Congress—and not the president—to be preeminent when it comes to war power.

*C. Additional Evidence Following the Philadelphia  
Convention Supports this Notion of Congressional  
War Power Supremacy*

In advocating for the Constitution’s ratification in THE FEDERALIST No. 69, Alexander Hamilton explicitly addressed the balance of war power between Congress and the president:

The President is to be Commander-in-Chief of the army and navy of the United States. In this respect his authority . . . 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; while that of the British King extends to the *declaring* of war and to the *raising* and

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30. U.S. CONST. art. I, § 8, cl. 12–16.

31. IRONS, *supra* note 18, at 23.

32. U.S. CONST. art. I, § 8, cl. 11.

33. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1060–61 (1986).

34. *See* Irons, *supra* note 18, at 22.

*regulating* of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.<sup>35</sup>

Thus, according to Hamilton, the president's war power authority is strictly limited. Equally illustrative of the Framers' intent is an April 2, 1798 letter from James Madison to Thomas Jefferson, in which Madison notes: "The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."<sup>36</sup>

Thus, delegate comments at the Philadelphia Convention, the enumerated Article I powers, and Framers' remarks made subsequent to the Constitution's drafting all provide evidence of the Framers' intent to lodge America's power to go to war with the national legislature. Madison's letter is especially salient, as it represents correspondence discussing the balance of war power between two future commanders-in-chief. While the future fourth president's comments are insightful, a historical survey of American military actions is necessary to discover how the Framers' theoretical balance of war power between Congress and the president was implemented in practice.

## II. CONGRESS, THE PRESIDENT, AND WAR: A HISTORICAL SURVEY

While American presidents' early use of military force displayed tremendous deference to Congress, more recent military actions have exhibited the executive's dominance in making war. Reviewing the historical record of America's military activity demonstrates that, for the nation's first one hundred-sixty years, the administration of war power mirrored the balance the Framers proscribed, permitting the legislature predominance over the executive branch.<sup>37</sup> However, beginning with the Korean War in the early 1950s, the executive has come to dominate the use of America's military power, leaving Congress with a subservient role and betraying the Framers' original intent. As such, the history of American war-making—with its continued transfer of war power from the legislature to the Executive—demonstrates the need for war power legislative reform in order to restore the system of congressional supremacy the Founders envisioned.

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35. THE FEDERALIST NO. 69 (Alexander Hamilton).

36. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798) *reprinted in* 6 THE WRITINGS OF JAMES MADISON: 1790–1802, at 312 (G. Hunt ed., 1906).

37. LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 15 (2000).

A. *The Early Use of the War Power Followed the Framers' Intended Balance*

The earliest examples of American military action firmly establish legislative dominance in war-making. In confronting Indian attacks on the frontier, President Washington acknowledged that his constitutional authority permitted only defensive actions against the hostile Indian forces.<sup>38</sup> Secretary of War Henry Knox advised territorial governors that military operations could only amount to “defensive measures” until Congress, which was “solely . . . vested with the powers of War” authorized offensive engagement.<sup>39</sup> Furthermore, in suppressing the Whiskey Rebellion of 1794, President Washington acted expressly on the congressionally delegated authority provided in 1792 legislation authorizing Washington to call up the state militias should the United States “be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe.”<sup>40</sup>

President Adams displayed similar deference to the Congress during the Quasi-War with France from 1798 to 1800. Upon initial review, it may seem that Adams—who deployed naval forces without Congress declaring war—betrayed the Constitution’s grant of war power to Congress. However, closer inspection reveals that President Adams did not act unilaterally, instead going to the Congress, which subsequently debated various defense measures and passed several dozen bills in preparation for war.<sup>41</sup> In fact, Congress ultimately demonstrated more belligerence than Adams, passing several bills aimed at encouraging the war effort.<sup>42</sup>

President Jefferson also recognized legislative supremacy regarding war power during his confrontation with Barbary Pirates. When the Bey of Tripoli threatened the United States with war, Jefferson dispatched a squadron of frigates. Despite the Bey’s declaration of war—via the custom of chopping down the flagpole of the consulate—Jefferson ordered the navy to release any prisoners and vessels captured after having disarmed them, as Jefferson believed his authority to act in defense of the country did not permit

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38. See *id.* at 15–16.

39. *Id.* (quoting 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 195, 220–21 (Clarence Edwin Carter ed., 1936)).

40. See FISHER, *supra* note 18, at 16 (quoting 1 Stat. 264, § 1 (1792)).

41. See Fisher, *supra* note 23, at 14; see also FISHER, *supra* note 37, at 16; FISHER, *supra* note 18, at 17; IRONS, *supra* note 18, at 35; ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT 10 (1982).

42. Biden & Ritch, *supra* note 18, at 375 (“Indeed, Congress ultimately became more belligerent than Adams, passing a number of measures aimed at encouraging successful prosecution of the conflict.” (internal citation omitted)).

aggressive action, even after an adversary's declaration of war.<sup>43</sup> In his request for "authorizing measures of offense," Jefferson told Congress that naval forces were "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense."<sup>44</sup>

Less than a decade later, on November 5, 1811, President Madison submitted a message to Congress, describing several hostile actions by Great Britain and requesting that Congress prepare for war. Noting how the British had "[t]rampl[ed] on rights which no independent nation can relinquish," Madison hoped that Congress "[w]ill feel the duty of putting the United States into an armor and an attitude demanded by the crisis, and corresponding with the national spirit and expectations."<sup>45</sup> After detailing various "injuries and indignities" to Congress on June 1, 1812, Madison left to Congress the decision to declare war, "a solemn question which the Constitution wisely confides to the legislative department of the Government."<sup>46</sup> Congress declared war on June 18, 1812.<sup>47</sup> Thus, the military actions of America's first four Commanders-in-Chief—Washington, Adams, Jefferson, and Madison—all exhibit the Executive's deference to Congress, as envisioned at the Philadelphia Convention.

### *B. The Executive Now Dominates the Use of America's Military Power*

The beginning of the Korean War in 1950 marked the end of presidential deference to Congress in the conduct of war. While from 1789 through 1950, presidents did use military force unilaterally on occasion, those military actions, as scholar Edward S. Corwin described them, consisted largely of "fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like."<sup>48</sup> However, in 1950, President Truman—completely without congressional declaration, authorization, or consultation—committed the United States to war in Korea, a conflict that would last three years

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43. See Note, *supra* note 9, at 1779; see also THOMAS & THOMAS, *supra* note 41, at 10.

44. Thomas Jefferson, *First Annual Message (December 8, 1801)*, in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 327 (James D. Richardson ed., 1896).

45. See FISHER, *supra* note 18, at 28 (quoting 2 MESSAGES AND PAPERS OF THE PRESIDENTS 479 (James D. Richardson ed., 1897)).

46. See *id.* (quoting 2 MESSAGES AND PAPERS OF THE PRESIDENTS 489–90 (James D. Richardson ed., 1897)).

47. *Id.* at 29.

48. Edward S. Corwin, *The President's Power*, NEW REPUBLIC, Jan. 29, 1951, at 16.

at a cost of more than 140,000 casualties.<sup>49</sup> Rather than seek approval from the United States Constitution, Truman justified his authority using the United Nations Charter, a treaty and the supreme law of the land, and resolutions taken pursuant to that Charter authorizing the use of force.<sup>50</sup>

Justifying the action, Truman's Secretary of State Dean Rusk wrote: "As Commander-in-Chief the President can deploy the Armed Forces and order them into active operations. In an age of missiles and hydrogen warheads, his powers are as large as the situation requires . . . ."<sup>51</sup> Secretary Rusk's analysis of executive authority served as a preview to presidents' continued use of the war power without congressional authorization.

In 1962, President Kennedy ordered a naval quarantine of Cuba without congressional permission.<sup>52</sup> Additionally, President Kennedy in 1962 deployed the first large contingent of American troops to Vietnam without seeking prior congressional authorization.<sup>53</sup> Although President Johnson did receive congressional authorization with the Gulf of Tonkin Resolution<sup>54</sup> in 1964 for continued military action in Southeast Asia, President Johnson did not consult Congress when sending over twenty thousand troops to the Dominican Republic in 1965 in an effort to prevent communist takeover.<sup>55</sup> President Ford's attack on the *Mayaguez* vessel, President Carter's Iranian hostage rescue operation, President Reagan's missions to Grenada, Lebanon, and Libya, and President Bush's capture of Panamanian dictator Noriega were all conducted without congressional authorization.<sup>56</sup> While President Bush did finally seek eleventh-hour legislation from Congress to wage the Persian Gulf War, President Bush did not consider such permission necessary. In remarks that seem a far cry from the words of Washington, Adams, Jefferson, and Madison, President Bush in a January 8, 1991 response to reporters asking him whether he needed congressional authorization to wage war against Iraq stated, "I don't think I need it . . . I feel that I have the authority to fully implement the United Nations resolutions."<sup>57</sup> His remarks during the

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49. See THOMAS & THOMAS, *supra* note 41, at 20.

50. See *id.*; see also FISHER, *supra* note 37, at 40; Vance, *supra* note 28, at 80.

51. Dean Rusk, *The President*, 38 FOREIGN AFF. 353, 357 (1959).

52. See Vance, *supra* note 28, at 80; see also Fisher, *supra* note 23, at 23.

53. See THOMAS & THOMAS, *supra* note 41, at 25.

54. Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia (Gulf of Tonkin Resolution), Pub. L. No. 88-408, 78 Stat. 384 (1964).

55. See THOMAS & THOMAS, *supra* note 41, at 25-26; see also Vance, *supra* note 28, at 80.

56. See FISHER, *supra* note 18, at 136-48.

57. The President's News Conference on the Persian Gulf Crisis (Jan. 9, 1991) 27 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 25 (1991).

1992 presidential campaign were even more pointed: "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait."<sup>58</sup> President Bush's words translated into action when, in December 1992, he sent U.S. troops to Somalia without congressional authorization, a military action that would continue during President Clinton's first year in office. For his part, President Clinton seemed to accept his predecessor's view of executive war power, launching an unauthorized bombing campaign against Serbia in 1999 that lasted in excess of sixty days.<sup>59</sup>

This historical survey is not meant to suggest that presidents now only conduct wars without the consent of Congress. Over the past few administrations, presidents have often received congressional authorization for major military conflicts, including the Vietnam War, the Persian Gulf War, and the current military actions in Afghanistan and Iraq.<sup>60</sup> However, the historical survey presented above does demonstrate an increased willingness and ability on the part of the Executive to act without Congress in making war. Thus, while American presidents' early use of military force exhibited deference to Congress, history has illustrated the president's steady expropriation of the war power at Congress's expense. The contemporary situation whereby the president is able to wage war without any form of congressional authorization runs afoul of the Framers' intent in balancing the war power between the legislative and executive branches. This Note proposes a legislative measure to remedy this situation and restore Congress's role in war-making. However, before discussing legislative reform, it is first necessary to exhaust an alternative remedial forum, namely the courts.

### III. MIXED MESSAGES: HOW THE JUDICIARY HAS ADDRESSED WAR POWER

Notwithstanding a few early Supreme Court decisions defending Congress's predominance over the president in exercising war power, the judiciary has been largely unhelpful in restoring the constitutional Framers' original vision. Initial decisions arising out

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58. IRONS, *supra* note 18, at 210.

59. See GENE HEALY, *THE CULT OF THE PRESIDENCY* 126 (2008).

60. Persian Gulf War Authorization for Use of Military Force against Iraq Resolution, Pub. L. No. 107-243, 116 Stat. 1497 (2002); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq, Pub. L. No. 102-1, 105 Stat. 3 (1991); Joint Resolution To Promote the Maintenance of International Peace and Security in Southeast Asia (Gulf of Tonkin Resolution), Pub. L. No. 88-408, 78 Stat. 384 (1964).

of the Quasi-War with France affirmed Congress's authority, but subsequent holdings—most especially the Supreme Court's decisions in *The Prize Cases*<sup>61</sup> and *United States v. Curtiss-Wright*<sup>62</sup>—seemed to imbue the president with extra-constitutional war power authority.<sup>63</sup> By the time litigation arose during the Vietnam and Persian Gulf Wars, the courts timidly refused to decide the issue, claiming the issue to be a nonjusticiable political question.<sup>64</sup> As such, the judiciary does not represent a viable means for mandating the constitutionally required congressional input in war-making decisions.

A. *The Earliest Supreme Court Cases Pertaining to War Power  
Affirmed Congress's Authority*

The earliest Supreme Court cases pertaining to war power arose out of the Quasi-War with France between 1798 and 1800, which, although authorized by congressional statute, was undeclared. Writing in 1800, the Supreme Court noted in *Bas v. Tingy*,<sup>65</sup> that regardless of whether hostilities were declared or undeclared, the conflict still constituted "war" in the constitutional sense, with the declared war being "perfect" and "general" war and the undeclared war constituting "imperfect" and "limited" war.<sup>66</sup> While the Court did not expressly identify Congress to be the dominant player in war-making decisions, the Court strongly implied this message:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws [as passed by Congress].<sup>67</sup>

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61. 67 U.S. (2 Black) 635 (1863).

62. 299 U.S. 304 (1936).

63. See Note, *supra* note 9, at 1780 (identifying *The Prize Cases* as the "final stamp of approval on [the] expanding power of the President to make war without prior authorization . . ."); see also Comment, *supra* note 4, at 1241 n.66 (1984) (describing *Curtiss-Wright's* "extremely broad reading of presidential foreign affairs power").

64. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311 (2d Cir. 1973); *Mitchell v. Laird*, 488 F.2d 611, 615–16 (D.C. Cir. 1973); see also *Orlando v. Laird*, 443 F.2d 1039, 1042–43 (2d Cir. 1971).

65. 4 U.S. (4 Dall.) 37 (1800).

66. *Id.* at 40; see also FISHER, *supra* note 18, at 18; Biden & Ritch, *supra* note 18, at 375.

67. *Bas*, 4 U.S. at 43; see also Lofgren, *supra* note 8, at 701.

The Court was far more explicit in *Talbot v. Seeman*,<sup>68</sup> an 1801 case also with origins in the Quasi-War with France. In *Talbot*, the newly-sworn Chief Justice John Marshall confronted a dispute between Captain Silas Talbot, whose American warship (the *U.S.S. Constitution*) libeled the *Amelia*, a Hamburg vessel that had been captured by the French.<sup>69</sup> In finding Captain Talbot's seizure of the *Amelia* lawful, Justice Marshall held that although war had not been declared against France, Congress had authorized the U.S. Navy to capture French vessels, and since the *Amelia* was carrying eight carriage guns and in possession of the French, there was sufficient probable cause for Captain Talbot to capture the ship.<sup>70</sup> Most notable is Justice Marshall's explicit statement regarding Congress's war power:

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. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.

To determine the real situation of America in regard to France, the acts of congress are to be inspected.<sup>71</sup>

Justice Marshall more precisely defined his views regarding the balance of war power between the legislative and executive branches in *Little v. Barreme*,<sup>72</sup> an 1804 case also arising out of the Quasi-War. In *Little*, Justice Marshall held that in authorizing war, Congress may place limits on the president's conduct. The facts of *Little* relay the story of Congress authorizing President Adams to seize ships sailing to French ports, with President Adams—contrary to Congress's wishes—issuing an order to capture vessels sailing to or from French ports.<sup>73</sup> Captain George Little seized a Danish ship sailing from a French port, and was subsequently sued for damages. Marshall, in deciding the case, held that Captain Little could

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68. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

69. *Id.* at 2.

70. *Id.* at 27–45.

71. *Id.* at 28–29; see also FISHER, *supra* note 18, at 18; FISHER, *supra* note 37, at 18–19; Biden & Ritch, *supra* note 18, at 375; Lofgren, *supra* note 26, at 701; Comment, *supra* note 4, at 1233.

72. 6 U.S. (2 Cranch) 170 (1804).

73. *Id.* at 171.



be held liable for damages,<sup>74</sup> thus ruling that orders issued by the Commander-in-Chief during wartime are still subject to Congress's restrictions.<sup>75</sup> Such a ruling clearly indicates Justice Marshall's belief that, on war-making decisions, Congress reigned supreme over the president.

The Court affirmed the notion of congressional war power supremacy in *Martin v. Mott*,<sup>76</sup> a controversy arising in 1827 in the aftermath of the War of 1812. While some cite this case as support for broad presidential war power, the Court actually imposed limits on the president's authority.<sup>77</sup> In the decision, Justice Story sustained the delegation by Congress to the president of the authority to call up the militia, but the Court carefully constricted the circumstances in which the president could act, noting the president's power to be "a limited power, confined to cases of actual invasion, or of imminent danger of invasion."<sup>78</sup> Furthermore, the Court confirmed that the president did not hold any inherent war power authority; he could only exercise war power when such power was "confided by Congress to the President."<sup>79</sup> These four decisions illustrate early Supreme Court recognition of Congress's dominant role, thus fulfilling the Framers' original vision for the balance of war power.

### *B. Subsequent Decisions Imbued the President with Extra-constitutional War Power Authority*

In two decisions—one rendered in 1862 pertaining to President Lincoln's conduct at the start of the Civil War, the other decided in 1936 discussing the president's role in foreign affairs—the Supreme Court expanded presidential war power. The Supreme Court addressed Lincoln's order to blockade southern ports and seize ships without Congress's authorization in *The Prize Cases*,<sup>80</sup> splitting five to four, with the majority sustaining the Union seizures.<sup>81</sup> According to the Court's opinion, the president's inherent authority as Commander-in-Chief justified his action<sup>82</sup> and, even if

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74. *Id.* at 179.

75. *See* Fisher, *supra* note 23, at 15; *see also* FISHER, *supra* note 18, at 19.

76. 25 U.S. (12 Wheat.) 19 (1827).

77. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 121 (1984).

78. *Martin*, 25 U.S. at 29.

79. *Id.*; *see also* Carter, *supra* note 77, at 121.

80. 67 U.S. (2 Black) 635 (1862).

81. *Id.* at 680.

82. *Id.* at 666–70; *see also* Carter, *supra* note 77, at 120.

he lacked the constitutional authority to issue the blockade, Congress ratified the blockade via subsequent legislation, thus rendering this military action without Congress's consent a valid exercise of the war power.<sup>83</sup>

The Supreme Court further weakened Congress's ability to intervene on the president's foreign affairs activity in *United States v. Curtiss-Wright Export Corp.*<sup>84</sup> in 1936. Upholding the president's declaration of an arms embargo, the Court noted, "the powers of external sovereignty did not depend upon the affirmative grants of the Constitution"<sup>85</sup> and that "participation [by Congress] in the exercise of the power is significantly limited."<sup>86</sup> Citing "this vast external realm, with its important, complicated, delicate and manifold problems"<sup>87</sup> Justice Sutherland, writing the majority opinion, argued that the president has an inherent power to be "the sole organ of the federal government in the field of international relations."<sup>88</sup> Justice Sutherland further elaborated on this view of presidential supremacy in foreign affairs, focusing specifically on war:

[H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.<sup>89</sup>

Thus, according to Justice Sutherland's constitutional interpretation, it is the president—and not Congress—who is predominant in exercising war power. In both *The Prize Cases* and *Curtiss-Wright*, the Supreme Court has undermined its previous commitment to congressional war power, and provided support to those who support broad presidential war-making authority.

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83. *The Prize Cases*, 67 U.S. at 670–71; see also Carter, *supra* note 77, at 120.

84. 299 U.S. 304 (1936).

85. *Id.* at 318.

86. *Id.* at 319.

87. *Id.*

88. *Id.* at 320; see also FISHER, *supra* note 18, at 60.

89. *Curtiss-Wright*, 299 U.S. at 320; see also THOMAS & THOMAS, *supra* note 41, at xi; ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 79 (1991).

C. *Modern Courts Refuse to Rule on War Power, Declaring the Issue a Nonjusticiable Political Question*

In more recent decisions, the courts have adopted a different approach, refusing to decide cases concerning war power on grounds that the issue is a nonjusticiable political question. During the Vietnam War, Members of Congress sought assistance from the courts in reasserting their constitutionally-provided war power. However, rather than hear these cases, the judiciary sidestepped the issue, declining to hear cases concerning the constitutionality of the continuation of the war on grounds that the political question doctrine prevented the courts from deciding the issue.<sup>90</sup> During the Reagan and Bush Administrations, courts declined to reach the merits in war powers cases relying on other excuses including mootness,<sup>91</sup> ripeness,<sup>92</sup> standing,<sup>93</sup> the doctrines on judicial prudence and equitable discretion,<sup>94</sup> and the notion that Congress would be a better fact-finder than the courts on this issue.<sup>95</sup> Unlike the early Supreme Court cases, or the subsequent *Prize Cases* and *Curtiss-Wright* decisions, the judicial branch over the last thirty years has steered clear of the war powers issue.

While the Supreme Court once served as a bulwark in defense of Congress's predominance over the president in administering the war power, subsequent Supreme Court decisions undermined Congress's constitutional authority. The courts have thus revealed themselves as unable to restore the balance of war power to the Framers' original vision. The judiciary's more recent strategy of treating war power as a nonjusticiable political question has unequivocally established that the courts cannot be trusted to protect

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90. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311–12 (2d Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146, 1152 (2d Cir. 1973); *Mitchell v. Laird*, 488 F.2d 611, 615–16 (D.C. Cir. 1973); *Orlando v. Laird*, 443 F.2d 1039, 1043–44 (2d Cir. 1971); *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967) (*per curiam*); *Berk v. Laird*, 317 F. Supp. 715, 728–30 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir. 1971). For additional cases and more information on courts employing the political question doctrine, see Harold Hongju Koh, *Judicial Constraints: The Courts and War Powers*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR*, *supra* note 23, at 121.

91. FISHER, *supra* note 18, at 197 n.36 (citing *Conyers v. Reagan*, 765 F.2d 1124, 1126–29 (D.C. Cir. 1985)).

92. FISHER, *supra* note 18, at 198 n.37 (citing *Ange v. Bush*, 752 F. Supp. 509, 515–17 (D.D.C. 1990); *Dellums v. Bush*, 752 F. Supp. 1141, 1149 (D.D.C. 1990)).

93. FISHER, *supra* note 18, at 198 n.38 (citing *Dorman v. U.S. Sec'y of Def.*, 851 F.2d 450, 451 (D.C. Cir. 1988) (*per curiam*)).

94. FISHER, *supra* note 18, at 198 n.39 (citing *Lowry v. Reagan*, 676 F. Supp. 333, 337–39 (D.D.C. 1987); *Conyers v. Reagan*, 578 F. Supp. 324, 326–27 (D.D.C. 1984)).

95. FISHER, *supra* note 18, at 198 n.40 (citing *Crockett v. Reagan*, 558 F. Supp. 893, 898–99 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985)).

Congress. For this reason, Congress must seek to help itself, acting to pass a legislative war power reform act to ensure that its input is considered when the United States goes to war.

#### IV. CONGRESS'S PREVIOUS EFFORT: THE WAR POWERS RESOLUTION OF 1973

Throughout American history, Congress has launched legislative efforts in defense of its constitutionally-provided war power, the most famous being the War Powers Resolution of 1973. A survey of the War Powers Resolution, as well as previous congressional attempts to safeguard its war-making prerogative, demonstrates the futility of these efforts. During the nineteenth and twentieth centuries, presidents routinely ignored legislation designed to defend Congress's war power. The current legislative measure designed to ensure congressional input—the War Powers Resolution—suffers from several inadequacies including questionable constitutionality, inartful drafting, and presidential disregard.

##### *A. Presidents Routinely Ignored Legislation During the Nineteenth and Twentieth Centuries*

Congress's earliest legislative attempt to limit presidential war power occurred in the aftermath of the Civil War. In 1868, Congress passed a law mandating a procedure by which the president was to confront foreign governments who were holding American citizens: the president first had to demand an explanation, then demand the citizen's release, and only after completing those two steps could he then use such means "not amounting to acts of war."<sup>96</sup> This law, however, was ambiguous as to both the situations to which it applied and the scope of presidential action authorized. This 1868 law had no practical effect and, in subsequent years, presidents deployed troops throughout Latin America, the Middle East, and Asia, all without following the prescribed procedure and all without congressional authorization.<sup>97</sup>

In 1912, Congress again sought to limit the president's war power, attaching a rider limiting the president's ability to commit troops to an appropriations bill. However, at the urging of Former

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96. THOMAS & THOMAS, *supra* note 41, at 117 (quoting Act of July 27, 1868, ch. 249, § 3, 15 Stat. 223, 224 (codified as amended at 22 U.S.C. § 1732 (2006))).

97. *Id.* at 118.

Secretary of State Elihu Root, the rider was dropped amid questions regarding its constitutionality.<sup>98</sup>

In a third example, Senator Gerald Nye and his isolationist colleagues attempted to constrain presidential war power in the late 1930s with a series of “Neutrality Acts.”<sup>99</sup> Despite the pleas of President Roosevelt as well as Secretary of State Cordell Hull, Congress maintained these laws, only to see presidential will triumph in July 1940 when Roosevelt disregarded the Neutrality Acts and agreed to lend Prime Minister Winston Churchill fifty destroyers in exchange for military basing rights in Bermuda and Newfoundland.<sup>100</sup> Senator Nye’s Neutrality Acts were not the only congressional measures designed to limit President Roosevelt’s ability to entangle the United States in overseas conflict. In the Selective Training and Service Act of 1940, Congress included a provision prohibiting the deployment of U.S. armed forces outside the Western Hemisphere.<sup>101</sup> However, within months of the bill’s passage, President Roosevelt dispatched troops to Greenland and Iceland without congressional authorization.<sup>102</sup>

Finally, in various self-defense treaties, Congress has attempted to limit presidential war power, inserting language demanding that action by each signatory would be taken under the treaties “to meet the common danger in accordance with its constitutional processes.”<sup>103</sup> Such language may have been inserted in defense of Congress’s prerogative to declare war, yet, as has been recognized in a previous part, Presidents Truman, Kennedy, and Johnson all deployed military force without congressional authorization, using America’s self-defense treaty obligations to justify their actions. While these previous legislative efforts to reform the balance of war power have gone largely unrecognized, Congress’s latest attempt—the War Powers Resolution of 1973—has been the subject of tremendous controversy.

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98. *Id.*

99. TURNER, *supra* note 89, at 2.

100. *Id.* at 7.

101. THOMAS & THOMAS, *supra* note 41, at 118.

102. *Id.*

103. *Id.* at 119 (quoting North Atlantic Treaty, Apr. 4, 1949, 43 AM. J. INT’L L. (SUPP.), at 159, 34 U.N.T.S. 243).

*B. The War Powers Resolution of 1973 Represents Congress's  
Most Significant Attempt to Reassert Itself in  
the War-Making Process*

As the United States found itself in an increasingly unpopular war in Vietnam, the Senate adopted the National Commitments Resolution in 1969, stating its sense that national commitments could only be launched via “affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.”<sup>104</sup> The final version of the War Powers Resolution was reported out on October 4, 1973 and the legislation was passed on November 7, 1973 over President Nixon’s veto.<sup>105</sup>

The mechanics of the War Powers Resolution provided for tight procedural constraints upon the president’s deployment of American armed forces. Section 2(c) of the Resolution established three situations in which the president may use the military: (1) when Congress declares war, (2) when Congress otherwise authorizes the use of force, and (3) when the United States or its armed forces are under attack.<sup>106</sup> Section 3 mandated that the president consult with Congress “in every possible instance” before U.S. forces are deployed and that the president consult regularly with Congress following the introduction of forces.<sup>107</sup> Section 4 required that when U.S. forces are deployed without congressional authorization, the president must report such military action to Congress within forty-eight hours.<sup>108</sup> Section 5 required that the president withdraw all military personnel no later than sixty days after a report is required unless Congress specifically authorizes the use of force.<sup>109</sup> This sixty-day window could be expanded by thirty days if the president certifies that additional time is needed to safely extricate the troops.<sup>110</sup> Section 5(c) provided a congressional veto over presidential use of the armed forces, allowing Congress to

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104. National Commitments Resolution, S. Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. 17245 (1969); see also Ellen C. Collier, *Statutory Constraints: The War Powers Resolution, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES*, *supra* note 23, at 54, 57.

105. Pub. L. No. 93-148 (codified as amended at 50 U.S.C. §§ 1541-48 (2006)). See also Collier, *supra* note 104, at 58; FISHER, *supra* note 18, at 130.

106. War Powers Resolution of Nov. 7, 1973, Pub. L. No. 93-148, § 2(c).

107. § 3.

108. § 4(a).

109. § 5(b).

110. § 5(b).

direct the removal of military force via passage of a concurrent resolution.<sup>111</sup>

A review of the War Powers Resolution's thirty-five year tenure reveals the legislation has failed in its stated mission to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . ."<sup>112</sup> Three main issues have undermined the War Powers Resolution's efficacy: (1) questions regarding the Resolution's constitutionality; (2) the Resolution's inartful drafting; and (3) presidential disregard for the Resolution's provisions.

### 1. Scholars Question the Resolution's Constitutionality

Ever since the Supreme Court's 1983 decision in *INS v. Chadha*,<sup>113</sup> the constitutionality of the War Powers Resolution has been subject to debate. In *Chadha*, the Supreme Court definitively held that legislative vetoes are unconstitutional because they violate the Constitution's Presentment Clause.<sup>114</sup> Section 5(c) of the War Powers Resolution contained such a legislative veto, granting Congress the option to force the president to withdraw troops via passage of a concurrent resolution.<sup>115</sup> As such, most scholars—including many supporters of the War Powers Resolution—believe Section 5(c) to be unconstitutional.<sup>116</sup> There are, however, defenders who believe the War Powers Resolution remains constitutional, even in a post-*Chadha* world.

Some argue that *Chadha* can be distinguished, since *Chadha* involved a one-house legislative veto in a domestic context, while the War Powers Resolution invokes a two-house concurrent resolution and involves an international question.<sup>117</sup> It can further be argued that the *Chadha* court was concerned with separation of powers issues arising from overly broad legislative delegations of power to

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111. § 5(c).

112. § 2(a).

113. 462 U.S. 919 (1983).

114. *Id.* at 958. See U.S. CONST. art. 1, § 7, cl. 2 ("Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States . . . ."); cl. 3 ("Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States . . . .").

115. Pub. L. No. 93-148, § 5(c).

116. See Biden & Ritch, *supra* note 18, at 388 ("In the aftermath of the Supreme Court's 1983 decision in *INS v. Chadha*, which found that legislative vetoes violate the Constitution's presentment clause, most scholars who otherwise support the Resolution's constitutionality accept the unconstitutionality of § 5(c)." (internal citations omitted)).

117. See Vance, *supra* note 28, at 86.

the executive, thereby distinguishing the War Powers Resolution, which seeks to wrest power from the executive branch.<sup>118</sup> Another argument is that Congress, in passing the War Powers Resolution, was simply defining the word “war” in Article I, and providing an enforcement mechanism for Congress to maintain its constitutionally provided check on the president.<sup>119</sup>

Even if Section 5(c) of the Resolution is constitutionally shaky, Section 5(b)—the provision prohibiting the president from deploying armed forces for more than sixty days without congressional authorization—remains intact.<sup>120</sup> Supporters also note that if Congress always had exclusive control of the war power, the Resolution, rather than have any legislative effect, would merely set forth a congressional plan of action thereby keeping the statute constitutional even after the Supreme Court’s decision in *Chadha*.<sup>121</sup> But even if these arguments can be marshaled in support of the War Powers Resolution’s constitutionality, the fact remains that the legislation is constitutionally suspect.

## 2. The Resolution Is Inartfully Drafted

A second critique of the War Powers Resolution is that the statute is inartfully drafted. The critics’ assault begins with the title, and continues throughout much of the statute’s provisions. Some have argued that by calling the law a “Resolution,” Congress undermined the statute’s efficacy, as presidents and the public might be more willing to disregard the law as a “mere resolution” instead of something more serious.<sup>122</sup> On a less cosmetic note, Section 2(c)’s enumerated list of when the president can use force is too narrow, omitting two instances—namely a military operation rescuing Americans and a military operation forestalling an imminent attack—that should probably be authorized.<sup>123</sup> Furthermore, Section 5(b) is at odds with the president’s constitutional authority to repel attacks, as Section 5(b) does not exempt from the sixty-day clock those instances where the president is acting to repel an

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118. See *id.* at 86–87.

119. See Carter, *supra* note 77, at 101–02.

120. See *id.* at 133.

121. See Comment, *supra* note 4, at 1237 (“[A]s to the effect on the legal rights of those outside the legislature, passage of a concurrent resolution under the Act would not alter the President’s right to wage war because, from this vantage, the President possesses no war power that a resolution could alter.”).

122. John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1386 (1988).

123. See Biden & Ritch, *supra* note 18, at 386; see also Ely, *supra* note 122, at 1393.



attack but Congress has not given him authorization.<sup>124</sup> Section 5(c) has also been criticized, as ambiguities in the text create significant doubt over when the sixty-day clock is triggered,<sup>125</sup> and it is doubtful Congress would even invoke the time limit, thereby just providing an excuse for the president not to abide by the War Powers Resolution altogether.<sup>126</sup> The sixty-day time limit is also problematic, as it may provide the enemy with incentive to hold on and escalate hostilities to increase U.S. casualties.<sup>127</sup> It is also arguable that the sixty-day time period, with its thirty-day extension, is an indefensibly long time to have troops in the field without congressional authorization.<sup>128</sup>

### 3. Presidents Disregard the Resolution

Perhaps the most significant problem facing the War Powers Resolution is presidential disregard. Shortly after the 1973 passage of the War Powers Resolution, on May 12, 1975, Cambodians seized the U.S. merchant ship *Mayaguez*.<sup>129</sup> In response, President Ford ordered air strikes against Koh Tang Island where the crew was thought to be held and sent in the Marines, but he delayed exercise of his War Powers Resolution Section 4(a)(1) obligation to inform Congress until after the operation was over, thereby denying the Resolution any practical effect.<sup>130</sup> President Ford, ordering the operation "pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces," thus engaged in a hostile action overseas in which forty-one U.S. troops were lost without regard to the War Powers Resolution.<sup>131</sup> Similarly, President Carter did not consult Congress prior to the 1980 Desert One rescue effort designed to free American hostages in Tehran.<sup>132</sup>

When President Reagan deployed troops to Lebanon in 1982, he neglected to report the action to Congress under Section 4(a)(1). Although Congress considered invoking the War Powers Resolution, popular sentiment of support discouraged such

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124. See Biden & Ritch, *supra* note 18, at 386.

125. See *id.* at 389-90.

126. See Ely, *supra* note 122, at 1397.

127. See TURNER, *supra* note 89, at 148.

128. See Ely, *supra* note 122, at 1398.

129. See Vance, *supra* note 28, at 88.

130. See FISHER, *supra* note 18, at 137; see also TURNER, *supra* note 89, at 121.

131. IRONS, *supra* note 18, at 199.

132. See FISHER, *supra* note 18, at 139; see also IRONS, *supra* note 18, at 200; TURNER, *supra* note 89, at 123.

efforts.<sup>133</sup> Instead, Congress acted to save face, passing separate legislation providing that Section 4(a)(1) became operative and permitting the military action for eighteen months.<sup>134</sup>

The deployment to Lebanon was not President Reagan's only violation of the War Powers Resolution. Reagan repeatedly sent troops overseas without consulting Congress, thereby violating the War Powers Resolution: on October 25, 1983, sending American troops to invade the Caribbean nation of Grenada;<sup>135</sup> on March 24, 1986 launching air strikes against Libya;<sup>136</sup> and in 1987, authorizing escort operations in the Persian Gulf during the Iran-Iraq War.<sup>137</sup> President George H.W. Bush followed his predecessor's example, invading Panama in Operation Just Cause in December 1989 without congressional consultation.<sup>138</sup> The same for President Clinton who failed to consult Congress prior to his launching of missiles against Baghdad in June 1993<sup>139</sup> or his 1999 bombing campaign against Serbia.<sup>140</sup> Thus, over the War Powers Resolution's thirty-five year history, Presidents of the United States have routinely ignored or disregarded the War Powers Resolution.

While Congress has attempted to engage in self-help in an effort to restore its constitutionally granted war power, its efforts have largely failed. Early attempts were either ignored or withdrawn and Congress's most concerted effort—the War Powers Resolution of 1973—suffers from the pitfalls of questionable constitutionality, inartful drafting, and presidential disregard. As the law currently stands, presidents consistently engage in military conflict without congressional input, and Congress is without real legal recourse in reasserting its constitutional prerogative in war-making decisions. Accordingly, a new legal regime is necessary.

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133. See Carter, *supra* note 77, at 106.

134. See FISHER, *supra* note 18, at 140; see also Carter, *supra* note 77, at 105; FISHER, *supra* note 37, at 68; IRONS, *supra* note 18, at 201.

135. See IRONS, *supra* note 18, at 202; see also FISHER, *supra* note 37, at 68–69; FISHER, *supra* note 18, at 141–42; TURNER, *supra* note 89, at 123–25; Vance, *supra* note 28, at 89–90.

136. See FISHER, *supra* note 18, at 142–44; see also FISHER, *supra* note 37, at 69–70.

137. See Biden & Ritch, *supra* note 18, at 368–69; see also FISHER, *supra* note 18, at 144–45.

138. See FISHER, *supra* note 18, at 145–48; see also IRONS, *supra* note 18, at 203–04.

139. See FISHER, *supra* note 18, at 151–52.

140. See HEALY, *supra* note 59, at 126.

V. ONCE MORE UNTO THE BREACH: THE WAR POWERS  
APPROPRIATIONS ACT

While the constitutional Framers intended Congress to play an integral, if not dominant, role in deciding when to go to war, presidents have expropriated the war power to the point that a Chief Executive can go to war without consulting Congress. The courts have been of little assistance in providing a remedy, and Congress's self-help efforts have been unsuccessful. As such, the present task is to design a means for reforming war power in such a way that Congress's role cannot be sidelined. Since the executive branch cannot be trusted to willfully relinquish power and the judicial branch has elected not to address the issue, the legislative branch must engage in some form of self-help. However, in order for Congress to succeed, this self-help must avoid previous legislation's shortcomings of questionable constitutionality, inartful drafting, and presidential disregard. To accomplish these objectives, Congress should pass the War Powers Appropriations Act, a hypothetical piece of legislation developed below that re-injects the legislature in the war-making discussion.

The War Powers Appropriations Act will rest upon Congress's constitutional power to appropriate funds. The Act will ensure congressional input in both the decision to engage in armed conflict as well as to maintain conflict. Furthermore, because the president will require Congress's continued funding to pursue military conflict, the Executive will be largely unable to disregard the Act's provisions.

The proposed language of the Act is as follows:

Section 1. None of the funds appropriated by Congress shall be used for overseas combat unauthorized by Congress, excepting missions to rescue American hostages and missions to thwart imminent attack upon the American homeland or American troops stationed abroad.

Section 2. If, in the judgment of Congress, the United States is engaged in overseas military action, each House of Congress will hold a vote every sixty days following the date of initial engagement assessing the sense of Congress as to whether the war should be continued. If, in any one of these votes, a two-thirds supermajority in each House of Congress votes not to sustain continued military action, the Congress shall notify the president. Ninety days following both Houses' passage of a measure not to sustain continued military action, an appro-

priations limitation rider will take effect, specifying that none of the funds appropriated by Congress may be employed to pursue further hostile action. The ninety day time frame for the implementation of this appropriations limitation rider can be extended via majority vote in each House of Congress.

Section 3. The term “funds appropriated by Congress” shall include all amounts Congress has disbursed or will disburse including, but not limited to, previously passed annual appropriations, supplemental appropriations, continuing resolutions, and direct spending. The term “imminent attack” shall be defined as a hostile military action capable of being waged within one week.

*A. Congress Has Authority to Control Appropriations to Affect American Military Forces*

The power to appropriate money, known colloquially as the “power of the purse,” lies firmly within Congress’s realm of constitutional authority. Under Article I of the Constitution, Congress’s enumerated powers include the ability to collect taxes, borrow money, and authorize expenditures.<sup>141</sup> Furthermore, Section 9 of Article I explicitly limits the executive branch’s power to spend money to only those purposes and amounts Congress specifies: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>142</sup> During the Constitution’s ratification, Congress’s power of the purse was cited as a significant check on the president’s power. In FEDERALIST NO. 48, James Madison noted that “the legislative department alone has access to the pockets of the people.”<sup>143</sup> Additionally, in FEDERALIST NO. 58, Madison also argued that Congress’s “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”<sup>144</sup>

The judiciary has largely defended this congressional prerogative. An 1880 U.S. Court of Claims decision noted that, “[t]he absolute control of the moneys of the United States is in Congress,

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141. U.S. CONST. art. I, § 8, cls. 1-2.

142. U.S. CONST. art. I § 9, cl. 7.

143. THE FEDERALIST NO. 48 (James Madison).

144. THE FEDERALIST NO. 58 (James Madison).

and Congress is responsible for its exercise of this great power only to the people."<sup>145</sup> A 1945 California federal district court stated: "The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of government to comply with the same."<sup>146</sup> While the courts have upheld Congress as the sole power to appropriate funds, the judiciary has also defended the president's authority as Commander-in-Chief.

In *Fleming v. Page*, the Supreme Court held that the president "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."<sup>147</sup> Although such an opinion may initially appear to thwart any effort to limit the president's war power, the phrase "placed by law" implies that Congress can constitutionally limit the scope of the Commander-in-Chief powers.<sup>148</sup> Thus, it appears Congress's authority as sole appropriator of funds is a firm constitutional foundation upon which to construct a legislative provision to reform the balance of war power.

The notion of Congress utilizing its control over appropriations to affect the deployment of American military forces is not without precedent. On multiple occasions over the last thirty-five years, Congress has used its spending power to limit U.S. involvement in overseas conflicts. In 1976, Senator Dick Clark of Iowa added the Clark Amendment to the U.S. Arms Export Control Act of 1976, prohibiting aid to private groups engaged in military operations in Angola.<sup>149</sup> Similarly, in 1984, Congress enacted the Boland Amendment to prohibit U.S. military and intelligence forces from supporting the Nicaraguan Contras.<sup>150</sup> The Boland Amendment is a particularly relevant example because it employs an appropriations limitation rider, the same mechanism underlying the proposed War Powers Appropriations Act. The relevant text of the 1984 Boland Amendment reads as follows:

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145. *Hart's Administrator v. United States*, 16 Ct. Cl. 459, 484 (1880), *aff'd*, 118 U.S. 62 (1886).

146. *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946).

147. *Fleming v. Page*, 50 U.S. 603, 615 (1850).

148. *See FISHER, supra* note 18, at 200.

149. Clark Amendment, Pub. L. No. 94-329, § 404, 90 Stat. 757 (1976); *see FISHER, supra* note 37, at 110.

150. *See FISHER, supra* note 18, at 176-77.

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.<sup>151</sup>

The Clark Amendment and the Boland Amendment serve as precedent in support of Section 1 of the War Powers Appropriations Act. Precedent for Section 2 of the Act can be found in the 1973 Case-Church Amendment.<sup>152</sup> The Amendment allowed bombing in Cambodia to continue until August 15, 1973, but prohibited the use of military forces in Southeast Asia without congressional authorization.<sup>153</sup> By refusing to provide the necessary emergency funds, Congress starved the Vietnam War to its death in 1974.<sup>154</sup> These three amendments suggests that use of appropriations limitation riders represents a viable means by which Congress can police presidential use of the war power.

*B. The War Powers Appropriations Act Provides for Congressional Involvement at the Outset and During Armed Conflicts*

Ensuring congressional input in war-making decisions is a two-headed problem. First, Congress—with small exceptions—needs to be involved in the decision to embark upon an overseas conflict. However, this only addresses half the problem, for once Congress authorizes a military action, they still need to be kept in the loop. The Vietnam War—where a 1964 congressional resolution authorizing force maintained a conflict lasting through 1975, despite its repeal in 1971—demonstrates how Congress might initially authorize the use of military force, only to have misgivings later on without any means of again becoming involved in the war-making decision process. Reforming legislation must create a method by which Congress can remain involved in the decision to continue or discontinue hostilities. The War Powers Appropriations Act, via judicious use of Congress's appropriations power, meets both of these objectives, providing for both congressional input at the

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151. Boland Amendment, Pub. L. 98-473, § 8066(a), 98 Stat. 1937 (1984).

152. STANLEY KARNOW, *VIETNAM: A HISTORY* 656 (1983).

153. *Id.*

154. ROGER H. DAVIDSON, WALTER J. OLESZEK, & FRANCES E. LEE, *CONGRESS AND ITS MEMBERS* 459–60 (11th ed. 2008).

outset of an overseas conflict, as well as consistent congressional input as the president pursues a war.

The War Powers Appropriations Act accomplishes its objectives of ensuring congressional input both at the outset of overseas conflict as well as during the pursuit of a war via blanket application of an appropriations limitation rider.<sup>155</sup> Limitation riders are provisions in appropriations bills that prohibit the spending of funds for specific purposes. They are generally phrased in the form of: “None of the funds provided in this Act shall be used for . . . .” Limitation riders are a common means by which Members of Congress seek to insert policy proposals into appropriations legislation.<sup>156</sup> Section 1 of the Act is worded to require Congress’s approval to go to war in almost all circumstances, with exceptions being narrowly confined to hostage rescue missions and missions defending American soil or soldiers from imminent attack. The provision dovetails with the Framers’ intent that the president is permitted to “repel sudden attacks”<sup>157</sup> without congressional authorization, while the initiation of other types of military action can be done only with congressional approval.

When the United States is at war, Congress remains a key player, reviewing the merits of the conflict every sixty days, regardless of whether Congress initially authorized hostilities. If the war is supported, military action is confirmed and the conflict continues. However, if public sentiment turns against the conflict, Congress retains the ability to put a stop to the conflict, giving the president a ninety day window to safely extricate American troops from the region. By forcing these votes every sixty days, the Act ensures that the president is apprised of Congress’s position, which is recorded in both remarks on the floor as well as the final outcome of the vote. Thus, the effect of Section 2 is not to co-opt the Commander-in-Chief’s role in directing the armed forces, but rather to keep the president informed of the sense of Congress and, if necessary, to force the president to devise a scheme under which American troops can be withdrawn. If a supermajority turns against the war, the president is afforded a three-month cushion to effectuate a withdrawal plan, thereby granting the president enough time to plan and manage the safest possible extraction. If it becomes

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155. “None of the funds appropriated by Congress shall be used for overseas combat unauthorized by Congress, excepting missions to rescue American hostages and missions to thwart imminent attack upon the American homeland or American troops stationed abroad.” Proposed War Powers Appropriation Act, § 1; *see supra* Part V for full text of proposed act.

156. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 53 (7th ed. 2007).

157. *See supra* text accompanying notes 18–20.

apparent that ninety days is an insufficient amount of time, if the situation on the ground dramatically changes, or if the president believes more time is necessary to safely effectuate a withdrawal plan, Congress retains the power to delay the effective date of the appropriations rider.

*C. Potential Arguments Against the War Powers  
Appropriations Act Fall Short*

It is unlikely that the War Powers Appropriations Act will be welcomed without controversy. There are several likely counterarguments to the Act's implementation, including: (1) Congress lacks the backbone necessary to pass the Act, or to implement its provisions; (2) Section 2 of the Act amounts to an abandoning of U.S. troops in the field of battle; (3) the Act's provisions represent an unconstitutional infringement upon the president's power as Commander-in-Chief.

1. Congress Has Previously Shown Strength  
in Claiming War Power

The first counterargument represents a valid concern: after all, Members of Congress are constantly "running scared," spending much of their time fundraising and campaigning for re-election.<sup>158</sup> Why would Congress want to thrust its hand into a potential hornet's nest, when it is usually presidents whose names get tarnished when wars go badly? It is worth noting, however, that when wars have become sufficiently unpopular, Congress has had occasion to assert its opposition. In 1971, as the Vietnam War dragged on and the war's popularity plummeted following its expansion into Cambodia, Congress acted to repeal the Gulf of Tonkin Resolution that initially authorized the war.<sup>159</sup> Following that repeal, Members of Congress launched a myriad of lawsuits, seeking a court's ruling that the Vietnam War was unconstitutional, as the president lacked the necessary congressional authority.<sup>160</sup> In a second example, during the 1998 bombing campaign over Kosovo, Members of Congress openly challenged President Clinton, noting that the

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158. See generally ANTHONY KING, *RUNNING SCARED: WHY AMERICA'S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE* (1997).

159. Amendment to the Foreign Military Sales Act, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 55 (1971).

160. See Comment, *supra* note 4, at 1221.



bombing campaign was waged without congressional authorization and would represent a violation of the War Powers Resolution if it continued.<sup>161</sup> Most recently, when Democrats retook control of Congress in the 2006 elections, they sought to use spending bills to express their opposition to continuing the Iraq War.<sup>162</sup> These examples from the past thirty-five years demonstrate a congressional willingness to challenge executive war power.

## 2. The Act Does Not Abandon Troops on the Field of Battle

A second counterargument to the War Powers Appropriations Act is that it represents a measure abandoning American troops on the battlefield. The arguments leveled against opponents of the \$87 billion Iraq War supplemental appropriations bill passed by Congress in November 2003 represent a taste of what critics might argue in evaluating the War Powers Appropriations Act.<sup>163</sup> Section 1 of the proposed Act is largely immune from this “abandoning the troops”-type criticism, as that Section’s function is to keep troops out of unauthorized combat. Section 2, however, is more vulnerable.

But Section 2 does not provide an immediate appropriations cutoff, which would strand troops on the field of battle. To the contrary, Section 2 places the onus on the president who, as Commander-in-Chief and recipient of intelligence and military reports, is the appropriate entity for planning the troops’ safe extraction. If in the president’s judgment a safe withdrawal requires additional time, he can take his case to Congress and obtain an extension.

The provision also affords Congress the ability to react to a changing situation on the ground or a shift in public attitude. By requiring a supermajority in both House and Senate, the bar for triggering the ninety day withdrawal window is sufficiently high to ensure that a vote to discontinue the conflict is a belief broadly held amongst Members of Congress and the American people. Furthermore, it is unlikely that Congress’s decision to end the war will be a surprise. By recording votes every sixty days, the president will be aware of Congress’s increasing sentiment concerning the untenable nature of a given tactic or situation on the ground.

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161. See Alison Mitchell, *Only Congress Can Declare War. Really. It's True.*, N.Y. TIMES, May 2, 1999, at WK6.

162. See DAVIDSON, OLESZEK & LEE, *supra* note 154, at 460.

163. David Firestone, *Democrats Lean Against Bush Spending Request*, N.Y. TIMES, Oct. 15, 2003, at A10 (“Many conservative Democrats say they would readily vote against the reconstruction aid if it were a separate bill, but feel obliged to vote for the entire package in order to avoid being charged by Republicans with abandoning the troops.”).

Using Congress's appropriations power to limit the president's ability to unilaterally make war always carries the risk that critics will decry such efforts as "cutting off the troops." However, the procedural safeguards inherent in the War Powers Appropriations Act likely serve to assuage such concerns.

### 3. The Act Represents a Constitutional Exercise of Congress's Authority

A third potential argument against the proposed legislation is that it represents an unconstitutional usurpation of the president's power as Commander-in-Chief. In confronting this argument, it should be noted that the previous cited precedents—the Clark Amendment, Boland Amendment, and Case-Church Amendment—were never held unconstitutional by any court. Furthermore, from an originalist perspective, the War Powers Appropriations Act does not interfere with the president's constitutionally afforded powers. As cited previously, Alexander Hamilton in FEDERALIST NO. 69 noted that the president's Commander-in-Chief power amounted to "nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy . . ." <sup>164</sup> Hamilton goes on to describe how the duties of declaring war and raising and regulating fleets and armies are under Congress's control. <sup>165</sup> The proposed legislation does not govern the mechanics of troop deployment and withdrawal, instead leaving these responsibilities to the Commander-in-Chief. The Act's only function is to set the rules under which Congress will exercise its Article I, Section 9 power to appropriate funds. While constitutional objections plagued the War Powers Resolution following the 1983 *Chadha* decision, the War Powers Appropriations Act avoids enacting a legislative veto provision. Because the legislation is couched within Congress's Article I, Section 9 power of the purse, it represents a constitutionally viable means for Congress to engage itself in the decision to make war.

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164. THE FEDERALIST NO. 69 (Alexander Hamilton).

165. *Id.*

*D. A Hypothetical Application of the War Powers Appropriations Act to Past Conflicts Reveals its Efficacy*

While in theory, the War Powers Appropriations Act may represent a viable means for Congress to reassert its constitutional war power, it must be recognized that war-making decisions are intensely political affairs. Accordingly, in order to probe the potential efficacy of the proposed legislation, it may be helpful to apply legal formalism to political history, hypothetically applying the War Powers Appropriations Act to recent controversial conflicts to see what effect the Act's provisions might have had. Looking back over the past thirty-five years, it is likely that the War Powers Appropriations Act would have prevented several wars from occurring, or at least forced the president to obtain congressional authorization before deploying troops. Section 1 of the War Powers Appropriations Act would have forced Congress to authorize or would have otherwise prevented President Reagan's military excursions into Lebanon, Libya, and Grenada, President Bush's invasion of Panama in 1989, and President Clinton's bombing campaign over Serbia in 1998.

During the congressionally authorized conflicts of Vietnam or the current Iraq War, for example, Congress would have been required to hold bimonthly votes assaying congressional support for the conflict. While counterfactual history is always difficult, it is arguable that bimonthly votes regarding Vietnam may have affected the course of the war. Perhaps in 1970, as public support for the war dwindled in the aftermath of the 1968 Tet Offensive, bimonthly congressional votes and the realistic possibility that Congress might end the war may have given President Nixon pause before he expanded combat operations to Cambodia.

The course of the current Iraq War might also have been influenced had the War Powers Appropriations Act been in effect. While it may be unlikely that Congress could muster the supermajority necessary to end the conflict, Congress's realistic ability to trigger that ninety-day withdrawal window might have provided President George W. Bush with increased incentive to provide more swiftly a strategic plan describing American objectives and an exit strategy. While these counterfactual scenarios are nothing but conjecture, the fact remains that had the War Powers Appropriations Act existed at the time of the Vietnam and Iraq Wars, it would have been impossible for Congress to pass a resolution authorizing force and then be largely sidelined for years as the war dragged on.

Consistent with the Framers' intentions, Congress would have played a more active role.

In the end, the War Powers Appropriations Act may not be the most elegant legislative solution to the problem. Denying life to a war or threatening to kill one by cutting off its food supply of congressionally appropriated dollars is a somewhat crude legislative mechanism. The Act attempts to mitigate its harshness by providing means by which the president can still repel sudden attacks and providing for possible extension of the deadline triggering the three-month withdrawal window. With these structural safeguards in place, the War Powers Appropriations Act seems to represent a viable means by which Congress can once again become an integral player when the United States makes war. The proposed Act represents an improvement over the current regime in which a president can unilaterally initiate sustained military conflict without the consent of the people's representatives in Congress. With the courts and Congress's previous efforts failing to bring about the balance the Framers envisioned, the United States needs the War Powers Appropriations Act.

#### CONCLUSION

The present conflict in Iraq, just like the Vietnam War thirty-five years ago, marks an interesting constitutional moment, whereby the appropriate balance of war power between the legislative and executive branches is being hotly debated. Much of the contention regarding the proper balance of war power between Congress and the president stems from the Framers' bifurcation of war making authority in the United States Constitution. While Congress's enumerated powers include the power to declare war, raise and support armies, provide and maintain a navy, make rules for the government of military forces, lay taxes, and appropriate funds, the president is explicitly afforded the power to act as Commander-in-Chief, make treaties, and appoint envoys with the Senate's consent. Scholars have meticulously deconstructed the debate regarding war power at the Philadelphia Convention, noting how delegates' remarks during the "make war" debate suggest that the Framers intended Congress, and not the president, to decide when the United States would wage war. Other structural elements in the Constitution include Congress's power to issue letters of marque and reprisal. Evidence from the ratification, as expressed in the *Federalist Papers*, affirms this notion that the Framers intended Congress to reign supreme in making the decision to make war.

A historical survey, however, imparts an image of the president expropriating Congress's war power over the United States' two-hundred twenty years of existence. Early uses of military power—including the Quasi-War with France, the Barbary Wars, and the War of 1812—illustrate presidential deference to Congress. The launch of the Korean War in 1950, however, marked the end of Congress's dominant role, when President Truman relied on a UN resolution, rather than the U.S. Congress, to justify the use of force. Since 1950, American presidents have routinely engaged in unauthorized overseas military combat across the globe in the Caribbean, Southeast Asia, the Middle East, and the Balkans. Thus, under the current system, the United States can go to war solely on the president's order, a situation remarkably different from the one the Framers envisioned.

The judiciary has proven to be an ineffective means for upholding Congress's role in the decision to wage war. While early Supreme Court decisions recognize the breadth of Congress's war power, subsequent decisions—namely *The Prize Cases* and *United States v. Curtiss-Wright*—have seemed to condone the president's predominance in the realm of war and foreign affairs. Most recently, the courts have shied away from rendering decisions regarding the constitutionality of war making decisions, instead declaring such cases to be non-justiciable on account of the political question doctrine, mootness, ripeness, or a lack of standing. With the courts rendering little assistance, Congress has engaged in self-help, promulgating legislation to restore their war making prerogative. These efforts, however, have proven unsuccessful with the War Powers Resolution of 1973—by far the most notable of Congress's efforts—suffering from the ailments of constitutional questionability, inartful drafting, and presidential disregard.

Accordingly, this Note advocates that Congress embark on a second legislative effort to ensure that its input is considered when the United States wages war. The proposal, entitled the War Powers Appropriations Act, calls for using Congress's power to appropriate funds as a means for curbing the president's power to unilaterally make war. While one section of the Act requires congressional authorization prior to engagement in most hostilities, a second section keeps Congress in the loop as the war continues with Congress maintaining the ability to end the war should broad consensus turn against the conflict. Various safeguards in the legislation ensure that the president is still able to repel sudden attacks and that the troops are not abandoned in the battlefield. Although counterfactual history is always difficult, conjecture regarding how

the War Powers Appropriations Act might have affected controversial conflicts over the past thirty-five years suggests how the Act might have curbed the executive's current unilateral ability to initiate and prosecute the Nation's wars.

Among the various decisions a nation makes, committing soldiers to the battlefield is the most important. To permit this heavy responsibility to fall in the hands of one leader is antithetical to the republican principles upon which the United States Constitution rests. Congress, by entering once more unto the breach and developing a second legislative proposal to ensure congressional input in war-making decisions, can bring America closer to her founding principles. The War Powers Appropriations Act represents one proposal Congress might entertain to reassert its war-making prerogative and bring contemporary America a step closer to the more perfect union the Framers designed.

