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Cover Page Footnote

J.D. candidate, May 2016, The Catholic University of America, Columbus School of Law; B.S., 2006, United States Coast Guard Academy. The author would like to thank Catholic University's General Counsel, COL Lawrence J. Morris, U.S. Army (ret.), for his valuable perspective and his many insightful comments throughout the process. The author would also like to thank the Honorable Patrick J. Murphy, former Congressman from Pennsylvania, for his mentorship and support of the project; and CAPT Glenn M. Sulmasy, U.S. Coast Guard (ret.), for helping to instill the author's passion for national security law. Finally, the author would like to thank his parents Charles and Ann and his wife Lara for their never-ending support, as well as the members of the *Catholic University Law Review* for their patience and attention to detail throughout the writing and editing process.

THE WAR POWERS CONSULTATION ACT: KEEPING WAR OUT OF THE ZONE OF TWILIGHT

Brendan Flynn⁺

“We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.” — Thomas Jefferson¹

“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” — Justice Robert H. Jackson²

“Executive overreach: that’s what Madison saw. But what Madison didn’t see, what he wasn’t quick enough to see is that legislators like to abdicate. And the symbiotic relation between legislative abdication and executive overreach has been the source of this problem up to today.” — Senator Tim Kaine³

⁺ J.D. candidate, May 2016, The Catholic University of America, Columbus School of Law; B.S., 2006, United States Coast Guard Academy. The author would like to thank Catholic University’s General Counsel, COL Lawrence J. Morris, U.S. Army (ret.), for his valuable perspective and his many insightful comments throughout the process. The author would also like to thank the Honorable Patrick J. Murphy, former Congressman from Pennsylvania, for his mentorship and support of the project; and CAPT Glenn M. Sulmasy, U.S. Coast Guard (ret.), for helping to instill the author’s passion for national security law. Finally, the author would like to thank his parents Charles and Ann and his wife Lara for their never-ending support, as well as the members of the *Catholic University Law Review* for their patience and attention to detail throughout the writing and editing process.

1. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd et al., eds., 1958), <http://founders.archives.gov/documents/Jefferson/01-15-02-0375-0003>.

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

3. Press Release, Sen. Tim Kaine, Kaine Addresses Center for American Progress on the Role of Congress in the Fight Against ISIS (Sept. 23, 2014), <http://www.kaine.senate.gov/press-releases/kaine-addresses-center-for-american-progress-on-the-role-of-congress-in-the-fight-against-isis>.

The United States has not formally declared war against another nation since June 5, 1942.⁴ Despite this, over the last seven decades the United States has deployed forces into harm's way throughout the world, in far-flung places such as the Korean Peninsula,⁵ the small leeward Caribbean island of Granada,⁶ and the Middle East, without a declaration of war or explicit congressional authorization.⁷ Indeed, as of the publication of this Comment, the United States is currently engaged in armed conflict within the territory of two sovereign nations—and has been for a full year—without authorization from Congress.⁸

While the Constitution divides the war powers between Congress, which declares war (and appropriates the funds to pay for it),⁹ and the President, who serves as Commander in Chief of the Armed Forces,¹⁰ the President has, since the Korean War, claimed increased authority to send the military into harm's way.¹¹ In fact, many of these overseas deployments ordered by the President in the absence of congressional authorization have been into difficult situations of uncertain duration.¹² Harold Koh, former Dean of Yale Law School and Legal

4. Congress's last declaration of war was against Rumania on June 5, 1942. H.R.J. Res. 321, 77th Cong., 56 Stat. 307 (1942).

5. See JAMES A. BAKER III ET AL., NATIONAL WAR POWERS COMMISSION REPORT 17 (2008), <http://web1.millercenter.org/reports/warpowers/report.pdf>.

6. See *id.* at 18–19.

7. See *id.* at 17–18.

8. See Dana Milbank, Opinion, *Congress: Talking Loud, Doing Nothing*, WASH. POST, June 18, 2015, at A2 (discussing “the utter inability of Congress to do its job” in authorizing use of force against the Islamic State of Iraq and the Levant (ISIL)); Zeke Miller, *Obama Says ‘We Don’t Have a Strategy Yet’ For Fighting ISIS*, TIME (Aug. 28, 2014), <http://time.com/3211132/isis-iraq-syria-barack-obama-strategy/> (stating that the United States has been conducting airstrikes on targets within Iraq since August 8, 2014); Jim Sciutto, Mariano Castillo & Holly Yan, *U.S. Airstrikes Hit ISIS Inside Syria for First Time*, CNN (Sept. 23, 2014, 4:11 PM), <http://www.cnn.com/2014/09/22/world/meast/u-s-airstrikes-isis-syria/index.html> (stating that the first U.S. airstrikes in Syria occurred early in the morning on September 23, 2014); *Obama Authorizes Air Strikes, Humanitarian Aid Mission in Iraq*, ABC NEWS (Aug. 7, 2014), <http://abcnews.go.com/International/us-begins-humanitarian-airdrops-iraq/story?id=24884633> (President Obama announcing “‘targeted’ air strikes if necessary to protect American interests in Iraq”).

9. See U.S. CONST. art. I, § 8, cl. 11 (establishing Congress's power to declare war); U.S. CONST. art. I, § 8, cl. 1 (establishing Congress's power to tax and spend).

10. U.S. CONST. art. II, § 1, cl. 1.

11. See *infra* note 12 and accompanying text.

12. See BAKER, *supra* note 5, at 11–17 (discussing the shifting balance of power between Congress and the President with respect to the power to make war); see also EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 1–2 (1982) (discussing instances of unilateral executive military action and noting that “despite congressional attempts to limit presidential warmaking . . . recent Congresses have responded pliantly to [military actions authorized by the President]”).

Adviser to the Department of State, has characterized the system as one of “executive initiative, congressional acquiescence, and judicial tolerance.”¹³

The War Powers Consultation Act of 2014,¹⁴ introduced in January of 2014 by Senators Tim Kaine (D-Va.), John McCain (R-Ariz.), and Angus King (I-Me.),¹⁵ seeks to re-establish Congress’s role in taking the country to war.¹⁶ Benefiting from the bipartisan recommendations of Secretaries James A. Baker III and the late Warren Christopher, co-chairmen of the National War Powers Commission,¹⁷ the legislation seeks to go beyond the debate concerning the respective war-making powers of Congress and the President.¹⁸ Instead, the proposal aims to establish a new system that affords meaningful consultation between the legislative and executive branches of government, along with a streamlined procedure that obligates Congress to either authorize or approve “significant armed conflict” in advance of, or immediately following, commencement of hostilities.¹⁹

Part I of this Comment surveys the war powers issue through the lens of preventing congressional abdication of the constitutional war-making responsibilities. It begins by examining the two dominant academic approaches in the area of war powers and discusses how these approaches interpret early precedent under Presidents John Adams and Thomas Jefferson. Part II illustrates the exercise of the war powers during the Korean and Vietnam conflicts, assesses the impact of the War Powers Resolution of 1973 on the war powers debate, and reaches the conclusion that the approach taken by the War Powers Resolution has generally failed. Part III analyzes the proposed War Powers Consultation Act and reaches the conclusion that, while the Act would do a better job of forcing Congress to have an up-or-down vote on military action, there are several components of the Act that could be improved.

13. HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 117 (1990). Ironically, years after writing these words, Dean Koh made a major contribution to the expansion of executive authority in war-making. See *infra* Part I.E.2.

14. S. Res. 1939, 113th Cong. (2014).

15. *Id.*

16. See *id.* § 2.

17. See *National War Powers Commission*, MILLER CTR., <http://millercenter.org/policy/commissions/warpowers> (last visited May 23, 2015); see also BAKER, *supra* note 5, at 12 (discussing the purpose and structure of the National War Powers Commission Report).

18. See BAKER, *supra* note 5, at 12.

19. S. Res. 1939, 113th Cong., §§ 2, 6–7 (2014). For the definition of “significant armed conflict,” see *infra* note 223.

I. WAR POWERS: THEORY AND PRACTICE

A. *Justice Jackson's Concurrence in Youngstown Sheet & Tube Co. v. Sawyer*

No discussion of the relationship between executive and legislative power may begin without first considering the celebrated and influential case of *Youngstown Sheet & Tube Co. v. Sawyer*,²⁰ popularly known as the “Steel Seizure case.”²¹ While the case is not explicitly about war powers, it arose in the midst of the Korean War, when President Harry S. Truman ordered his Secretary of Commerce to seize most of the nation’s steel mills in order to prevent a threatened nationwide work-stoppage by the United Steelworkers of America.²² *Youngstown Sheet and Tube Company* and other affected steel companies sued Secretary of Commerce Charles Sawyer in federal court, claiming that the President had no authority to seize the steel mills.²³ In response, counsel for the President argued that the executive branch possessed inherent authority (grounded in historical practice and judicial precedent)²⁴ emanating from the Constitution’s language vesting all “executive power” in a President,²⁵ the President’s authority as “Commander in Chief of the Army and Navy of the United States,”²⁶ and the President’s duty to “take Care that the Laws be faithfully executed.”²⁷

After hearing an expedited appeal from the U.S. District Court for the District of Columbia, the U.S. Supreme Court held, in a six-to-three ruling, that President Truman exceeded his authority by ordering the seizures.²⁸ Although Justice Hugo Black authored the majority opinion,²⁹ each of the five justices who joined

20. 343 U.S. 579 (1952).

21. See BAKER, *supra* note 5, at 32.

22. *Youngstown*, 343 U.S. at 582–83. President Truman cited the exigency of ongoing combat in Korea in ordering the seizure. See Exec. Order No. 10340, 17 Fed. Reg. 3139, 3139 (Apr. 10, 1952).

23. See *Youngstown*, 343 U.S. at 582–83; *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 572 (D.D.C. 1952), *aff'd*, 343 U.S. 579 (1952); Brief for Plaintiff Cos, Petitioners in No. 744 and Respondents in No. 745 at 15, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Nos. 744, 745), 1952 WL 82173, at *15.

24. See *Youngstown*, 343 U.S. at 583–84; see also *id.* at 641–53 (Jackson, J., concurring) (discussing the constitutional moorings with respect to the President’s executive powers as Commander-in-Chief and the Faithful Execution Clause, the historical practice of previous presidents, and the role of emergency powers).

25. U.S. CONST. art. II, § 1, cl. 1.

26. *Id.* § 2, cl. 1.

27. *Id.* § 3.

28. *Youngstown*, 343 U.S. at 587.

29. *Id.* at 585 (asserting that the President’s action was not authorized by either the Constitution or an Act of Congress).

him wrote separate opinions;³⁰ Justice Robert Jackson's concurring opinion is known as the most influential and enduring opinion resulting from the case.³¹

According to Justice Jackson, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."³² In Justice Jackson's self-described "somewhat over-simplified [method of] grouping," executive action falls into one of three categories.³³ In the first category, presidential power is at its peak when the President acts "pursuant to an express or implied authorization of Congress."³⁴ If executive action in this area is found to be unconstitutional, "it usually means that the Federal Government as an undivided whole lacks power" to carry out the act.³⁵ In the second category, Congress has neither granted nor denied the President the power to act; therefore, the President can rely only on the power granted to the Executive by the Constitution,³⁶ generating "a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."³⁷ In these situations, Justice Jackson explains that "congressional inertia, indifference or quiescence" will allow or even invite the President to act on his or her own authority without Congress.³⁸ In the third category, the President is acting contrary to the express or implied wishes of Congress and can only act in areas where Congress itself has no power to act.³⁹

In conclusion, Justice Jackson determined that since Congress did not approve the seizure of the steel mills and the President did not avail himself of congressionally-approved methods for seizing said steel mills, the executive

30. See *id.* at 593 (Frankfurter, J., concurring); *Id.* at 629 (Douglas, J., concurring); *Id.* at 634 (Jackson, J., concurring); *Id.* at 655 (Burton, J., concurring); *Id.* at 660 (Clark, J., concurring).

31. In *United States v. Nixon*, 418 U.S. 683, 707 (1974) and *Dames & Moore v. Regan*, 453 U.S. 654, 661–62 (1981), the Supreme Court explicitly adopted Justice Jackson's analysis in its majority opinions. In fact, in *Dames & Moore*, then-Associate Justice Rehnquist noted that "both parties agree [Justice Jackson's concurrence] brings together as much combination of analysis and common sense as there is in this area." *Id.* at 661; see also Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 224–25 (2002) (observing the trend among legal academics "to note the eclipse of Justice Hugo Black's majority opinion by Justice Robert Jackson's concurrence").

32. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

33. *Id.*

34. *Id.*

35. *Id.* at 636–37.

36. *Id.* at 637.

37. *Id.*

38. *Id.*

39. *Id.* To exemplify a situation where the President can, while Congress cannot, constitutionally act, Justice Jackson cites *Myers v. United States*, 272 U.S. 52, 106, 176 (1926), where the Court upheld President Woodrow Wilson's authority to remove postmasters unilaterally, despite an act by Congress that declared such removal subject to the advice and consent of the Senate.

action was relegated to the third category and the seizure was not authorized within its narrow confines.⁴⁰ More than sixty years later, Justice Jackson's concurrence remains the primary authority regarding executive action in the presence or absence of legislative action.⁴¹

B. Two Schools of Thought—Two Widely Divergent Approaches

Generally speaking, legal academics and practitioners in the area of war powers fall into one of two camps: "Congress-First" and "President-First."⁴² Each faction relies selectively on authority such as early English practice, the debates of the Constitutional Convention and subsequent ratification of the Constitution, practice of Presidents and Congress, and the decisions of the Supreme Court and lower federal courts.⁴³ There is very little common ground between these two positions; indeed, as the War Powers Commission points out, "[a]dvocates on both sides find the answer obvious. Each of their claims to power, however, is met with contrary legal authority, historical counterexamples, and countervailing policy arguments."⁴⁴

1. Congress-First

Legal scholars and practitioners in the Congress-First camp argue that the unambiguous words of Article 1, Section 8, Clause 11, the Declare War Clause—"Congress shall have Power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"⁴⁵—establish that Congress must act in order to send the nation to war,⁴⁶

40. *Youngstown*, 343 U.S. at 638–40 (Jackson, J., concurring).

41. *See supra* note 31 and accompanying text.

42. Matthew Fleischman, Note, *A Functional Distribution of War Powers*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 137, 139, 141–44 (2010) (characterizing approaches to determining the proper balance of war powers as "Congress-First" or "President-First"); *see also* MILLER CTR. FOR PUB. AFFAIRS, UNIV. OF VA., NATIONAL WAR POWERS COMMISSION APPENDIX FOUR: A WAR POWERS PRIMER 2–5 (2008), <http://web1.millercenter.org/commissions/warpowers/appfour.pdf> (employing the terms "Proponents of Congress" and "Proponents of the President").

43. *See, e.g.*, discussion *infra* Parts I.B.1–2 (noting the various roots of the Congress-First and President-First arguments). Much of the language cited from judicial decisions by both war power factions is dicta, as the Judicial Branch has largely declined to settle these issues. *See infra* text accompanying notes 186 and 198.

44. BAKER, *supra* note 5, at 12.

45. U.S. CONST. art. I, § 8, cls. 1, 11.

46. *See, e.g.*, JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3 (1993) (stating that although often "the 'original understanding' of the [Constitution's] framers and ratifiers can be obscure to the point of inscrutability," there is no such confusion when it comes to analyzing the Framers' original intent with respect to the separation of war powers); David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 POL. SCI. Q. 1, 3–8 (1988) (discussing the Framers' intent behind the War Clause); Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A*

with the President holding, as James Madison suggested, the power only “to repel sudden attacks.”⁴⁷ Advocates of the Congress-First view suggest that the Framers specifically sought to distance themselves from the model of their English forebears (wherein the King had the power to send the nation to war) when drafting the Constitution;⁴⁸ some influential members of the Constitutional Convention, such as James Madison and James Wilson, identified “[m]aking peace and war” a legislative function that the King previously appropriated improperly for himself.⁴⁹

The Congress-First perspective is bolstered by the prevalent, near-unanimous, Congress-centric approach in debates at the Constitutional Convention concerning the war-making powers; for instance, only a single convention deputy, Pierce Butler of South Carolina, expressed the opinion that the war powers were most appropriately vested in the President, “who will have all the requisite qualities, and will not make war but when the Nation will support it.”⁵⁰ The records of the Convention indicate massive opposition to Rep. Butler’s sentiment, believing, as articulated by Elbridge Gerry of Massachusetts, that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”⁵¹

Further, the Congress-First approach relies on additional language located in the Declare War Clause, which grants Congress the power to issue “Letters of Marque and Reprisal” and write “Rules concerning Captures on Land and Water,”⁵² empowering Congress to authorize limited or “imperfect” wars as well as general or “perfect” wars.⁵³ Language in early Supreme Court cases

“*Joint Decision*” *Solution*, 77 GEO. L.J. 367, 373–74 (1988) (discussing the Framers’ concern about granting the President war-making power).

47. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (Max Farrand ed., 1966), [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(fr00286\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(fr00286))).

48. See *infra* notes 64–66 and accompanying text.

49. See Adler, *supra* note 46, at 3–4 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 65–66, 73–74 (Max Farrand ed., 1966), [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(fr00135\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(fr00135)))).

50. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 47, at 318.

51. *Id.* Madison’s notes indicate that he and Gerry “moved to insert ‘declare,’ striking out ‘make’ war; leaving to the Executive the power to repel sudden attacks.” *Id.* Lt. Col. Robert Bracknell, USMC (Ret.), at the time an active-duty Marine Corps JAG officer, described this textual amendment as “a curtailment of the originally envisioned power of Congress to ‘make’ war, dissecting the ‘make war’ power into a ‘declare war’ power for Congress and an executive portion. Mathematically expressed, ‘make war’ equals ‘declare war’ plus a variable (MW=DW+X), where the variable X represents the President’s authority.” Robert G. Bracknell, *Real Facts, “Magic Language”, the Gulf of Tonkin Resolution, and Constitutional Authority to Commit Forces to War*, 13 NEW ENG. J. INT’L & COMP. L. 167, 220 (2007). For more on the machinations of the Constitutional Convention, see Adler, *supra* note 46, at 3–8.

52. U.S. CONST. art. I, § 8, cl. 11.

53. See, e.g., Kathryn L. Einspanier, Note, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 GEO. L.J. 985, 988, 992–96 (2008) (discussing the Framers’ intention to give

concerning the Quasi-War with France would seem to support this view.⁵⁴ Thus, from a Congress-First perspective, in any war, general or limited, with the exception of sudden attack, the President must first obtain Congressional authorization prior to exercising executive war powers.⁵⁵

2. *President-First*

Legal academics and practitioners in the President-First camp interpret the Declare War Clause much more narrowly.⁵⁶ To Professor John Yoo and other advocates of this “insurgent” but increasingly influential perspective,⁵⁷ the Framers perceived a declaration of war not as legal authorization to initiate an armed conflict, but as a simple ministerial function, “a notification mechanism that defined the wartime rights of citizens and neutrals.”⁵⁸

President-First advocates define executive powers broadly.⁵⁹ These advocates cite Locke, Montesquieu, and Blackstone for the proposition that the Framers would have considered all powers related to foreign affairs and war as “executive” in nature.⁶⁰ Advocates of the President-First approach also locate support in the Constitution, highlighting section I of Article II, “[t]he executive

Congress the power to initiate “imperfect” or limited wars, and the President the authority to “to *conduct* wars and to repel sudden attacks”); *see also* HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND OF NATIONS* 36 (2007) (noting the distinction between formal and informal wars, stating that “war is not condemned by the voluntary law of nations,” and “certain formalities, attending war, were introduced by the law of nations, which formalities were necessary to secure the peculiar privileges arising out of the law”); *but see* Bracknell, *supra* note 51, at 215 (“A more likely interpretation of the ‘lesser war powers’ is that they regulate only what the text states: the authorization by Congress of conduct of *private* parties, particularly with regard to property, designed to have an effect on an opponent or enemy state.”).

54. *See infra* Part I.C.1.

55. *See* Einspanier, *supra* note 53, at 992.

56. *See* Fleischman, *supra* note 42, at 141 (“President-First advocates argue that the War Powers Clause should be read narrowly to distinguish between outright declarations of war, which must be authorized by Congress, and initiating hostilities and deploying troops for peace-time hostilities, which may be authorized by the President.”) (footnotes omitted).

57. *See* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 *HARV. L. REV.* 2070, 2073 (referring to this perspective as an “insurgency”). Professor Yoo became fairly well-known outside the legal academy due to his controversial tenure at the Department of Justice Office of Legal Counsel during the George W. Bush Administration. *See* Paul M. Barrett, *A Young Lawyer Helps Chart Shift in Foreign Policy*, *WALL ST. J.* (Sept. 12, 2005), <http://www.wsj.com/articles/SB112649010425437670>.

58. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CAL. L. REV.* 167, 244 (1996).

59. *See, e.g., id.* at 200 (discussing the Lockean notion concerning the importance of a strong Executive with broad emergency powers); *see also* Fleischman, *supra* note 42, at 141 (“[P]ro-Executive academics argue that the President seeks [war] voluntarily and that congressional silence before committing the country to military campaigns is perfectly acceptable . . .”).

60. *See, e.g.,* JOHN YOO, *THE POWERS OF WAR AND PEACE* 36–37, 40–41 (2005).

Power shall be vested in a President of the United States of America,”⁶¹ which, from a President-First perspective, would seem to vest all powers related to foreign affairs and national defense in the President, including the initiation of hostilities.⁶² Such broad language, effecting a comprehensive vesting of power in a single person, contrasts with the more limited grant of powers to Congress, which simply reads that “[a]ll legislative Powers herein granted.”⁶³

President-First advocates, Professor Yoo in particular, also stress the influence of the unwritten British Constitution upon the Framers in their development of the Constitution.⁶⁴ In the British model, the King initiated war and the Parliament raised the funds to pay for it.⁶⁵ Parliament’s only method of restraining the King was to withhold appropriations necessary to prosecute the war.⁶⁶ For these reasons, President-First advocates contend that the President has the power to send the nation to war without Congress passing a declaration or authorization of any sort.⁶⁷

61. U.S. CONST. art. II, § 1, cl. 1.

62. See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1677 (2002).

63. U.S. CONST. art. I, § 1; Yoo, *War and the Constitutional Text*, *supra* note 62, at 1677 (stating that “[t]his difference in language indicates that Congress’s legislative powers are limited to the enumeration of Article I, Section 8, while the President’s powers include inherent executive powers that are unenumerated in the Constitution”).

64. See YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 60, at 45–54 (discussing the development of the British war-making power during the colonial era and its effect on the Framers). This particular element of the President-First ideology has drawn criticism, with prominent Congress-First advocates—such as Joe Biden—referring to reading in an English influence as “monarchist” in nature. See Biden & Ritch, *supra* note 46, at 370–72. Such staunch opposition led then-Sen. Biden to vote against Justice Samuel Alito’s Supreme Court appointment following the Justice’s prior refusal to disavow Professor Yoo’s views on war powers. See Aaron Nielson, *An Indirect Argument for Limiting Presidential Power*, 30 HARV. J.L. & PUB. POL’Y 727, 727–28 (2007) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)). Justice Jackson in his *Youngstown* concurrence was similarly dismissive of this concept. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (“The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.”).

65. See WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* 17, 21 (1994) (noting that “colonial assemblies had acquired a stronger power of the purse than the English House of Commons then enjoyed”).

66. See YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 60, at 49–50 (“The Framers would have taken note of the ample opportunities available to Parliament to use its financial power to participate in the development of foreign policy. . . . Continual war demanded continual funding, and important members of Parliament used their voting power over military appropriations to seek a cooperative arrangement with the Crown in the setting of foreign policy.”).

67. See, e.g., *id.*, at 178 (discussing President Truman’s reliance on his authority as Commander-in-Chief to commit forces to the Korean Peninsula in 1950, despite the absence of “easily” obtainable congressional authorization).

C. Of Corsairs and Quasi-Wars: Early Practice Under the Constitution

Full, formal declarations of war have been rare in U.S. history.⁶⁸ Only five conflicts, against a total of eleven nations, have been fought under declarations of war passed by Congress.⁶⁹ On many other occasions—a total of 124 times according to many President-First advocates⁷⁰—the President has deployed U.S. military forces into harm's way with something less than a declaration of war, and often with no congressional authorization at all.⁷¹

1. The Quasi-War with France

While offering some support to the President-First faction, early U.S. war powers precedent illustrates that the recent executive practice of seeking congressional authorization—short of a declaration of war—for limited conflicts is by no means solely a late twentieth and early twenty-first century phenomenon.⁷² America's first major armed conflict under the Constitution, the so-called Quasi-War with France from 1798–1800, is instructive.⁷³

In 1798, President John Adams, in response to a campaign of maritime harassment of American shipping by French privateers and the failure of a

68. *Official Declarations of War by Congress*, U.S. SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Aug. 13, 2014); see also JENNIFER K. ELSEA & RICHARD F. GRIMMETT, *DECLARATIONS OF WAR AND AUTHORIZATIONS FOR MILITARY FORCES 6–8* (2009).

69. *Official Declarations of War by Congress*, U.S. SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Aug. 13, 2014); see also ELSEA & GRIMMETT, *supra* note 68, at 6–8.

70. See YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 60, at 12. This number has been cited in executive branch opinions from Vietnam onwards, including: Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484 (1966); *Proposed Deployment of United States Armed Forces in Bosnia and Herzegovina*, 19 OP. O.L.C. 327, 331 (1995); *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 25 OP. O.L.C. 188, 202 (2001). A similar document prepared to justify the Korean War listed eighty-five such military operations. *Authority of the President To Repel the Attack in Korea*, 23 DEP'T ST. BULL. 173, 177–78 (1950). During the Korean War, Professor Edward S. Corwin, a critic of the President-First approach, dismissively referred to most of these uses of military force as “involv[ing] 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.” Edward S. Corwin, *The President's Power*, THE NEW REPUBLIC, Jan. 29, 1951, at 16.

71. Corwin, *supra* note 70, at 16.

72. See YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 60, at 177 (stating that “[f]or much of the nineteenth and early twentieth centuries, Congress assented to presidential uses of force abroad”; although, such instances were usually “small-scale actions to protect American property, citizens, or honor abroad that had little risk of significant combat”).

73. The “Quasi-War” was a “limited war” between the United States and France that was the “first armed conflict that Americans, as citizens of an independent nation, fought.” See ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801* vii (1966).

diplomatic mission to Paris the previous year,⁷⁴ recommended that Congress authorize the Executive with certain war powers to appropriately provide protection for U.S. commercial ships abroad.⁷⁵ Congress passed a series of authorizations that would allow the fledgling naval establishment, under the newly established Department of the Navy,⁷⁶ to pursue a limited war against French naval and merchant ships.⁷⁷ Through this legislation, Congress authorized the Executive to engage in armed conflict, but also placed meaningful limitations on how that conflict could be waged.⁷⁸

Out of the Quasi-War came three early Supreme Court cases that, from a Congress-First perspective, further defined the scope of congressional power to

74. See *id.* at 9–10. The circumstances surrounding the failed diplomatic efforts are known as the “XYZ Affair.” See *id.* at 36–37, 58–59.

75. See ELSEA & GRIMMETT, *supra* note 68, at 9. President Adams considered requesting Congress to formally declare war, and many members of his own Federalist Party wished for one, believing it would cement their domestic political advantage. DECONDE, *supra* note 73, at 104. However, President Adams ultimately decided against seeking a formal declaration because the Federalists were divided on the issue and he feared that a general war with France could lead to invasion by the powerful French Army. See *id.*; Gregory E. Fehlings, *America’s First Limited War*, 53 NAVAL WAR COLL. REV. 102, 111–12 (2000).

76. In April 1798, Congress established the Department of the Navy to assume control of the three frigates that had been built under the auspices of the War Department the year before as well as to acquire and outfit other vessels in order to establish a Navy; in addition, the Treasury Department had available for action a small flotilla of revenue cutters (later known as the Revenue Cutter Service, a predecessor service of the U.S. Coast Guard). See *The Reestablishment of the Navy, 1787–1801, Historical Overview and Select Bibliography*, NAVAL HIST. CTR., <http://www.history.navy.mil/biblio/biblio4/biblio4a.htm> (last visited June 17, 2015); *Teaching with Documents: Launching the New U.S. Navy*, NAT’L ARCHIVES, <http://www.archives.gov/education/lessons/new-us-navy/navy-bill.html> (last visited June 17, 2015).

77. The first such authorization came in May of 1798, targeting armed French vessels “on and near the Coasts,” as well as authorizing U.S. naval vessels to seize the ships and bring them into U.S. ports. An Act More Effectually to Protect the Commerce and Coasts of the United States, ch. 48, 1 Stat. 561 (1798). A month later, another Act was passed which laid out policies and procedures to regulate the “forfeiture and condemnation” of such property seized. An Act in Addition to the Act More Effectually to Protect the Commerce and Coasts of the United States, ch. 62, § 1, 1 Stat. 574 (1798). Two days after the United States abrogated all treaties with France, on July 9, 1798, DECONDE, *supra* note 73, at 344, Congress authorized the President to order naval vessels to attack and capture “any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas[.]” and authorized the President to issue letters of marque to private armed vessels. An Act Further to Protect the Commerce of the United States, ch. 68, § 1, 1–2, Stat. 578 (1798). The following year, Congress passed further legislation that authorized the executive branch to stop, search and seize any U.S. ship engaging in commerce with France. An Act Further to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, ch. 2, § 5, 1 Stat. 613 (1799).

78. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 967–72 (2008) (discussing the implications of congressional limitations on executive war-fighting in the Quasi-War).

authorize military action.⁷⁹ First, in 1800 the Supreme Court in *Bas v. Tingy*,⁸⁰ following a dispute over salvage rights for a ship recaptured from France, was asked to decide whether France should be considered an “enemy” for purposes of a March 2, 1799 general law that created a system of regulating the recapture of ships and materiel from the “enemy.”⁸¹ The Court, delivering its opinions *seriatim*, came to a unanimous conclusion that France was considered the “enemy” of the United States during this time.⁸² Justice Bushrod Washington argued that, even though war had not been “declared in form” and was “limited as to places, persons, and things,” the two nations should be considered enemies because Congress had taken several steps towards war and conflict had been “authori[z]ed by the legitimate authority of the two governments.”⁸³ Justice Samuel Chase agreed, stating that “Congress is empowered to declare a general war, or [C]ongress may wage a limited war; limited in place, in objects, and in time.”⁸⁴ The Justice found that in this case, “Congress has not declared war in general terms; but [C]ongress has authori[z]ed hostilities on the high seas by certain persons in certain cases.”⁸⁵

The following year, the Court was called upon in *Talbot v. Seeman*⁸⁶ to decide as a preliminary question whether Congress “may declare a general war, or a partial war.”⁸⁷ Newly minted Chief Justice Marshall, writing for the Court, drew on the precedent established in *Bas* and reached the conclusion that the “situation of this country with regard to France, was that of a partial and limited war.”⁸⁸ Finally, in *Little v. Barreme*,⁸⁹ Chief Justice Marshall found that the President

79. See, e.g., *id.* at 954–55, 967–68 (discussing *Little v. Barreme* and *Bas v. Tingy*).

80. 4 U.S. (4 Dall.) 37 (1800).

81. See J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465, 483–86 (2005); see also An Act for the Government of the Navy of the United States, ch. 24, 1 Stat. 709 (1799) (establishing general principles for the regulation of the Navy). The major dispute in *Bas* was whether this law superseded an earlier law, An Act in Addition to the Act More Effectually to Protect the Commerce and Coasts of the United States, ch. 62, §2, 1 Stat. 574 (1798), that had established less generous salvage rights. Sidak, *supra* at 483.

82. See *Bas*, 4 U.S. (4 Dall.) at 39–40 (Moore, J.), 44–45 (Chase, J.), 45–46 (Patterson, J.); see also Sidak, *supra* note 81, at 483–86.

83. *Bas*, 4 U.S. at 40, 43 (Washington, J.); see also Charles A. Lofgrent, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 701 (1972) (stating that *Bas* stood for the proposition that “whether hostilities were declared or undeclared, they still constituted war—being perfect and general war in the one case, and imperfect and limited war in the other”).

84. *Bas*, 4 U.S. (4 Dall.) at 43 (Chase, J.).

85. *Id.*

86. 5 U.S. (1 Cranch) 1 (1801).

87. *Id.* at 8–9. The Court concluded that the ship *Amelia*, a German merchant vessel from the city of Hamburg that had first been captured by the French before being subsequently captured by Americans, was lawfully seized under U.S. law and the law of nations. See *id.* at 9–10.

88. *Id.* at 9.

89. 6 U.S. (2 Cranch) 170 (1804).

had gone beyond his executive authority by ordering U.S. naval vessels to seize merchant vessels appearing to be of neutral nations but in which there is a “just suspicion” that the vessels are actually American.⁹⁰

Though some scholars have argued that these cases say far less about the war powers than Congress-First advocates read into them,⁹¹ the cases represent helpful tools that assist legal scholars in discerning how the first generation of justices under the Constitution worked through these issues.⁹²

2. *The First Barbary War*

Congress played a similar role during the First Barbary War, a conflict between the United States and privateers of the Barbary States in North Africa who made their living harassing European and American shipping in the Mediterranean.⁹³ President Thomas Jefferson, upon taking office, sought to avoid the previous U.S. practice of paying these Barbary corsairs hefty ransoms.⁹⁴

Just prior to Jefferson’s inauguration in March 1801, Yusuf Karamanli, the Pasha of Tripoli, stepped up his attacks on American shipping, demanded an increase in tribute, and in May, declared war on the United States.⁹⁵ Around the same time, President Jefferson, still unaware of the Tripolitan declaration of war,

90. See *id.* at 179 (“I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”). The statute at question in this case was: An Act to Further Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, ch. 2, § 5, 1 Stat. 613 (1799).

91. See, e.g., Sidak, *supra* note 81, at 483–86 (noting in particular that “*Bas* was a case of statutory construction, not constitutional interpretation,” and that “[s]aying that Congress has the power to authorize limited war does not necessarily imply that it holds that power exclusively”); see also Katharine A. Wagner, *Little v. Barreme: The Little Case Caught in the Middle of A Big War Powers Debate*, 10 WAYNE ST. J. L. IN SOC’Y 77, 78 (2008) (“For some, *Little* has risen to mythological status . . . while others consider *Little* as no more than urban legend, extended far beyond its meager beginning as a common-place—for 1799—ship seizure claim.”) (footnote omitted).

92. Not only were all of the justices sitting during this period contemporaries of the Framers, but Justice William Patterson had been a member of the Constitutional Convention, and Justice Samuel Chase had signed the Declaration of Independence. See ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., *SOLDIER-STATESMEN OF THE CONSTITUTION* 166 (1987), <http://www.history.army.mil/books/RevWar/ss/ss-fm.htm>; *Samuel Chase*, SUP. CT. HIST. SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/samuel-chase-1796-1811/>.

93. See Alex J. Whitman, *From the Shores of Tripoli to the Deserts of Iraq: Congress and the President in Offensive and Defensive Wars*, 13 U. PA. J. CONST. L. 1363, 1374 (2011).

94. See *id.*

95. Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375, 385 (2013). Tripoli did not execute a legal document declaring war, but rather manifested its declaration by cutting down the flagstaff in front of the U.S. consulate in Tripoli, as was its custom. *Id.*

met with his cabinet to discuss sending a naval force to confront Karamanli.⁹⁶ According to the notes of the cabinet meeting held on May 15, 1801, the majority of the cabinet argued that if the commander of the naval squadron were to determine that a state of war existed between the United States and any of the Barbary States, he may “search for & destroy the enemy’s vessels wherever they can find them[.]”⁹⁷ Only Attorney General Levi Lincoln argued that, in the absence of a declaration of war, “[o]ur men of war may repel an attack on individual vessels, but after the repulse, may not proceed to destroy the enemy’s vessels generally.”⁹⁸ After consulting his cabinet, and prior to congressional consent, President Jefferson elected to send a naval force to the Mediterranean “to protect American shipping but not to offensively engage the Tripolitan Navy unless he were to find upon arrival that a state of war had been declared.”⁹⁹

Jefferson’s actions can be examined both from Congress-First and President-First perspectives.¹⁰⁰ From a Congress-First perspective, President Jefferson’s decision to order his naval commander to serve only as a protective force and not to engage in offensive actions symbolizes executive restraint in the absence of congressional approval in response to a real threat.¹⁰¹ The behavior of the U.S. schooner *Enterprise* in August 1801, which merely disarmed and released, rather than destroyed, the Tripolitan cruiser *Tripoli* serves to illustrate executive restraint corresponding to these orders.¹⁰² President Jefferson, in a “famous statement of deference to Congress’ power,” explained the release of the Tripolitan cruiser in his first annual Message to Congress, asserting that such an offensive act would be “[u]nauthorized by the constitution, without the sanction of Congress, [as it would] go beyond the line of defen[s]e, the vessel being disabled from committing further hostilities, was liberated with its crew.”¹⁰³

However, looking at these events in a different light, President Jefferson’s actions may also support the President-First position. Scholars have advanced the argument that by ordering Commodore Dale to advance into the Mediterranean Sea, the President anticipated an aggressive response from hostile forces.¹⁰⁴ This action necessitated a congressional response and thereby justified

96. *See id.* at 385–86.

97. Thomas Jefferson, Notes on a Cabinet Meeting (May 15, 1801) (on file with Founders Online, National Archives), <http://founders.archives.gov/documents/Jefferson/01-34-02-0088>.

98. *Id.*; *see* Garrison, *supra* note 95, at 387.

99. *See id.* at 386–87 (“[I]f war was declared, [the U.S. naval commander] was ordered to ‘chastise’ the Tripolitan Navy ‘wherever you shall find them.’”); Whitman, *supra* note 93, at 1376.

100. *See infra* text accompanying notes 101–08.

101. *See* Whitman, *supra* note 93, at 1375–77.

102. *See id.*; *see also* Adler, *supra* note 46, at 18–19.

103. *See* John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 433 (2008) (quoting President Thomas Jefferson, President’s Message (Dec. 8, 1801), in 7 ANNALS OF CONG. 11, 12 (1801)).

104. *See infra* note 107.

his order, once a declaration of war had been declared, to “protect our commerce & chastise their insolence—by sinking, burning, or destroying their ships & Vessels wherever you shall find them.”¹⁰⁵ Supporting this inference of presidential sleight-of-hand, Abraham Sofaer, a law professor who later served as a U.S. District Court Judge and State Department Legal Adviser in the Reagan Administration,¹⁰⁶ argues that President Jefferson was not forthright in his December address to Congress by neglecting to fully inform Congress of the circumstances involving the encounter between *Enterprise* and *Tripoli*.¹⁰⁷ Sofaer points to evidence that President Jefferson omitted “material information” from his address to Congress; specifically, that “the cabinet had authorized offensive actions, and Dale had been instructed accordingly. [The *Enterprise*] had released the [*Tripoli*] only because [the *Enterprise*] was on [its] way to Malta, rather than on [its] way back,” not because the President was exercising restraint in the absence of congressional assent.¹⁰⁸

Soon thereafter, Congress passed legislation granting the President authority to engage in hostilities against Tripoli.¹⁰⁹ Unlike the series of narrow

105. See Samuel Smith to Commodore Richard Dale (May 20, 1801), in 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 465, 469 (1939).

106. See Abraham D. Sofaer, HOOVER INST., <http://www.hoover.org/profiles/abraham-d-sofaer> (last visited May 25, 2015).

107. See Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 25–27 (1976). Sofaer, at the time a Professor of Law at Columbia University, argued that the only reason that the *Enterprise* did not capture the Tripolitan ship was that Commodore Dale sent *Enterprise*, serving as a tender for the larger frigates, to Malta for water; in fact, Commodore Dale’s specific orders to Lieutenant Andrew Sterett, commanding officer of *Enterprise*, were to defeat, disable, and leave any Tripolitan corsairs he encountered *on his way to Malta*, but defeat and capture any such corsairs he encountered *on his way back from Malta* to the waters off Tripoli. See *id.*; see also Richard Dale to Andrew Sterett (July 30, 1801), in 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 534–35 (1939). Jon Meacham, author of a recent popular biography on Jefferson, Jill Abramson, *Grand Bargainer* N.Y. TIMES (Nov. 2, 2012), http://www.nytimes.com/2012/11/11/books/review/thomas-jefferson-the-art-of-power-by-jon-meacham.html?_r=0, agrees with this characterization, writing “[h]ere Jefferson was effectively exerting control over military and foreign policy while appearing to defer to the legislature. It was typical Jefferson: having his way without precipitating confrontation or a distracting crisis.” JON MEACHAM, THOMAS JEFFERSON: THE ART OF POWER 365 (2012); but see LOUIS FISHER, CRS REPORT FOR CONGRESS: THE BARBARY WARS: LEGAL PRECEDENT FOR INVADING HAITI? (1994), <http://www.loufisher.org/docs/wp/barbary.pdf> (noting that Jefferson, after issuing orders to Dale authorizing him to attack Barbary ships, said “[t]he real alternative before us is whether to abandon the Mediterranean or to keep up a cruise in it. . . . [T]his Congress must decide.”) (quoting 8 The Writings of Thomas Jefferson 63–64 (Ford ed. 1897)).

108. See Sofaer, *supra* note 107, at 25–26.

109. See An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. 4, 2 Stat. 129 (1802).

authorizations passed by Congress in the Quasi-War,¹¹⁰ this authorization was broadly worded, allowing the President to seize any property of Tripoli whether at sea or on land, and “to cause to be done all such other acts of precaution or hostility, as the state of war will justify, and may in [the President’s] opinion require.”¹¹¹ With this authorization, President Jefferson was then free to commit forces to engage in offensive action against Tripoli.¹¹² It seems, then, that both the Quasi-War and the Barbary Wars stand not only for the proposition that the President must obtain authorization from Congress to engage in significant armed conflicts, but also that the President has some freedom to dispatch forces short of the onset of hostilities.¹¹³

In fact, some prominent scholars and practitioners argue that the early precedent shows a more complicated reality.¹¹⁴ Eugene Rostow, Dean of Yale Law School and Under Secretary of State for Political Affairs under President Lyndon B. Johnson,¹¹⁵ argued that the war powers arrangement was not a bipolar decision between receiving authorization from Congress on one hand and the President acting completely on his or her own on the other.¹¹⁶ In fact, Dean Rostow noted that in this early period of American history, “Presidents and Congress alike found that the exigencies of diplomacy in a world at war required many uses and threats to use military power which defied simplified

110. See *supra* Part I.C.1.

111. See An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. 4, § 2, 2 Stat. 129 (1802). Sofaer compared this to the authorization for military force in Vietnam: “the authorization concerning Tripoli was surely as broad and as vague as the Gulf of Tonkin Resolution, passed after questionable executive representations in 1964.” Sofaer, *supra* note 107, at 27.

112. This would include an elaborate plot to depose Yusuf Karamanli as Pasha and replace him with his brother Hamet. See *supra* note 107, at 27–29.

113. See Whitman, *supra* note 93, at 1407 (noting that while “the rhetoric and the actions of the Framers, exemplified during the Barbary Wars reflect a distinct desire for Congress to play a central role in the decision to go to war,” this role is reduced as “undeclared war, whether offensive or defensive” has become more common).

114. See *infra* text accompanying notes 115–17.

115. See Todd S. Purdum, *Eugene Rostow, 89, Official at State Dept. and Law Dean*, N.Y. TIMES (Nov. 26, 2002), <http://www.nytimes.com/2002/11/26/us/eugene-rostow-89-official-at-state-dept-and-law-dean.html>. Though Dean Rostow’s views could fairly be considered to be in the President-First camp, he also saw a greater role for Congress than others, particularly Professor Yoo. See Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 851 (1972) (“It is tempting, but would be incorrect, to suggest . . . that the constitutional allocation of power between President and Congress with respect to the use of the armed forces corresponds to the categories of international law, with the President authorized to use the armed forces as head of state and commander-in-chief . . . while only Congress could move the nation into the juridical world of a state of war. . . . The constitutional pattern is . . . more complex.”); see also Barrett, *supra* note 57 (discussing John Yoo’s views favoring very broad Executive war-making powers).

116. Rostow, *supra* note 115, at 851.

classification,” and that the “invocation of force as a tool of national policy ranged from the purely Presidential to the full declaration of war.”¹¹⁷

D. Post World War II Expansion of Executive Power

Still, the general American practice up until 1950 was that major conflicts against foreign nations were fought under either a declaration of war or upon congressional authorization; while reprisals, punitive expeditions, protection of U.S. citizens or commerce on foreign shores, and other such relatively minor military actions could be waged by the President acting alone.¹¹⁸ President Truman made a clean break with this precedent by deciding not to seek congressional authorization for U.S. military action in the Korean peninsula.¹¹⁹

1. The “Police Action” in Korea: A New Precedent

On June 25, 1950, forces of the Democratic People’s Republic of Korea (DPRK) streamed across the thirty-eighth parallel, invading the Republic of Korea (ROK) and catching the southern nation’s army (and the small cadre of U.S. advisors there) completely unprepared.¹²⁰ President Truman and his national security team quickly convened and determined that immediate military involvement would be necessary.¹²¹ Two days after this determination, President Truman and Secretary of State Dean Acheson met with congressional leaders to discuss the situation in Korea.¹²² When Republican Senator Alexander Smith asked President Truman whether he would seek congressional authorization for war in Korea, the President answered that he would “take it under advisement.”¹²³

117. *Id.*

118. *See, e.g.,* Bracknell, *supra* note 51, at 221 (“To wit, the ‘supergeneral’ power [of the President to deploy military forces without Congressional involvement] has been exercised well over 200 times in the history of the republic absent any legislative expression of approval of exercise of the war power. Obviously scores of uses of the armed forces would have been plainly inappropriate for a declaration of war”); *see also supra* text accompanying note 68; Corwin, *supra* note 70, at 16.

119. BAKER, *supra* note 5, at 17.

120. DAVID HALBERSTAM, *THE COLDEST WINTER: AMERICA AND THE KOREAN WAR* 1 (2007).

121. *See id.* at 93–94. Truman made the decision to fight despite an earlier speech by Secretary of State Dean Acheson that had notably failed to include Korea in the U.S. “Asian defense perimeter.” *Id.* at 48. This speech emboldened DPRK President Kim Il-Sung and convinced Soviet Premier Joseph Stalin and Chinese Communist Party Chairman Mao that the United States would not fight for the Korean Peninsula. *See id.* at 48–49.

122. *Id.* at 99.

123. *See id.* Rather remarkably, Halberstam reports that until Sen. Smith asked this question, no one in the President’s inner circle had stopped to consider whether congressional approval was necessary or preferable. *Id.*

Later that day, President Truman, Secretary Acheson, and White House adviser Averell Harriman discussed whether to seek authorization.¹²⁴ Though Harriman vigorously argued for congressional authorization (more for domestic political reasons than anything else), Acheson was concerned about the urgency of the situation in Korea and the prospect of Congress slowing down the process—a concern shared by Truman (along with his frustration at congressional grandstanding following the “loss” of China to Communism).¹²⁵

Several days later, on July 3, President Truman met with several cabinet secretaries, Senate Majority Leader Scott Lucas of Illinois, and other top officials of the government to consider “a recommendation by the Department of State that the President go before Congress some time in the near future to make a full report to a Joint Session of the Congress on the Korean situation . . . followed by the introduction of a Joint Resolution expressing approval of the action taken in Korea.”¹²⁶ Each of the assembled officials reacted to the proposal.¹²⁷ Secretary of the Navy Francis P. Matthews thought it “essential to say something to the people and not to by-pass the Congress.”¹²⁸ On the other hand, Postmaster General Jesse M. Donaldson argued that if the President approached Congress in this manner “he might be called back again and again”;¹²⁹ Secretary of Defense Louis Johnson seemed to concur with the Postmaster General’s concerns.¹³⁰ The reaction of Senator Lucas, the only representative of the Legislative Branch in the room, was particularly striking.¹³¹ He first remarked that “the President had very properly done what he had to without consulting the Congress,”¹³² and suggested a “fireside chat” with the people, rather than addressing Congress, as an alternative.¹³³ Senator Lucas then stated that if the President called another meeting of congressional leaders seeking authorization, he undoubtedly would not have any “trouble in getting it

124. *Id.*

125. *See id.*

126. *Memorandum of Conversation, by the Ambassador at Large (Jessup)* (July 3, 1950), in 7 FOREIGN RELATIONS OF THE UNITED STATES: 1950 at 287 (1976), <http://digital.library.wisc.edu/1711.dl/FRUS.FRUS1950v07>.

127. *See infra* text accompanying notes 128–37.

128. *See Memorandum of Conversation, by the Ambassador at Large, supra* note 126, at 289.

129. *Id.* Note that until 1971, the Postmaster General was a member of the Cabinet and was often a close political adviser to the President. *See* Peter Grier, *Postmasters General, Kings of Political Patronage?*, CHRISTIAN SCI. MONITOR (Mar. 11, 2010), <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Buzz/2010/0311/Postmasters-general-kings-of-political-patronage>.

130. *See Memorandum of Conversation, by the Ambassador at Large, supra* note 126, at 287–89 (suggesting “that the President wait until there were things which the public does not know and which could then be told to them”).

131. *See infra* text accompanying notes 132–35.

132. *See Memorandum of Conversation, by the Ambassador at Large, supra* note 126, at 287.

133. *Id.* at 288.

through.”¹³⁴ However, Senator Lucas relayed to the assembled group that “[m]any members of Congress had suggested to him that the President should keep away from Congress and avoid debate.”¹³⁵ Though Averell Harriman reiterated his (quite prescient) concern that “[w]hile things are going well now there may be trouble ahead[,]”¹³⁶ no further action was taken on the concept of a Joint Resolution, and the President ultimately decided not to seek congressional authorization.¹³⁷

The Truman Administration’s justification for Presidential authority without congressional authorization rested on its characterization of the Korean conflict as a “police action,”¹³⁸ combined with an expansive reading of the Commander-in-Chief Clause and United Nations Security Council Resolution.¹³⁹ The Administration, citing numerous instances where the President had previously sent U.S. forces to protect American lives and property as well as to execute U.S. foreign policy, maintained that the President could send the Armed Forces around the world without specific authorization.¹⁴⁰ The Administration also cited United Nations Security Council Resolutions of July 25 and 27, 1950, which ordered North Korean forces to retreat north of the thirty-eighth parallel, and requested that “Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to

134. *Id.* at 289.

135. *Id.* at 290.

136. *Id.* The near-unanimous support from Congress would be short-lived. See HALBERSTAM, *supra* note 120, at 99 (“[S]oon the moment [to secure a resolution from Congress] passed, and the political unanimity that had existed at the hour of the invasion evaporated.”); see also *infra* text accompanying notes 147–49.

137. See HALBERSTAM, *supra* note 120, at 99.

138. When asked directly in a press conference on June 29, 1950 whether the United States was at war, President Truman answered unequivocally “[w]e are not at war.” Harry Truman, The President’s News Conference of June 29, 1950, <http://teachingamericanhistory.org/library/document/the-presidents-news-conference-of-june-29-1950/>. In the same press conference, another reporter asked President Truman if it would be correct “to call this a police action under the United Nations[,]” to which the President answered, “Yes. That is exactly what it amounts to.” *Id.*

139. See *Authority of the President to Repel the Attack in Korea*, *supra* note 70, at 173 (“The President . . . has full control over the use [of the armed forces] . . . [and] has [the] authority to conduct the foreign relations of the United States. . . . Both traditional international law and article 39 of the United Nations Charter and the resolution pursuant thereto authorize the United States to repel the armed aggression against the Republic of Korea.”).

140. *Id.* The examples included minor U.S. interventions in Japan in the 1860s, what today might be called peacekeeping efforts in Samoa in 1889, and the U.S. Marines’ involvement in the Boxer Rebellion of 1900–1901. *Id.* at 175. While these examples do not, of course, come close to the scope of efforts in Korea, by October, 1950, General of the Army Douglas MacArthur was promising that American troops would be “home by Christmas,” so it is possible those precedents seemed reasonable at the time without the benefit of hindsight. See HALBERSTAM, *supra* note 120, at 23.

restore international peace and security in the area.”¹⁴¹ Later, the Administration also argued that Congress’s expansion of the draft, passed on July 30, 1950, as well as special appropriations to fund the war, amounted to de facto congressional approval of the war.¹⁴²

On the other hand, Professor John Hart Ely, a prominent Congress-first proponent, perceived the invasion of Korea without congressional authorization to be a “shatter[ing]” of the “long-standing legislative-executive consensus” model wherein congressional authorization of military action was the norm.¹⁴³ Even if time were a factor in the swift response to the deteriorating situation on the Korean Peninsula, Professor Ely states, the Truman Administration could have likely obtained contemporaneous approval from Congress as it was surging forces into the area, or at least cited Article II authority justifying the initial response to the North Korean attack before seeking congressional approval as soon as possible.¹⁴⁴

Regardless of his personal options, President Truman’s decision to greatly expand executive authority with respect to taking the nation to war gave his successors a powerful tool for exercising executive war-making capabilities.¹⁴⁵

141. See *Authority of the President to Repel the Attack in Korea*, *supra* note 70, at 176; see also S.C. Res. 83, U.N. Doc. S/1511 (June 27, 1950) (authorizing United Nations member states to render military aid to the Republic of Korea); S.C. Res. 82, U.N. Doc. S/1501 (June 25, 1950) (calling for the “immediate cessation of hostilities” and the withdrawal of North Korean forces from the thirty-eighth parallel). However, the resolutions did not mandate the use of military force. See S.C. Res. 83, U.N. Doc. S/1511 (June 27, 1950) (“Recommend[ing]” that member states “furnish such assistance . . . as may be necessary to repel the armed attack and to restore international peace and security in the area”).

142. See Selective Service Extension Act of 1950, H.R. 6826, 81st Cong. (1950); STEPHEN DAGGETT, CRS REPORT FOR CONGRESS: MILITARY OPERATIONS: PRECEDENTS FOR FUNDING CONTINGENCY OPERATIONS IN REGULAR OR IN SUPPLEMENTAL APPROPRIATIONS BILLS 3–4 (2006), <http://fas.org/sgp/crs/natsec/RS22455.pdf> (listing various military appropriations during the Korean War); ELY, *supra* note 46, at 153 n.66.

143. ELY, *supra* note 46, at 10.

144. See, e.g., *id.* at 151 n.59 (noting that “there seems to have been time to secure authorization prior to the commencement of [the U.S.] military response—for one thing Congress was in session—the failure to do so representing a deliberate assertion of presidential prerogative”).

145. See *infra* Parts I.D.2, I.E. Although some Presidents have chosen to seek congressional authorization for military deployments, the specter of unilateral executive action in taking the nation to war looms large over the public debate. See, e.g., RYAN C. HENDRICKSON, *THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS* 43 (2002) (noting how, on the issue of intervention in Haiti, “in remarkable fashion, Congress chose to defer to [President Clinton]”); JOHN LEHMAN, *MAKING WAR: THE 200-YEAR OLD BATTLE BETWEEN THE PRESIDENT AND CONGRESS OVER HOW AMERICA GOES TO WAR* 36 (1992) (discussing apprehension over whether Congress and the American people would be receptive to engagement in the First Gulf War); Matthew E. Vigeant, *Unforeseen Consequences: The Constitutionality of Unilateral Executive R2P Deployments and the Need for Congressional and Judicial Involvement*, 47 *COLUM. J.L. & SOC. PROBS.* 209, 210–12 (2013) (discussing President Obama’s use of force against Colonel Moammar Gadhafi’s regime in Libya absent congressional authorization); Jim Acosta & Jeremy Diamond,

It is fair to say that there was some sentiment within the Truman Administration to seek congressional authorization, if only in a *pro forma* fashion; after all, there would not have been a July 3 meeting if the State Department had not proposed a Presidential speech before a Joint Session of Congress followed by a Joint Resolution.¹⁴⁶ In addition, it is likely that Senator Lucas's comments at the July 3 meeting, in which he demonstrated "congressional inertia, indifference or quiescence,"¹⁴⁷ was a factor in President Truman abandoning any potential plans to go to Congress for formal authorization.¹⁴⁸ This choice was costly politically, as noted by Halberstam: "As the war became more difficult than originally imagined, the politics of it became more difficult as well, and the support began to fragment. Because Truman had not tried for congressional support, the opposition was off the hook in terms of accepting any responsibility for America's response."¹⁴⁹

2. Vietnam

Ironically, the war in Vietnam, which provoked a tremendous amount of controversy and sparked several legal challenges,¹⁵⁰ stands on much firmer legal

Obama ISIS Fight Request Sent to Congress, CNN (Feb. 12, 2015, 10:18 AM), <http://www.cnn.com/2015/02/11/politics/isis-aumf-white-house-congress/> (discussing President Obama's request that Congress authorize military action in Syria); Jack Goldsmith, *Blaming (or Crediting) the Lawyers for Our Syria Policy*, LAWFARE (July 15, 2013, 10:38 AM), <http://www.lawfareblog.com/2013/07/blaming-or-crediting-the-lawyers-for-our-syria-policy/> (discussing President Obama's oscillating policy on seeking legal bases for foreign military intervention); Michelle M. Stein, *Senate Delays Libya 'War Powers' Vote*, UPI (July 5, 2011), http://www.upi.com/Top_News/Special/2011/07/05/Senate-delays-Libya-war-powers-vote/UPI-49421309903544/ (discussing a resolution sponsored by Sen. John Kerry, D-Mass., authorizing President Obama's use of force in Libya).

146. See *Memorandum of Conversation by the Ambassador at Large*, *supra* note 126, at 287 (noting that Secretary Acheson proclaimed that "the purpose of the meeting was to lay before the President and his advisors a recommendation by the Department of State that the President go before Congress some time in the near future to make a full report to a Joint Session of the Congress on the Korean situation").

147. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *supra* notes 131–35.

148. See *Memorandum of Conversation by the Ambassador at Large*, *supra* note 126, at 289–90 (discussing Senator Lucas's apparent lack of urgency in seeking that President Truman ask for congressional authorization).

149. HALBERSTAM, *supra* note 120, at 99.

150. In *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), two servicemen attempted to enjoin the Secretary of Defense, the Secretary of the Army, and their commanding officers from deploying them to Vietnam on the grounds that the officers "exceeded their constitutional authority by ordering them to participate in a war not properly authorized by Congress." *Id.* at 1040. In *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971), servicemen argued that their deployment to Vietnam was "a deprivation of liberty in violation of the due process clause of the Fifth Amendment." *Id.* at 28. In *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973), thirteen members of the House of Representatives filed a complaint against the President and a number of Executive

footing than the Korean conflict.¹⁵¹ In 1964, just over 20,000 American service members were stationed in Vietnam.¹⁵² On August 2, 1964, the USS *Maddox*, a destroyer engaging in a signals intelligence patrol in international waters in the Gulf of Tonkin, was reportedly attacked by North Vietnamese patrol boats; the *Maddox* and the USS *Turner Joy* were reportedly attacked again over the next two days.¹⁵³ In response, President Johnson ordered retaliatory airstrikes and requested that Congress pass a resolution authorizing the President “to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”¹⁵⁴ The resolution, commonly referred to as either the Gulf of Tonkin Resolution or the Southeast Asia Resolution,¹⁵⁵ passed 416-0 in the House and 88-2 in the Senate.¹⁵⁶

In the years following the vote on the Gulf of Tonkin Resolution, many of the members of Congress who voted for it attempted to argue that the resolution did not authorize the type of military escalation that President Johnson eventually undertook.¹⁵⁷ However, after reviewing the legislative history, Professor Ely concluded that the Gulf of Tonkin Resolution, though vague and granting wide discretion in the President, was nonetheless a legal authorization of war from Congress.¹⁵⁸ Indeed, there is ample precedent for such an expansive resolution

officers alleging that the Executive officers “unlawfully impair[ed] and defeat[ed]” their “Constitutional right, as members of the Congress of the United States, to decide whether the United States should fight a war.” *Id.* at 613.

151. See *infra* text accompanying notes 152–59.

152. *Vietnam War Allied Troop Levels 1960–73*, AM. WAR LIBR., <http://www.americanwarlibrary.com/vietnam/vwatl.htm> (last visited May 25, 2015).

153. It is likely that the first attack actually occurred while the later-reported attacks did not. See Bracknell, *supra* note 51, 192–93, 195 (“[I]t is at least possible that the ‘engagements’ were in fact mere perceptions—sonar and radar ‘shadows’—generated aboard the ships merely as a result of the chaos and confusion that reigns during armed conflict.”); Robert J. Hanyock, *Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2–4 August 1964*, 19 CRYPTOLOGIC Q. 1, 1 (2000).

154. See The Gulf of Tonkin Resolution, H.R.J. Res. 1145 (1964); see also President’s Message to Congress (Aug. 5, 1964), <https://www.mtholyoke.edu/acad/intrel/tonkinsp.htm>.

155. See H.R.J. Res. 1145; see also David L. Larson, *The Constitution and U.S. Foreign Policy: The President, the Congress, and the People*, 32 FLETCHER F. OF WORLD AFF. 143, 147 (2008) (discussing common names for the resolution).

156. E.W. Kenworthy, *Resolution Wins*, N.Y. TIMES, Aug. 8, 1964, at 1.

157. See ELY, *supra* note 46, at 16–17 (quoting Senator William Fulbright (D-Ark.) claiming that he had been “unaware of the significance of the measure” and that passage of the Gulf of Tonkin Resolution “must stand as the only instance in the nation’s history in which Congress authorized war without knowing that it was doing so”).

158. See *id.* at 29–30. Despite Senator Fulbright’s later protestations, when asked by Senator Daniel Brewster (D-Md.) whether the resolution “would authorize or recommend or approve the landing of large American armies in Vietnam or in China,” Senator Fulbright responded,

There is nothing in the resolution, as I read it, that contemplates it. I agree with the Senator that this is the last thing we would want to do. However, the language of the

in American history; namely, the similarities between the Gulf of Tonkin Resolution and the authorization that began Thomas Jefferson's First Barbary War in 1801.¹⁵⁹

E. The War Powers Resolution Era

As the Vietnam War drew to an end, Congress responded to the perceived and actual overreach of two successive Presidents by drafting what became known as the War Powers Resolution of 1973 (WPR), which overcame President Nixon's veto in 1973.¹⁶⁰ Under the terms of the WPR, the President must report to Congress each time he or she directs U.S. forces into hostilities or into an area where hostilities are imminent, where military forces are entering a country equipped for combat, or to enter a country in numbers that substantially enlarge U.S. forces already in-country.¹⁶¹ The President may employ the military in this manner for no more than sixty days without an explicit declaration of war, authorization of the use of the military in such a manner, or if the President receives an extension beyond the sixty day maximum.¹⁶² In the absence of such a declaration, approval, or extension, the President must remove military forces within ninety days.¹⁶³

Professor Michael Stokes Paulsen, a legal scholar whose attitude towards executive war powers appears to be more consistent with the Congress-First camp, describes the WPR as a legislative attempt to minimize, if not eliminate, executive actions falling in the "Category II" "zone of twilight" of Justice Jackson's tripartite analysis in *Youngstown*.¹⁶⁴ This contention is supported, according to Professor Paulsen, by Section 8 of the WPR, which states that the Executive shall not infer authority from "treaties, appropriations acts, or any other legislative action or inaction short of specific authorization."¹⁶⁵

resolution would not prevent it. *It would authorize whatever the Commander in Chief feels is necessary.*

Id. at 17 (emphasis added).

159. *See supra* text accompanying notes 110–13.

160. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2012). *See also* Andrew Glass, *Richard Nixon Vetoes War Powers Resolution*, POLITICO (Oct. 24, 2013, 5:06 AM), <http://www.politico.com/story/2013/10/nixon-vetoes-war-powers-resolution-oct-24-1973-98747.html> (discussing Nixon's veto and Congress's override with respect to the War Powers Resolution).

161. 50 U.S.C. § 1543(a).

162. *Id.* § 1544(b).

163. *Id.*

164. Paulsen, *supra* note 31, at 245–48; *see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); *see also supra* Part I.A.

165. Paulsen, *supra* note 31, at 222 (citing War Powers Resolution of 1973 § 8(a); 50 U.S.C. § 1547(a) (2012) (attempting to limit the context in which the President can view acts, or lack thereof, by Congress that may further his war-righting capability)).

1. *Presidential Parsing: “Consistent with” not “Pursuant to”*

Presidents since Richard Nixon have maintained that the WPR is unconstitutional.¹⁶⁶ Nonetheless, as of September 2012, 132 reports have been submitted to Congress by the President consistent with the reporting requirements enumerated in Section 4 of the WPR.¹⁶⁷ In each instance, the President reserves the right to question the constitutionality of the WPR by stating he or she is submitting the report “consistent with” the WPR, rather than “pursuant to” that law.¹⁶⁸

In addition, since the WPR was enacted, Congress has passed several specific statutes authorizing the President to use military force in response to significant events.¹⁶⁹ Such authorizations related to the use of military force in Lebanon (1982), Iraq (1991), in response to the attacks of September 11, 2001, and once more in Iraq (2002).¹⁷⁰ During this time, the executive branch also engaged in several instances of congressionally unauthorized combat that lasted less than ninety days, including in Granada (1983) and Panama (1989–1990).¹⁷¹ Other actions, like Haiti (1994), were authorized retroactively.¹⁷²

2. *Presidential Indifference: Actions Neither “Consistent with” Nor “Pursuant to”*

In the recent past, in addition to the ongoing United States-led use of force in Iraq and Syria,¹⁷³ Presidents have twice exceeded the sixty-day limit while

166. RICHARD F. GRIMMETT, CRS REPORT FOR CONGRESS: WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 2 (2012), <http://fas.org/sgp/crs/natsec/RL33532.pdf>.

167. *Id.* at 14 (stating that, as of September 2012, “President Ford submitted 4, President Carter 1, President Reagan 14, President George H.W. Bush 7, President Clinton 60, President George W. Bush 39, and President Barack Obama 11”).

168. *See, e.g.*, Letter from the President to the Speaker of the House Regarding 2012 War Powers Resolution 6-Month Report, (June 15, 2012), *on file at* <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>.

169. *See, e.g.*, ELSEA & GRIMMETT, *supra* note 68, at 14 (discussing Congress’s authorization of the use of force in Lebanon in 1983).

170. *See id.* at 14–20.

171. *See* BARBARA SALAZAR TORREON, CRS REPORT: INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2014 13 (2015).

172. *See* GRIMMETT, *supra* note 166, at 8–10. The military action in Haiti was originally intended to be an invasion, without congressional authorization, but after a naval blockade and successful diplomacy it became a peacekeeping mission. *Id.* The military action was ultimately authorized in October of 1994, although Congress requested a timely withdrawal. *Id.* at 9; *see also* Act of Oct. 25, 1994, Pub. L. No. 103-423, § 1, 108 Stat. 4358, 4358 (1994); *but see* HENDRICKSON, *supra* note 145, at 60 (stating that “[o]nce American troops reached Haitian soil, both the House and the Senate passed resolutions supporting the president and the troops. At the same time, neither chamber explicitly approved the deployment,” and “[b]oth resolutions were sufficiently vague to gain widespread support from both parties.”).

173. This Article does not offer an overview of the current debate over the legality of President Obama’s use of force in Iraq and Syria because of the ongoing nature of the conflict. Although the

placing the military into active hostilities without authorization from Congress, such as in the Kosovo region of Yugoslavia (1999) and Libya (2011).¹⁷⁴

On March 24, 1999, President Bill Clinton announced the beginning of air strikes against the Federal Republic of Yugoslavia (Serbia and Montenegro) in order to protect the ethnic Albanian majority in the province of Kosovo.¹⁷⁵ Though the Senate had passed a non-binding resolution the day before that would have authorized the President “to conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia,”¹⁷⁶ the House of Representatives “took no constitutional position” at that time.¹⁷⁷ Two days later, the President filed a report “consistent with” the WPR that informed Congress of military action in Yugoslavia.¹⁷⁸

In April 1999, the House debated several pieces of legislation dealing with the war powers question.¹⁷⁹ The House passed a bill prohibiting the use of ground forces in Yugoslavia¹⁸⁰ while striking down a Senate resolution in support of the Kosovo campaign,¹⁸¹ a bill that would have ordered the President to remove

President claims that the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), covers use of force against ISIL, in February 2015 the President requested a new Authorization to cover the campaign to defeat ISIL; as of the publication of this Comment, Congress has not acted on the President’s request. Gabrielle Levy & Paul Shinkman, *Senators Split on Obama’s War Powers Authorization*, U.S. NEWS & WORLD REP. (Mar. 11, 2015, 5:23 PM), <http://www.usnews.com/news/articles/2015/03/11/senators-split-on-obamas-war-powers-authorization>; Scott Wong & Julian Hatten, *Boehner: Obama Needs to Start Over on ISIS War Powers Request*, THE HILL (May 19, 2015, 11:05 AM), <http://thehill.com/homenews/house/242487-boehner-obama-should-start-over-on-isis-war-powers-request>; Milbank, *supra* note 8, at A2.

174. See HENDRICKSON, *supra* note 145, at 117 (noting that “NATO’s military operation in the Federal Republic of Yugoslavia was the most prolonged and intense use of force during the Clinton presidency,” lasting “seventy-eight days”); see also *Report to the House of Representatives on United States Activities in Libya*, submitted June 15, 2005, https://www.scribd.com/fullscreen/57965200?access_key=key-1u10mi6mo7qaatybceao, at 25 (“The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of ‘hostilities’ contemplated by the Resolution’s 60 day termination provision.”).

175. See HENDRICKSON, *supra* note 145, at 129; Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro) (March 26, 1999) in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON: 1999 460 (2000), <http://quod.lib.umich.edu/p/pptopus/4733243.1999.001/479?page=root;rgn=full+text;size=100;view=image>.

176. S. Con. Res. 21, 106th Cong., (1999) (enacted).

177. See HENDRICKSON, *supra* note 145, at 128–29.

178. Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), *supra* note 175, at 460.

179. See GRIMMETT, *supra* note 166, at 5 (discussing the considered legislation).

180. See *id.*; see also H.R. 1569, 106th Cong., § 2 (1999).

181. See GRIMMETT, *supra* note 166, at 5; see also S. Con. Res. 21, 106th Cong. (1999).

forces from the area per the WPR,¹⁸² and legislation declaring war against Yugoslavia.¹⁸³ In late April 1999, seventeen Members of Congress, led by Tom Campbell of California, sued President Clinton, claiming that he violated the WPR.¹⁸⁴ While the case was pending, the sixty-day cap enumerated in the WPR expired, placing the President, from the perspective of the Members of Congress, in violation of the WPR.¹⁸⁵ The judicial branch, however, refused to intervene, dismissing the case on procedural grounds after determining that the legislators lacked standing because the injury suffered was “not sufficiently concrete and particularized.”¹⁸⁶ Ultimately, the bombing campaign lasted seventy-eight days.¹⁸⁷

One of the most recent controversies over the war powers took place in the same geographical area where it was first tested over two hundred years earlier by President Jefferson.¹⁸⁸ In early 2011, a local uprising against Libyan leader Colonel Moammar Gadhafi prompted a multinational effort to intervene on behalf of the rebels.¹⁸⁹ In response, President Barack Obama committed U.S. military forces to this effort without seeking authorization from Congress.¹⁹⁰ The U.S. campaign started on March 19, 2011.¹⁹¹ While French forces fired the first shots in imposing a United Nations no-fly zone, the United States launched cruise missiles, provided logistical support, and carried out air combat

182. See GRIMMETT, *supra* note 166, at 5; see also S. Con. Res. 21, 106th Cong. (1999).

183. See GRIMMETT, *supra* note 166, at 5; see also H.R.J. Res. 44, 106th Cong. (1999).

184. See GRIMMETT, *supra* note 166, at 5.

185. *Id.* President Clinton did not request a thirty-day extension of the deployment under the War Powers Resolution, believing the War Powers Resolution to be “constitutionally defective.” *Id.*

186. Campbell v. Clinton, 52 F. Supp. 2d 34, 43 (D.D.C. 1999), *aff’d*, 203 F.3d 19 (D.C. Cir. 2000).

187. See *NATO’s Role in Kosovo: Operation Allied Force*, NATO, <http://www.nato.int/kosovo/all-frce.htm> (last visited June 21, 2015). Some have argued that the Kosovo incident was the death knell for the War Powers Resolution. See Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1152–54 (2001) (noting that “[a]nalysis of the actual operation of the Resolution in relation to . . . various combat operations reveals a consistent pattern of executive side-stepping,” and that “[a]s a result of . . . Operation Allied Force, this analysis can no longer be avoided”).

188. See *supra* Part I.C.2.

189. See *A Timeline of the Conflict in Libya*, CNN (Aug. 24, 2011, 2:59 PM), <http://www.cnn.com/2011/WORLD/africa/08/18/libya.timeline/>. The coalition was ultimately led by NATO and acted in accordance with United Nations Security Council Resolution 1973. S.C. Res. 1973, U.N. Doc. S/1973 (Mar. 19, 2011).

190. See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong., 4–5 (1st Sess. 2011) (statement of Sen. Richard Lugar, ranking member of S. Comm. on Foreign Relations) (noting that the President “made a deliberate decision not to seek a congressional authorization of his action, either before it commenced or during the last [three] months”).

191. *Libya: French Plane Fires on Military Vehicle*, BBC (Mar. 19, 2011), <http://www.bbc.co.uk/news/world-africa-12795971>.

missions.¹⁹² On March 21, 2011, President Obama sent a letter to Congress reporting the U.S. engagement in hostilities and further representing that his actions were consistent with the WPR.¹⁹³

In June 2011, House Speaker John Boehner wrote a letter to President Obama, noting that unless hostile involvement of U.S. forces in Libya ceased, the President would soon be in violation of the WPR ninety-day limit.¹⁹⁴ In response, President Obama first asserted that he, in fact, believed the WPR to be constitutional—a viewpoint not shared among his predecessors—and second, that he felt that the “constrained and supporting role in a multinational coalition” that the United States was playing in Libya was not the kind of situation the WPR was meant to address.¹⁹⁵ At a hearing held on June 28, 2011, Harold Koh, Legal Adviser of the Department of State, supported the President’s position, arguing that U.S. involvement in Libya did not constitute “hostilities” within the meaning of the WPR.¹⁹⁶ Koh urged that an “unusual confluence” of limitations allowed the Libyan mission because the conflict was “limited in mission, limited in exposure, limited in risk of escalation, and limited in choice of military means.”¹⁹⁷ Though a group of Congressmen again sued to enforce the WPR, it was similarly unsuccessful on standing grounds.¹⁹⁸

192. *Id.*

193. President Barack Obama, Letter from the President Regarding the Commencement of Operations in Libya to the Speaker of the House (Mar. 21, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

194. Letter from John A. Boehner, Speaker of the House, to Barack Obama, President of the United States (June 14, 2011), <http://www.speaker.gov/press-release/speaker-boehner-challenges-president-obama-legal-justification-continued-operations>. Pursuant to the War Powers Resolution, the President, after the sixty-day period expires, has an additional thirty days to remove forces from the country in which they are engaged. See 50 U.S.C. § 1544(b) (2012).

195. See *Report to the House of Representatives on United States Activities in Libya*, submitted June 15, 2005, https://www.scribd.com/fullscreen/57965200?access_key=key-1u10mi6mo7qaatybcea0, at 25.

196. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong., 9–10 (1st Sess. 2011) (statement of Harold Koh, Legal Adviser, U.S. Dep’t of State). Koh particularly emphasized the fact that the United States had played a supporting role, mostly in intelligence and refueling support, throughout the duration of the operation and that, by June, nations other than the United States were flying ninety percent of the strike sorties. *Id.*

197. *Id.*

198. *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011). In addition to the judicial branch’s refusal to serve as a referee in war powers disputes arising under the WPR, Congress lost a key tool in enforcing the limits of the WPR when the Supreme Court handed down its decision in *INS v. Chadha*. See *INS v. Chadha*, 462 U.S. 919, 957–58 (1983). The Court held that the congressional practice of one-chamber “legislative vetoes” to invalidate federal administrative agency action was unconstitutional under the Constitution’s Presentment Clauses. *Id.*; see U.S. CONST. art. I, § 7, cls. 2–3. Although this decision does not directly invalidate any part of the WPR, it is generally thought among legal academics that the *Chadha* opinion preempts any congressional attempt to invoke WPR Section 5(c), which allowed Congress to compel the President to remove forces from the battlefield by passing a concurrent resolution. See BAKER, *supra* note 5, at 23

II. "REPEALING AND REPLACING" THE WAR POWERS RESOLUTION

A. *The War Powers Resolution Has Failed*

It has become increasingly clear from both the President-centric and Congress-centric perspectives that the WPR is not functioning as intended.¹⁹⁹ From a Congress-First perspective, the law provides the Executive far too much authority, "arguably invit[ing] Presidents to wage *any* military campaign they wish for up to [ninety] days."²⁰⁰ From a President-First perspective, the limitations placed on the Executive in carrying out the war powers are unconstitutional, unduly restrictive, and unresponsive to modern national security concerns.²⁰¹ Further, legal scholars in both camps have acknowledged that the reporting requirements are both unnecessarily onerous to the President and not particularly helpful to Congress.²⁰² Moreover, what was originally seen as the WPR's main enforcement mechanism—Congress's ability under Section 5(c) to remove forces from the battlefield by passage of a concurrent resolution—is largely understood to be unconstitutional under the Constitution's Presentment Clauses.²⁰³

Most significantly, the WPR has not succeeded in preventing conflicts housed in Justice Jackson's "zone of twilight" category.²⁰⁴ Though there are notable instances where the President has sought congressional authorization to conduct

("Constitutional scholars generally agree that Section 5(c) of the Resolution is unconstitutional in light of [*Chadha*]"); Martin Wald, Note: *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1408–09 (1984) ("The provision for 'congressional veto' of presidential actions by concurrent resolution is typical of many of the measures enacted to control the executive [b]ut *Chadha*[] made it clear that virtually all such congressional vetoes are unconstitutional.") (footnotes omitted).

199. See *infra* text accompanying notes 200–18.

200. BAKER, *supra* note 5, at 21 (emphasis added).

201. *Id.* at 21, 23. Indeed, in a number of conflicts, such as in Grenada, Yugoslavia, and Haiti, Presidents have deployed military forces absent the declaration of war, statutory authorization, or national emergency spurred by an attack on the U.S. as outlined in Section 2(c) of the WPR. *Id.*; see also 50 U.S.C. § 1541(c) (2012) (laying out the constitutional uses of the President's commander-in-chief power).

202. See, e.g., BAKER, *supra* note 5, at 23–24 (stating that "[e]xperts [have said] . . . that the general, ongoing reporting requirements in Section 4(c) [of the WPR] have devolved into tedious paperwork obligations," that the reports "hardly [prove] useful," and are "widely considered a waste of time"). Further, as A.B. Culvahouse, White House Counsel under President Reagan, stated, "[t]here's a real Kabuki dance that's done here. You send a notice up to the Hill while protesting all the time that you're not really providing notice and that it's all unconstitutional." *Id.* at 24.

203. See *id.* at 23 (stating that the consensus among constitutional scholars is that Section 5(c) is unconstitutional under *Chadha*, as both the House of Representatives and the Senate must approve a bill prior to sending it to the President); *supra* note 198.

204. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *supra* Part I.A.

military operations per the WPR, more often Presidents have acted in the absence of such authorization.²⁰⁵ Additionally, in several of these instances, the President acted not to “repel sudden attacks,” in James Madison’s words,²⁰⁶ but for a myriad of reasons beyond the direct defense of the United States, its citizens, or its installations overseas.²⁰⁷ Indeed, despite President Obama’s avowed willingness to scale back executive authority, some have argued that he has become an ardent practitioner of unilateral warfare.²⁰⁸

Furthermore, the WPR has failed to definitively prevent the President from justifying his or her actions upon the inference of support from war appropriations or other similar actions.²⁰⁹ The executive branch continues to cite these actions in its legal justifications of armed conflict, despite the explicit words of Section 8(a) of the WPR.²¹⁰

205. See *supra* text accompanying notes 167–71.

206. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 47, at 318.

207. For example, while President Clinton’s rationale for U.S. airstrikes in Kosovo—the protection of the ethnic Albanian population of Kosovo from cleansing by the Yugoslav government—was certainly a noble and laudable goal, this goal was far afield from the Madisonian concept of defending against “sudden attacks” and the pre-Korea precedent of unilateral executive action only in protection of clear American interests. See *supra* note 51 and accompanying text; Peter Baker, *Obama’s Dual View of War Power Seeks Limits and Leeway*, N.Y. TIMES, Feb. 11, 2015, http://www.nytimes.com/2015/02/12/us/obama-war-authorization-congress.html?_r=0 (noting that Presidents such as Harry S. Truman, Lyndon B. Johnson, Bill Clinton, George H.W. Bush, and George W. Bush have, for a variety of reasons other than direct defense of the United States, engaged in warfare without acknowledging a need for congressional approval); see also Jeff Pierce, *Lecturer Says Obama Bypassed War Powers Resolution for Libya Conflict*, THE SOUTH END: WAYNE ST. UNIV., (Oct. 20, 2011, 12:00 AM), http://www.thesouthend.wayne.edu/archives/article_5929146a-cdab-5c9d-a25a-19fe3fae8dc8.html (noting that there have been more than two hundred instances where Presidents have acted to deploy military forces without congressional authorization).

208. See Jack Goldsmith & Matthew Waxman, *Obama, Not Bush, is the Master of Unilateral War*, THE NEW REPUBLIC (Oct. 14, 2014) <http://www.newrepublic.com/article/119827/obamas-war-powers-legacy-he-must-look-for-congressional-authorization> (contrasting President Obama’s “broad theory of unilateral war powers” with his “lofty rhetoric about principle”).

209. See War Powers Resolution of 1973 § 8(a)(1), 50 U.S.C. § 1547(a)(1) (2012); see also *supra* text accompanying notes 167–72.

210. See, e.g., Memorandum from Randolph D. Moss, Assistant Attorney Gen., to the Attorney Gen., “Authorization for Continuing Hostilities in Kosovo” (Dec. 19, 2000), <http://www.lawfareblog.com/wp-content/uploads/2013/10/Memorandum-from-Randolph-D.-Moss-Assistant-Attorney-General-to-the-Attorney-General-“Authorization-for-Continuing-Hostilities-in-Kosovo”-Dec.-19-20001.pdf> (stating that “[p]rior to the enactment of the WPR, many enactments of Congress, especially appropriations measures, could justifiably have been regarded by the Executive as constituting implied authority to continue the deployment of our armed forces in hostilities”) (quoting Memorandum Opinion for the Attorney General: Overview of the War Powers Resolution, 8 Op. O.L.C., 271, 273 n.4 (1984)).

Moreover, the blurred constitutionality of certain sections of the WPR has led Presidents to either minimize it or ignore it completely.²¹¹ Even though President Obama, contrary to his predecessors, nominally supports the constitutionality of the WPR, his administration has minimized the WPR by narrowing its scope considerably.²¹²

At the same time, Congress deserves a large portion of the blame for the WPR's ineffectiveness.²¹³ Rather than working to support the institution of Congress and its role in checking executive authority with respect to the war powers, Congress often neglects to partake in the high-stakes and politically-fraught process of sending the nation to war²¹⁴ (just as Senator Lucas did at the dawn of the Korean War).²¹⁵ In the debates concerning military involvement in Kosovo and Libya, certain members of Congress sought to aggressively hold the President to the WPR (arguably for more political than institutional reasons),²¹⁶ but others felt the wiser option was to offer criticism but remain uncommitted to

211. See Baker, *supra* note 207 (commenting that "Presidents of both parties have refused to acknowledge the constitutionality of the War Powers Act of 1973").

212. See *id.* (noting that while President Obama has asked Congress to impose a limit on American military action abroad and repeal the 2002 authorization of President George W. Bush's war in Iraq, he did not seek a similar limit on his authority to "conduct a global war against Al Qaeda and its affiliates"). The Obama administration faced criticism for this interpretation in both the legal community and the press. See Pierce, *supra* note 207 (quoting Temple University law professor Peter Spiro's belief that "President Obama's actions in Libya were vindicated by the results, and presidents involved in future conflicts will cite Obama's actions in Libya as legal precedent"); see also Goldsmith & Waxman, *supra* note 208 (arguing that "Obama's statement on the need for congressional consent [in authorizing the use of military force in Syria], and the noted contrast with [President George W. Bush] are . . . clarifying in their irony" where Obama has developed "new precedents" creating a "legacy of expanded presidential power to use military force," such as the humanitarian intervention against ISIL on behalf of Iraqi civilians initiated in August 2014).

213. See *infra* notes 214–17.

214. Jim Webb, *Congressional Abdication*, HARPER'S MAGAZINE, June 2013, <http://harpers.org/archive/2013/06/congressional-abdication/> (discussing the "reluctan[cy]" of "congressional leaders" to "assert the authority that forms the basis of [American] government").

215. See *supra* text accompanying notes 131–35.

216. See, e.g., *Bartlett Joins Lawsuit Against Obama Over Libya*, THE BALTIMORE SUN, June 15, 2011, http://weblogs.baltimoresun.com/news/local/politics/2011/06/bartlett_joins_lawsuit_against.html (discussing how a bipartisan group of members of Congress filed a lawsuit against President Obama over his military action in Libya; one of the members, Roscoe G. Bartlett, joined a similar effort against President Clinton's action in Yugoslavia).

a particular stance.²¹⁷ Together, this is the very picture of “congressional inertia, indifference or quiescence.”²¹⁸

B. War Powers Consultation Act Overview

Previous efforts to reform or replace the WPR, of which there have been many, have generally been firmly rooted in either the President-First or Congress-First camp.²¹⁹ The War Powers Consultation Act of 2014 (WPCA), introduced by Senator Tim Kaine (D-Va.) and his colleagues John McCain (R-Ariz.) and Angus King (I-Me.), seeks to sidestep this eternal debate between Congress-First and President-First advocates by setting up a structure in which both sides’ prerogatives are meaningfully considered.²²⁰ The WPCA, modeled after legislation proposed by a bipartisan commission led by former Secretaries of State James A. Baker III and Warren Christopher,²²¹ would repeal the WPR and replace it with a flexible—albeit mandatory—system of Presidential consultation with Congress, along with a mechanism for congressional approval or disapproval.²²²

The proposed legislation requires the President to consult a newly-created special Joint Congressional Consultation Committee before (or, in emergencies, within three days of) “significant armed conflict,” which the Act defines as any armed conflict lasting or expected to last more than one week.²²³ Additionally,

217. See *supra* Part I.E.2; see also HENDRICKSON, *supra* note 145, at 43, 65–67 (noting Congress’s deference to President Clinton during his deployment of American forces in Haiti); Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959, 959 (2004) (stating that “members of Congress are prone to the same warped risk assessment and political pressure as the executive branch”). This isn’t to say that there have not been institutional stalwarts, particularly in the Senate, who have taken seriously the mandate to ratify the decision to go to war: the Senate debate over Kosovo in 1998, where Senators John Warner, John McCain, and Sam Nunn joined together to shepherd a resolution through to bipartisan Senate passage, is a notable example of this. *Id.* at 43–67.

218. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

219. See BAKER, *supra* note 5, at 7 (“[U]ncertainty about war powers has precipitated a number of calls for reform and yielded a variety of proposals over the years. These proposals have largely been rejected or ignored, in many cases because they came down squarely on the side of one camp’s view of the law and dismissed the other.”).

220. See generally S. Res. 1939, 113th Cong. (2014). The aim of the resolution is to correct the problems that befell previous war powers resolutions, namely that they “ha[ve] not worked as intended, and . . . added to the divisiveness and uncertainty that exists regarding the war powers of the President and Congress”. *Id.* § 2(a)(1).

221. BAKER, *supra* note 5, at 6 (noting that Baker and Christopher were at the forefront of finding a way to equalize the power of the President and Congress with respect to war-making abilities).

222. *Id.* at 35–40 (outlining the main provisions of the WPCA).

223. “[S]ignificant armed conflict” is defined as “any conflict expressly authorized by Congress, or any combat operation involving members of the Armed Forces lasting more than a

in the absence of a declaration of war or authorization for use of military force, the Act requires the Joint Congressional Consultation Committee to introduce a Joint Resolution of Approval no more than thirty days after the commencement of hostilities; if the Joint Resolution of Approval is voted down, the Act allows Congress to vote on a Joint Resolution of Disapproval shortly thereafter.²²⁴

III. THE WAR POWERS CONSULTATION ACT MAY JUST FORCE CONGRESS TO DO ITS JOB, BUT HURDLES REMAIN

A. Forcing an Up-or-Down Vote

Ultimately, one of the main difficulties in fashioning an appropriate war powers structure is ensuring that Congress does not abdicate its role in the process. As Professor Ely points out, many members of Congress simply find it convenient to allow the executive branch to assume responsibility for military action, lest it go poorly in the end.²²⁵

This unfortunate reality is where the War Powers Consultation Act's automatic "Resolution of Approval" function in Section 7 is particularly appropriate.²²⁶ The Act mandates that, in the absence of a declaration of war or congressional authorization to use military force, the co-chairs of the Joint Congressional Consultation Committee are to introduce a Concurrent Resolution within thirty days of the initiation of significant armed conflict that serves as congressional approval of the conflict.²²⁷ This legislation would be fast-tracked through the committee process and put to a vote relatively quickly

week or expected by the President to last more than a week." S. Res. 1939, 113th Cong., § 3(a) (2014). Exceptions to this one-week benchmark include actions taken to repel attacks or prevent imminent attacks, limited reprisals against terrorists, humanitarian missions, covert action, and missions to rescue U.S. personnel. *Id.* § 3(b); *see also* BAKER, *supra* note 5, at 35–36 (discussing situations that would and would not qualify as "significant armed conflict").

224. S. Res. 1939, 113th Cong., §§ 7(a)(1), (b)(1) (2014).

225. *See generally* ELY, *supra* note 46, at 48–54 (discussing congressional reluctance to be part of the decision-making process of going to war). This political reluctance is not unjustified. It is not a stretch for one to argue that Hillary Clinton would currently be in her second term as President had she not voted in support of the Iraq War authorization. Pub.L. No. 107-243, 116 Stat. 1498 (2002); *see* Philip Rucker, *Hillary Clinton on Iraq Vote: 'I Still Got It Wrong. Plain and Simple,'* WASH. POST (June 5, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/06/05/hillary-clinton-on-iraq-vote-i-still-got-it-wrong-plain-and-simple/> (commenting that Clinton's authorization of the Iraq War "dogged her with the Democratic Party's antiwar activist base in the 2008 presidential primaries").

226. S. Res. 1939, 113th Cong., § 7(a) (2014) (requiring a congressional resolution for approval or disapproval of presidentially-instigated military action).

227. *See id.*; *see also* BAKER, *supra* note 5, at 39 (discussing the congressional approval or disapproval mechanism in Section 7; note that in the original Baker-Christopher proposal this provision is contained in Section 5, while in Senator Kaine's legislation it is found in Section 7).

in both Houses of Congress.²²⁸ If either House fails to pass the Resolution of Approval, any member of the House or Senate may then introduce a Resolution of Disapproval that would also be fast-tracked.²²⁹ This would require each member to stand on one side or another—an imposition not present under the WPR—in plain, simple language that would be difficult to obfuscate or rationalize.²³⁰ While nothing would stop members from voting against both resolutions, the simple and high-profile nature of each vote would ensure that each representative's constituents knew how he or she voted.²³¹

B. BUT: Clever Lawyers Still Have Places to Claim Expansive Executive Authority

Still, from the prospective of constructing legislation designed to ensure that Congress does its job, the bill is not without some weaknesses.²³² First, the Act does nothing to constrain the potential for excessively broad readings of statutory language.²³³ Because the Act encourages specific congressional authorization of military action, one could envision a President seeking authorization utilizing ambiguous terms that are subject to broad construction, negating any limitations on specificity.²³⁴ Indeed, this has been the case with the continued reliance on the Authorization for Use of Military Force of 2001 (AUMF).²³⁵ The AUMF initially referred to the perpetrators of the September 11 attacks and those who harbored them, but has been expanded far beyond its original bounds to encompass drone strikes in Yemen, special operations raids

228. See S. Res. 1939, 113th Cong., § 7(a)(5)(A) (2014) (stating that a motion to proceed with an approval resolution is “highly privileged in the House of Representatives and . . . privileged in the Senate and not debatable”); see also BAKER, *supra* note 5, at 39 (discussing the expedited hearing route).

229. See S. Res. 1939, 113th Cong., § 7(b)(2)(A) (2014) (noting that motions to proceed with resolutions for disapproval are privileged similarly to motions to proceed with resolutions for approval); see also BAKER, *supra* note 5, at 39 (discussing an additional expedited process for disapproval resolutions under the WPCA).

230. Press Release, Sen. Tim Kaine, *Kaine, McCain Introduce Bill to Reform War Powers Resolution* (Jan. 16, 2014), <http://www.kaine.senate.gov/press-releases/kaine-mccain-introduce-bill-to-reform-war-powers-resolution> (arguing that the Act would “increas[e] the knowledge of the population and the accountability of our elected officials”).

231. *Id.*

232. See *infra* notes 233–36.

233. See, e.g., Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 161 (1988) (stating that some Presidents have waited to notify Congress of military action that is underway or complete, or simply deny the existence of such action altogether); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20, 329 (1936) (concluding that the executive branch must be given wide latitude to craft foreign policy that is in the nation's best interests).

234. See S. Res. 1939, 113th Cong., § 2 (2014).

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

in Somalia, and recent airstrikes in Iraq and Syria.²³⁶ One could easily imagine a scenario in which a President argues that the WPCA has not been triggered because the military action subject to scrutiny is linked, and therefore included, under pre-existing authorization (even if only as a pretext).

In order to forestall executive usage of previous AUMFs in creative ways, Congress should amend the WPCA to provide more specificity with respect to the required features of congressional declarations of war or authorizations for use of military force. Though the nature of conflict in the twenty-first century may necessarily preclude Congress from placing geographical limits on locations where military force may be used, or specific nations or organizations targeted, in the absence of these limits it seems vital to put in place a “sunset provision” that would limit the temporal scope of authorized combat operations.²³⁷ To this end, Congress should amend the WPCA with the following language by expanding the Section 3 definitions section as follows:

236. See, e.g., Kylie Alexandra, *Battlefield Earth: The Danger of Executive Overreach in the Global Fight Against Terrorism and Why Congress Must Act*, 82 GEO. WASH. L. REV. 456, 459–60 (2014) (discussing the invocation of AUMF in Yemen); Beau D. Barnes, *Reauthorizing the “War on Terror”: The Legal and Policy Implications of the AUMF’s Coming Obsolescence*, 211 MIL. L. REV. 57, 67 (2012) (remarking that shortly after the September 11, 2001 attacks, “no one seriously questioned the . . . ‘War on Terror’” and that it is “unclear” if the AUMF permits “targeted killings” in countries other than Afghanistan); Robert Chesney, *Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 173–74 (2013) (noting that AUMF includes “detention authority” that applies to “persons who are members or supporters of al Qaeda”); Graham Cronogoe, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT’L L. 377, 380 (2012) (“In addition to Afghanistan, the AUMF could authorize force against any other states that the President determined participated in the [September 11, 2001] attacks or harbored any of the organizations or people responsible for the attacks.”). In October 2014, after the sixty-day window under the WPR had expired for the U.S. bombing campaign against the Islamic State of Iraq and the Levant (ISIL, also known as ISIS or IS), the Obama Administration stated that the WPR did not apply to the bombing campaign “[b]ecause the 2001 and 2002 AUMFs constitute specific [authorization] within the meaning of the War Powers Resolution.” Spencer Ackerman, *White House Says Expired War Powers Timetable Irrelevant to Isis Campaign*, THE GUARDIAN (Oct. 16, 2014), <http://www.theguardian.com/us-news/2014/oct/15/white-house-war-powers-resolution-iraq> (quoting Bernadette Meehan, spokeswoman for the National Security Council); see also Jack Goldsmith, *The Administration Has Violated the War Powers Resolution Unless It is Right About the Applicability of the AUMFs to the Islamic State*, LAWFARE (Oct. 8, 2014, 7:50 AM), <http://www.lawfareblog.com/2014/10/the-administration-has-violated-the-war-powers-resolution-unless-it-is-right-about-the-applicability-of-the-aumfs-to-the-islamic-state/> (“[I]f the President is wrong about the applicability of the AUMFs to the Islamic state [there] is . . . a problem under the WPR.”).

237. Indeed, current discussion among Senators and legal academics for a replacement of the 2001 AUMF to include ISIL contemplates such a provision, and President Obama includes a three-year limit in his request for such an Authorization. See *supra* note 173; Press Release, Sen. Tim Kaine, *Kaine Introduces Authorization for Use of Military Force Against ISIL* (Sept. 17, 2014), <http://www.kaine.senate.gov/press-releases/kaine-introduces-authorization-for-use-of-military-force-against-isil> (proposing a one-year sunset provision); Rosa Brooks et al., *Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL*, JUST SECURITY

For the purposes of this Act, a congressional declaration of war shall include a specific description of the nation against which the United States is going to war. For the purposes of this Act, a congressional authorization for the use of military force without a specified geographical scope or specified nation or organizations against which force is authorized shall include a provision limiting the application of the authorization to a specified period of time.²³⁸

With the addition of this language, Congress retains enough flexibility to address the realities of twenty-first century combat and authorize military action against transnational non-state organizations without geographical scope, while still imposing a substantial limitation by requiring a sunset provision.²³⁹ While this language would allow the executive branch to prosecute war against transnational terrorist organizations throughout the globe for a specified period of time after authorization from Congress, it would also prevent the executive branch from using a preexisting authorization against other organizations or nations not initially contemplated by the framers of the original authorization (as the Obama Administration has used the 2001 AUMF to justify military action against ISIL over a decade later) because it obligates Congress to reassess the authorization after the specified time period.²⁴⁰

(Nov. 10, 2014), <http://justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement.pdf> (proposing an eighteen-to-twenty-four month sunset provision); Robert Chesney et al., *A Draft AUMF to Get the Discussion Going*, LAWFARE (Nov. 10, 2014, 1:00 PM), <http://www.lawfareblog.com/2014/11/a-draft-aumf-to-get-the-discussion-going/> (proposing a thirty-six-month sunset provision); *contra* John Bellinger, *The Lame Duck Congress Should Not Sunset the 2001 AUMF*, LAWFARE (Nov. 11, 2014, 7:53 PM) <http://www.lawfareblog.com/2014/11/the-lame-duck-congress-should-not-sunset-the-2001-aumf/> (“I remain concerned about sun-setting congressional authorization to use force to defend the United States The conflict with al Qaeda and associated groups shows no sign of ending within [a three-year sunset period].”).

238. This formulation assumes that Congress would utilize the formal “declaration of war” only against other nations, in line with the traditional conception of the term. *See* ELSEA & GRIMMETT, *supra* note 68, at 1–4. A declaration of war would also authorize total war against the other nation, without geographical limitation. *See infra* note 239. On the other hand, the “authorization for use of military force” may be used by Congress either against other nations or against non-state actors such as al Qaeda or ISIL. *See* Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001); *supra* notes 236–37. An authorization by Congress could also be narrowly tailored to authorize limited war, as Congress did in the Quasi-War. *See supra* Part I.C.1.

239. Note that a declaration of war traditionally authorized the use of force against the citizens, installations, and supply lines of an identified nation without any geographical scope. *See, e.g.,* *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (Washington, J.) (“If it be declared in form, it is called *solemn* . . . because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authori[z]ed to commit hostilities against all the members of the other, in every place, and under every circumstance.”). Thus, if Congress wished to formally declare war against a nation, there would be no geographical scope or sunset provision as a matter of course.

240. President-First advocates, such as John Yoo, may argue that this provision unconstitutionally constrains the President’s Commander-in-Chief power, that the Constitution is

Another WPCA section susceptible to broad construction is the Act's definition of "significant armed conflict" found in Section 3, which lists numerous exceptions to the rule that the WPCA will apply to all conflicts lasting over one week.²⁴¹ According to the Act, "significant armed conflict" does not consist of either "[a]ctions taken by the President to repel attacks, or to prevent imminent attacks, on the United States, its territorial possessions, its embassies, its consulates, or its Armed Forces abroad" or "[l]imited acts of reprisal against terrorists or states that sponsor terrorism."²⁴² Though protection of lives, property, and acts of reprisal are Article II powers that Presidents have generally claimed over the last 225 years, there is still a danger that a President might use, for instance, a rescue attempt as a pretext for sustained military action without congressional authorization.²⁴³

The potential to use a particular event, despite its pretextual nature, to justify military action is where the notorious WPR "reporting" requirements would actually prove to be of use.²⁴⁴ Section 6 of the WPCA requires consultation and submission of a written report to the Joint Congressional Consultation Committee either before or within three calendar days of the initiation of "significant armed conflict."²⁴⁵ However, the WPCA does not require contemporaneous reporting of military action that has not risen to the level of "significant armed conflict;" rather, it only requires a single written report, issued annually, listing all operations—both "significant" (for purposes of the WPCA) and not,²⁴⁶ despite the risk of such an operation leading to a full-scale war.²⁴⁷

designed to give "flexibility" in foreign affairs decision-making, and that, more often than not, Congress has not authorized presidential military action. *See* YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 60, at 11–12. However, nothing in this limitation on congressional authorization would constrain the President's "supergeneral" authority to deploy military forces for limited, circumscribed purposes without congressional authorization. *See* Bracknell, *supra* note 51, at 221 (noting that "history shows that power is narrowly circumscribed in scope, but practically unconstrained in terms of frequency," and that "[a]bsent the existence of a 'state of war,' the President retains the authority necessary to employ forces consistent with his role as the nation's first general").

241. *See* S. Res. 1939, 113th Cong., § 3(a) (2014).

242. *Id.* § 3(b).

243. The risk that a limited use of military force under Article II authority would then lead to a larger scale conflict is one that the United States has grappled with since the days of Presidents Adams and Jefferson. *See supra* Part I.C (discussing the Quasi-War and the First Barbary War). The initial stages of the Korean War reflected these concerns. *See supra* Part I.D.1. Indeed, the Obama Administration argued that the WPR did not apply to the air campaign against Colonel Gadhafi for very similar reasons. *See supra* text accompanying notes 194–95.

244. *See supra* Part I.E.1 (discussing presidential compliance with WPR reporting requirements).

245. S. Res. 1939, 113th Cong., § 6(a)–(b) (2014).

246. *Id.* § 6(c)–(d).

247. *See supra* note 243 and accompanying text.

In order to ensure Congress is adequately informed of all Article II operations, including those that may not rise to the level of “significant armed conflict,” Congress should add a subsection (e) to Section 6 stating the following:

(e) Reporting of other operations as described in section 3(b).—The President shall notify the Joint Congressional Consultation Committee of other operations as described in section 3(b) of this act within the same timeframe as specified in section 6(b). The President shall designate an official or officials of the executive branch to carry out this function. Notification may be in the form of a written report, secure electronic communication, secure telephone conversation, in-person meeting, or another form.

This addition ensures that Congress remains notified of all operations, even those not considered a “significant armed conflict,” but also removes some of the “kabuki dance” character of the WPR’s reporting requirement.²⁴⁸ Further, it makes clear that notification need not be in the form of a formal written report issued in the name of the President; a simple secure encrypted telephone conversation between staff of the National Security Council and Joint Congressional Consultation Committee would satisfy the requirement. At the same time, the transmission of this information would help to build the spirit of trust and consultation that is one of the main goals of the WPCA.²⁴⁹

IV. CONCLUSION

Ultimately, the War Powers Consultation Act is a strong piece of legislation. It takes into account 225 years of practice under the Constitution. By acknowledging the enduring conflict between Congress-First and President-First approaches, while seeking an equitable compromise between the principles

248. See *supra* note 202 and accompanying text.

249. See BAKER, *supra* note 5, at 9–10 (stating that “[h]istory suggests that building broad-based support for a military campaign—from both branches of government and the public—is often vital to success” and that “much of the distrust and tension that at times can characterize inter-branch relationships can be dissipated and overcome” through regular meetings between the President and the proposed Joint Congressional Consultation Committee). Some may argue that an additional reporting requirement favors congressional war-making authority and defeats the purpose of the balanced recommendations of the National War Powers Commission. See, e.g., *id.* at 10 (discussing the possibility that the WPCA may be seen as altering the balance of war-making powers); *supra* Part I.B.2 (discussing the argument that the President has the capability of committing the nation to war without legislative constraints or authorization). However, even with this additional reporting requirement, considering the old adage “knowledge is power,” the executive branch still has a decided advantage in the area of information, especially given the President’s “supergeneral” role directing the operations of the Armed Forces. See Bracknell, *supra* note 51, at 219–20 (remarking that although Congress may be responsible for “raising” and “equipping” forces, the discretion required to effectively make strategic and tactical decisions falls to the President). Thus, requiring additional information would empower Congress, but not beyond the scope of its constitutionally-assigned responsibility to take the nation to war.

defining the two factions, the WPCA manages to empower Congress without undermining the constitutional authority afforded to the President.²⁵⁰ It recognizes and partially remedies the inherent tendency of Congress to demonstrate “inertia, indifference[,] or quiescence” in the decision to take the nation to war by compelling each and every Representative to make a clear statement in either support or opposition to the military action.²⁵¹ At the same time, this requirement restrains the executive branch from waging war hidden in Justice Jackson’s “zone of twilight,”²⁵² presumably stimulating an informed electorate to participate in public debate on the merits of sending the nation to war, and in turn bestowing constitutional and political legitimacy upon the armed conflict that may result. This is the least we can do, as a nation, for the men and women who wear the uniform and serve in its defense: that we make the fateful decision to send them to war only with the full support of their government and the American people.

250. See BAKER, *supra* note 5, at 7 (stating that the proposals underlying the WPCA are designed to be “practical, fair, and realistic,” with a “reasonable chance of support from both the President and Congress,” and that “requir[ing] constructing a proposal that avoids clearly favoring one branch over the other”).

251. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

252. *Id.* To this point, Justice Jackson noted, “[i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” *Id.*