

## THE PROPOSED 2009 WAR POWERS CONSULTATION ACT

BY

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**THE PROPOSED 2009 WAR POWERS CONSULTATION ACT**

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## **ABSTRACT**

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President Obama and the 111<sup>th</sup> Congress should repeal the 1973 War Powers Resolution (Resolution) and enact the Proposed 2009 War Powers Consultation Act (Act) in its place. The Act will correct the constitutional issues and policy defects associated with the Resolution. More importantly, the Act will serve to restore the proper balance of power between the President and Congress relating to any decision to commit U.S. armed forces to significant armed conflict. Unless one of the limited exceptions outlined in the Act applies, the President must first consult with Congress and Congress must vote on whether to send American forces into a hostile situation.

Greater cooperation and participation by both political branches will result in two significant benefits. First, those fundamental democratic principles relating to national security and a proper balance of power between the political branches will be reinforced. Second, there is a genuine pragmatic strategic advantage when both the President and Congress participate in any decision to engage the military. The government leg of the Clausewitzian trinity is strengthened when both political branches of government participate in matters of national security.



## THE PROPOSED 2009 WAR POWERS CONSULTATION ACT

... war cannot be divorced from political life, and whenever this occurs in our thinking about war, the many links that connect the two elements are destroyed and we are left with something pointless and devoid of sense.

—Carl von Clausewitz<sup>1</sup>

President Obama and the 111<sup>th</sup> Congress should immediately enact the proposed 2009 War Powers Consultation Act as recommended by the National War Powers Commission.<sup>2</sup> Over the years, particularly since the Korean War, Presidents have deployed the armed forces of the United States into combat or into situations where combat was likely without fully consulting Congress. Congress has failed to properly exercise its constitutional duty to participate in the decision whether to commit troops and has simply acquiesced to executive leadership. Passage of the act would require the participation of both political branches of the government in any decision to consign the armed forces to any significant hostile action as the Framers of the Constitution intended.

Not only would participation of both branches of the government lead to a more constitutionally grounded decision to employ military force and expend U.S. treasure, a joint decision to use force will lead to greater strategic certainty. In turn, the resulting clear and unambiguous statements of support for the use of American forces by both political branches of the government should, in many cases, translate to a greater likelihood of battlefield success for the military commander.

In an effort to limit the President's ability to deploy US forces into hostile situations without congressional involvement, Congress passed the 1973 War Powers Resolution over the veto of President Nixon.<sup>3</sup> However, Presidents from both parties

have since considered the War Powers Resolution unconstitutional.<sup>4</sup> Moreover, recognizing its defects,<sup>5</sup> not only have Presidents largely ignored the law, so has Congress.<sup>6</sup> The Supreme Court has also all but refused to decide cases based on the law. Applying the judicially created “political question doctrine,”<sup>7</sup> the Court has never ruled on the constitutionality of the War Powers Resolution. Even so, the Court has struck down other unrelated laws but having same or similar alleged defects. This has led many to believe that the Court would find the 1973 War Powers Resolution unconstitutional if the Court ever decides to consider it.<sup>8</sup>

The political branches have had 35 years worth of opportunities to apply the 1973 War Powers Resolution. The Resolution has proven to be at best ineffective and at worst unconstitutional. Through the proposed 2009 War Powers Consultation Act, the National War Powers Commission has sought to correct the problems and defects associated with the 1973 War Powers Resolution. If enacted, the 2009 War Powers Consultation Act will repeal the 1973 War Powers Resolution. Passage of the act is in the United States' best interests.

### The Power to Make War is a Shared Congressional and Presidential Power

In terms of national security, the Framers of the Constitution created a decision making framework which balanced power between the President and Congress. Each branch has unique and separate powers associated with committing forces into hostilities. It is as if both branches hold certain keys which must be used together in order to be effective. For example, in Article 1, the Constitution grants to Congress power to raise and support armies.<sup>9</sup> In Article II, the Constitution grants to the President

the Commander in Chief power.<sup>10</sup> Congress generates the force which the President commands.

Both branches and their respective national security powers are indispensable. However, it is not clear in the Constitution as to how these respective powers are to be balanced. Some argue that the balance of power in making war should favor Congress while others say the Executive should be the primary power broker.

More than 220 years have passed since the Constitution was ratified, and yet the appropriate balance of power between the political branches with regard to foreign affairs and the power to wage war has not been settled.<sup>11</sup> Some argue that the founding fathers never completely resolved the issue of which branch has primacy in foreign affairs, including the power to commit military force.<sup>12</sup> Others argue the issue was resolved, but that the Framers purposely created a system with some ambiguity built in. The result is a system which diffuses power and thereby reduces the possibility for abuse.<sup>13</sup>

The Constitution is, as Professor Edward Corwin sees it, an “invitation to struggle for the privilege of directing American Foreign policy.”<sup>14</sup> While the preponderance of power may shift back and forth between the two branches depending on the type of and phase of a given crisis, in the final analysis, it is a shared and balanced power.

*Arguments in Support of Congressional Primacy in Foreign Affairs and National Security.* Some constitutional scholars have become critical of the way in which Presidents, from Truman through Bush, have committed US forces. They argue that Presidents have relied on an unconstitutionally exaggerated scope of the Commander

in Chief power. They believe that Presidents have ignored the primary role the Constitution grants to Congress in war making.<sup>15</sup>

Congressional power proponents point out that Article I of the Constitution created Congress. Because Article I is the first article, Congress was intended to be the preeminent branch of government. Those who assert that Congress has the primary role in national security often cite the sheer number of authorities granted to Congress, including such things as the power to:

- Lay and collect taxes, duties, imports and excises, to pay the debts and to provide for the common defense;
- Regulate commerce with foreign nations;
- Define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
- Declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
- Raise and support armies;
- Provide and maintain an navy;
- Make rules for the government and regulation of the land and naval forces;
- Provide for the calling forth of the militia to execute the laws of the Union, suppress insurrections and repel invasions; and
- Erect forts, magazines, arsenals, dock-yards, and other needful buildings.<sup>16</sup>

Additionally, in some cases, the Constitution grants to Congress certain key-like powers which prevent other entities from acting in the area of national security without prior congressional approval, including:

- No money shall be drawn from the treasury, but in consequence of appropriations made by law;
- No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal;
- No state shall, without the consent of Congress . . . keep troops or ships of war in time of peace, enter into any agreement or compact with another state or foreign power; or engage in war . . . .<sup>17</sup>

While all of these enumerated powers have a direct impact on national security, the constitutional authority most often cited in support of congressional preeminence in the decision to use the military is the congressional prerogative to declare war.

Congressional power proponents point out that the Framers were deathly afraid of an imperial President and did not want to give him unchecked authority to drag the United States into war. They argue that the phrase “declare war” means that only Congress has the power to authorize or initiate war. Professor Jon Hart Ely explains, “The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, ‘declared’ in so many words or not – most weren’t even then – had to be legislatively authorized.”<sup>18</sup>

Congressional power advocates assert that a President must have a declaration of war or its statutory equivalent before his Commander in Chief power is unlocked.<sup>19</sup> It is argued by some that only after Congress has authorized war, can a President exercise his power as Commander in Chief.<sup>20</sup> In support of this argument, congressional power adherents point to the shift in language from the original draft of the Constitution which gave Congress the power to “make war,” to the final version which gave

Congress the power to “declare war,” as evidence that the Framers did not want Congress to “conduct” war, an executive function, but wanted Congress to have a monopoly on the power to “authorize” war.<sup>21</sup> They further explain that use of the phrase declare war rather than make war would protect the Executive’s power to repel sudden attacks against the United States but reserve to Congress the power to take an otherwise peaceful nation to war.<sup>22</sup>

Unlike the President’s treaty power, which requires consent from the Senate,<sup>23</sup> a declaration of war is issued by Congress exercising its legislative or law making power, which requires the participation of both the House and Senate.<sup>24</sup> The Framers added an additional level of debate when it comes to declaring war. By requiring House participation in the decision to declare war, the Framers intended to slow the road to war by creating an intentional pause or a “sober second thought.”<sup>25</sup>

*Arguments in Support of Presidential Primacy in Foreign Affairs and National Security.* Most of the 55 delegates to the Constitutional Convention had served in the Continental Congress during the Revolutionary War.<sup>26</sup> Before the revolution, “the mood in the colonies was notoriously antiexecutive.”<sup>27</sup> By the time of the Constitutional Convention, however, the drafters of the Constitution were no longer concerned solely with the dangers associated with an imperial President. They were also keenly aware of the problems the young republic had experienced because of a weak executive.<sup>28</sup>

The Articles of Confederation gave the Continental Congress the power to conduct foreign affairs, make treaties and declare war; however, the Articles failed to provide for an executive body with executive powers that could enforce the laws passed by the Continental Congress.<sup>29</sup> Delegates came to the Constitutional Convention in

Philadelphia intending, among other things, to replace the Articles of Confederation with a stronger national government for national security purposes.<sup>30</sup>

Many constitutional scholars agree that unlike the enumerated congressional powers, there are “aggregate powers” in the President which are both explicit and implied. The “Vesting” and “Commander in Chief” clauses arguably give Presidents a broad array of inherent powers not specifically listed in the Constitution.<sup>31</sup>

Support for the notion that the President has inherent Commander in Chief and executive powers not specifically enumerated in the Constitution can be found in the US Supreme Court case of *United States v. Curtiss-Wright Corp.*<sup>32</sup> In *Curtiss-Wright Corp.*, Justice George Sutherland, a former Senator and member of the Foreign Relations Committee, and no supporter of President Roosevelt or of executive power,<sup>33</sup> opined that the, “. . . President” is “the sole organ of the federal government in the field of international relations,” and his “. . . power . . . does not require as a basis for its exercise an act of Congress.”<sup>34</sup> The Court apparently believed that the nation needed to be able to speak with one voice in foreign affairs and that one voice was to be the President’s.<sup>35</sup> The Curtis-Wright Court opined that unlike domestic affairs, in foreign affairs, the President requires a “degree of discretion and freedom from statutory restriction.”<sup>36</sup>

Although the Supreme Court has, since *Curtis Wright*, rendered opinions which temper the language of *Curtis Wright* and suggest the “sole organ” language is merely *dicta* and not the actual holding of the Court,<sup>37</sup> even strong proponents of congressional power admit there are times where the President has an inherent emergency response authority to “repel sudden attacks” on United States territory and possibly a functional

equivalent where there is some unforeseen “clear danger” to national security where there is no time to secure advance congressional authorization.<sup>38</sup>

Similarly, executive power proponents argue that from a “structural” standpoint, the Constitution places the Executive in the best position to handle matters of foreign affairs and national security.<sup>39</sup> The President has control over the intelligence agencies and the intelligence produced by those agencies. The Executive is more likely to be able to protect secrets because fewer persons are involved. The President controls the departments of State and Defense.

Debate, compromise, shifting policy, and building consensus are all important attributes when it comes to drafting legislation. However, these same structural strengths are potential structural weaknesses in foreign relations because they lead to indecision, a lack of unity of purpose, and perceived weakness by allies and enemies alike.<sup>40</sup> He can more effectively provide unity of effort, and act swiftly and decisively where time is of the essence.<sup>41</sup> Justice Robert Bork explains, “Congress, consisting of 535 members assisted by huge staffs, is obviously incapable of swift, decisive, and flexible action in the employment of armed force, the conduct of foreign policy, and the control of intelligence operations.”<sup>42</sup>

There is no denying that it is Congress, not the President, which has the power to declare war. However, presidential power proponents argue that the power to declare war is often misunderstood and does not necessarily include the power to initiate war. As with congressional power proponents, those who favor executive power point out that the initial draft of the Constitution granted to the legislature the power to “make war” rather than “declare war.”<sup>43</sup> However, they also look to the notes of some present

during the debates which indicate the drafters were concerned that giving Congress the power “make war” rather than “declare war” was too broad and would impinge on the Executive’s role as Commander in Chief.<sup>44</sup> For example, Rufus King from Massachusetts was concerned that use of the word “make” might be understood to mean that Congress was to “conduct” war which was the job of the Executive.<sup>45</sup>

Some argue that the power to declare war should be viewed more along the lines of the authority to announce a state of war exists rather than the power to initiate war.<sup>46</sup> According to dictionaries at the time of the Constitution, “declare” meant to “recognize” or “proclaim.”<sup>47</sup> The Framers could have instead selected words such as “enter,” “authorize,” “approve,” “initiate,” “begin,” “direct,” or “conduct” war if it was their intent for Congress to have the power to take the nation to war. An example of use of the word “declare” contemporaneous with the Constitution is the Declaration of Independence, which did not authorize combat by its own terms. Instead, the Declaration served as notice that the new republic had changed its status from group of British colonies to several independent states.<sup>48</sup>

Certainly treatises on international law such as Hugo Grotius’s *De Jure Belli ac Pacis* and Vattel’s *The Law of Nations or Principles of Natural Law* were well known to the Framers.<sup>49</sup> Supporters of a strong Executive point out that the Framers would have realized that a declaration of war was not required in international law prior to the initiation of hostilities.<sup>50</sup> At the time of the Constitution, war was declared about 10 percent of the time, and these notices of intent were largely used when a state was going to conduct offensive rather than defensive war.<sup>51</sup> There would be no reason to

declare war in the defense because it would be obvious to the attacking power and to US citizens that a state of war existed.<sup>52</sup>

And finally, in a rarely cited section of the Constitution, the individual states are granted the power to “engage” in war with prior congressional approval.<sup>53</sup> There is no explicit requirement in the Constitution for the President to first obtain the consent of the Congress prior to engaging in an exercise of his Commander in Chief powers or prior to committing forces to war.<sup>54</sup> If the Framers thought to include this requirement for prior approval for the states, they could have easily done so with the Executive if that was their intent.

While there is certainly merit to the arguments made by those who favor a strong Executive, scholars who believe Congress is the primary branch in matters of national security make an equaling compelling case. From the above discussion, it appears that there is insufficient evidence in order to determine which, if either, branch is controlling. As will be discussed below, the Judiciary plays a very limited role in resolving the debate. As will be seen, national security power is a balanced and shared power between both the political branches.

*The Role of the Judiciary in National Security.* Of the three branches of government, the Judiciary has the most limited role to play in foreign policy and national security. The Constitution states, “The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>55</sup> And, “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.”<sup>56</sup>

Not only is the Constitution relatively silent on the precise function the Judiciary is to play in national security, the Court itself has limited its own participation through the Court's self-made "political question" doctrine and by often finding that plaintiffs lack "standing" to bring challenges to national security decisions made by the political branches.<sup>57</sup> Efforts to turn to the Court have failed for the most part because the courts view the decision to use military force more as a policy or political decision rather than a legal one.

The Court has consistently maintained that the judicial branch plays a far less significant role than do the political branches in foreign policy.<sup>58</sup> Unlike other areas of constitutional law, such as criminal procedure, interstate commerce, equal protection, free speech, and privacy, the judicial branch has avoided acting as a referee between the two branches of government wrestling over national security issues. Ironically, resolving matters of national security may represent the most important of all constitutional governmental functions.<sup>59</sup>

*The Power to Make War as a Shared Power.* Congress and the President both have significant roles to play when sending troops into combat. For example, even if, as Commander in Chief, the President has the power to unilaterally deploy forces without a declaration of war or the equivalent from Congress, he will not be able to maintain that situation for any length of time because Congress must raise the army that he sends.<sup>60</sup> Congress must also decide whether to finance the effort.<sup>61</sup> Conversely, should Congress declare war, the Commander in Chief would decide where, when and how to prosecute the war. He would decide the strategy and tactics to be followed,<sup>62</sup> and whether and when and under what conditions to negotiate a peace treaty.<sup>63</sup>

In the area of national security, the concept of separated powers, where each branch operates separately from one another in its own sphere is somewhat of a misnomer. While the two branches are indeed separate, each with unique authorities, their powers are overlapping or shared.<sup>64</sup> History provides examples on how these overlapping powers have been exercised. Past exercises of the balance of power are important to consider because the Supreme Court looks to the “gloss of history” as an important tool in interpreting the balance of power outlined in the Constitution.<sup>65</sup>

In the American experience, declarations of war are rare in proportion to the total number of times forces have been involved in armed conflict. The United States has sent its military forces abroad approximately 220 times; however, in only five instances, has the United States committed its armed forces with a declaration of war. And in four of those five cases of declared war, the President had committed troops before a declaration had been issued.<sup>66</sup>

The mere lack of an exercise of a constitutional power certainly does not mean it has ceased to exist; however, if the Supreme Court looks to the gloss of history, then non-use over an extended period of time might suggest the authority has atrophied and now lacks the significance it once enjoyed. So rarely has Congress declared war, it is questionable whether the “declare war” clause is now any more relevant than the issuing letters of Marque power included in the same clause of the Constitution.<sup>67</sup>

Unilateral decisions by Presidents to commit forces without declarations of war have occurred from our earliest days. President Jefferson sent the American Fleet into the Mediterranean Sea to deal with the Barbary pirates without authority from Congress.<sup>68</sup> Presidents often commit military forces without congressional approval and

Congress will often issue a resolution in support of the action or to continue to authorize funding for the effort.<sup>69</sup> However, in a few cases, the President has deployed forces where Congress never formally approved the use of force, with Korea being the most notable.<sup>70</sup>

Presidents have sent in military forces while “Engaging in hot pursuit of aggressors . . . conducting punitive reprisals . . . preemptively attacking enemies . . . enforcing treaties . . . and acting pursuant to international organizations.”<sup>71</sup> If the “gloss of history” does in fact provide us with an indication of the proper relationship between Congress and the President in the use of armed forces, it appears the President has the constitutional authority to use troops to repel attacks against the United States, fight defensive wars initiated against us, rescue or evacuate US citizens abroad, protect American nationals or their property abroad, and to pursue attackers in retreat without any declaration of war.<sup>72</sup>

In *Youngstown Sheet & Tube v. Sawyer*, the Supreme Court provides guidelines in analyzing balance of power questions under these sorts of circumstances.<sup>73</sup> In *Youngstown*, President Truman issued an Executive Order in 1952, directing the Secretary of Commerce to seize and operate key steel mills. By taking control of the mills, the President hoped to avert a labor strike during the Korean War. In a six to three decision, the Court found that the President lacked the independent constitutional power to seize the mills. Congress had not previously authorized the President to seize the steel mills or to seize private property in general in order to prevent or resolve labor disputes. In fact, there were a few statutes in existence at the time which allowed the

President to seize property, but the Court found the requirements of these statutes were not met, suggesting that Congress was not silent but opposed the seizure of the mills.<sup>74</sup>

In his concurrence, Justice Robert H. Jackson provided a simple but commonsensical methodology for evaluating the President's use of his Commander in Chief and executive power. Justice Jackson opined that:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .<sup>75</sup>

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, it not invite, measures on independent presidential responsibility. In 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. . . .<sup>76</sup>

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his constitutional powers minus any powers of Congress over the matter.<sup>77</sup>

This test explains that when the Congress and the President share in a national security decision, such as the deployment of forces, all of their unique constitutional powers are combined and exercised in unity. The Court will rarely, if ever, review a shared national security decision and it is highly unlikely that such a decision would be found to be unconstitutional. When the President goes it alone without Congress, only his powers are at play and he runs a risk that his decision will not be constitutional. Where the two branches disagree on a proper response, it is quite possible that the President's decision may be declared unconstitutional because he would be acting without any congressional authority, including the power to draw funds from the treasury.

Supreme Court jurisprudence before and certainly since *Youngstown* has generally reflected the common sense wisdom of Justice Jackson's concurring opinion.<sup>78</sup> The Court has been willing to give the "Presidents wide berth in exercising their war powers when Congress has voiced its support."<sup>79</sup> The Court has generally been unwilling to hear cases brought by individual members of Congress in opposition to the vote of the majority of Congress, or to hear cases brought by members of Congress prior to Congress voting on a use of force relying on its "political question" or "standing" doctrine.<sup>80</sup> However, the Court has been more "receptive to challenges" where Congress has not been consulted or where the President had acted against congressional will.<sup>81</sup>

#### Shared Decisions Generate Greater Strategic Certainty

Although the primary benefit from a joint Congressional and Presidential decision to commit the armed forces into armed conflict, it turns out, over the long run, there are significant strategic benefits in complying with the shared power construct laid out in the Constitution. Certainly Clausewitz never formally supported the ideals of the United States Constitution. However, his writings regarding the importance of government in warfare ironically do suggest there are strategic advantages for a government to follow its political principles.

While certainly no two wars are alike, there are, according to Carl von Clausewitz, three common components present in all armed conflicts. This "paradoxical trinity," as he describes it, is "composed of primordial violence, hatred and enmity. . . ."<sup>82</sup> The first of these three aspects is generally associated with the "people," the second, "with the commander and his army," and the third with "the government."<sup>83</sup> Clausewitz

goes on to explain that a successful military policy or strategy will be one that considers each leg of the trinity and balances the relationship between them like “an object suspended between three magnets.”<sup>84</sup>

Clausewitz explains that any successful wartime strategy must include participation by the political arm. In the final analysis, the use of military force is nothing more than the clear manifestation and forceful exercise of state policy by violent or potentially violent means.<sup>85</sup> Therefore, the state political arm must clearly articulate to the military the underlying political objective sought and how the government defines success.<sup>86</sup>

Strategy is neither a purely political creation, nor a military one,<sup>87</sup> however, “strategy ultimately derives its significance from the realm of politics. . .”<sup>88</sup> and “the political dimension of strategy is the one that gives it meaning.”<sup>89</sup> The governing body, not just its military forces, must participate in the making of strategy. When a decision is made to apply military force to a problem, the body politic must determine the scope, magnitude and duration of its commitment. The state must decide what it is willing to spend in terms of lives and treasure. The state must calculate what risks it is willing to assume regarding its own national security and that of its allies and the international community.<sup>90</sup> Failure of the government to participate in the making of strategy can lead to potentially catastrophic results on the battlefield.<sup>91</sup>

Achieving the political object underlying the decision to use military power determines the degree of effort and commitment required of the military.<sup>92</sup> Success on the battlefield may be as much about the quality, clarity, and suitability of a state’s political objectives as it is about the relative military vitality, strength and tactical

superiority of the various opponents in the conflict. When the government fails to fulfill its responsibility to set and clearly articulate policy, it creates strategic uncertainty within its own population, its armed forces and allies. Moreover, absent clearly articulated state policy, the military element of power will not enjoy its full deterrent potential against the enemy.<sup>93</sup>

As discussed above, the Framers created a system that requires the participation of both branches of government in national security decisions. Unless both branches participate, the President is acting without congressional power and he is therefore only exercising half of the available war making power of the US government. Moreover, where the President fails to consult with Congress and seek concurrence for any significant commitment of forces in hostilities, or where Congress chooses to avoid participating in any such decision, strategic uncertainty may be the result.

Unless both Congress and the President clearly articulate their objectives through a declaration of war or similar legislative or regulatory equivalent, US armed forces, US allies, and perhaps most importantly, the enemy, will not be certain of America's resolve and determination. Allies might question whether the United States has the stomach to continue for a lengthy period. Commanders will be uncertain as to the funding available and the degree to which the country will mobilize.

Where both political branches participate in any significant commitment of the armed forces of the United States, constitutional principles are preserved and there are strategic benefits as well. First, adherence to these principles demonstrates to the world that as a democratic institution, built on the rule of law, the United States remains faithful to the principles and checks and balances established in the Constitution.

Second, the government leg of Clausewitz's trinity is strengthened where both branches are involved. Any failure to include both political branches means that only half of the power available to the government is employed.

#### Purposes and Problems Associated With The 1973 War Powers Resolution

The stated purpose of the 1973 War Powers Resolution (Resolution),<sup>94</sup> is to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or such situations."<sup>95</sup> The Resolution limits a President's power to introduce troops into hostilities where there is (1) a congressional declaration of war, (2) a specific congressional statutory authorization, or (3) a "national emergency created by attack upon the United States, its territories or possessions or its armed forces."<sup>96</sup>

Presidents of both political parties have argued that their power to deploy troops exceeds these three limited circumstances. For example, Presidents have asserted the power to "rescue Americans abroad, rescue foreign nationals where such action facilitates the rescue of U.S. citizens, protect U.S. Embassies and legations, suppress civil insurrection, implement the terms of an armistice or cease-fire involving the United States, and carry out the terms of security commitments contained in treaties."<sup>97</sup> Just to name a few, examples where Presidents have deployed military forces which exceed the authority of the Resolution include Grenada, Yugoslavia and Haiti.<sup>98</sup> Even many strong supporters of congressional power agree that the Resolution overly restricts the President in the types of situations he may send armed forces.<sup>99</sup>

The Resolution contains requirements relating to consulting with, and reporting to, Congress. However, because of poor drafting, these otherwise justifiable requirements create issues. Presidents are to “consult” with Congress “before” introducing forces into “hostilities or into situations where imminent involvement in hostilities is clearly indicated.”<sup>100</sup> The President must continue to consult with Congress regularly until the forces are removed from the situation.<sup>101</sup> However, the Resolution does not explain with whom among the 535 members of Congress the President is required to consult.<sup>102</sup>

The President is required to provide a written report to Congress whenever he introduces forces into hostilities or when hostilities are imminent. He must report deploying troops to a foreign country “equipped for combat” unless those troops are involved in training exercises.<sup>103</sup> Unless the President is granted a 30 day extension, 60 days after such a report is provided to Congress, the President must remove the forces if Congress does not affirmatively declare war or provide a statutory equivalent.<sup>104</sup> No President has ever filed a report as required by this section.<sup>105</sup>

Many law scholars agree that Section 5(c),<sup>106</sup> which requires the President to withdraw troops from hostile areas where Congress issues a “concurrent” resolution to withdraw troops, is unconstitutional. Only one branch of government is required to participate in a concurrent resolution. In *INS v. Chadha*,<sup>107</sup> a case decided by the Supreme Court subsequent to the 1973 War Powers Resolution, the Court struck down the practice of using one-house legislative vetoes.<sup>108</sup>

The Supreme Court has never decided a case on the constitutionality of the War Powers Resolution. Over the course of its existence, over 100 individual members of

Congress, acting alone or in small contingents, have petitioned the courts in order to challenge the legality of presidential decisions to deploy American forces. However, Congress as a whole has never sought to compel the President to comply with the Resolution, and therefore, the Supreme Court has avoided considering the issue.<sup>109</sup> For example, individual members of Congress have redressed the courts for actions in El Salvador, Nicaragua, Grenada, tanker escort duty in the Persian Gulf, the first Iraq war, and Kosovo. In each case, the judicial branch managed to avoid making a determination on the constitutionality of the Resolution due to the courts' determination to leave issues of national security to the political branches.<sup>110</sup>

In addition to its apparent constitutional defects, from a policy standpoint, some have argued the Resolution is detrimental to the operational effectiveness of U.S. forces. The Resolution places troops and civilians abroad at greater risk and has the potential to negatively affect a strategy based partially on deterrence.<sup>111</sup>

Critics of the Resolution point out that in 1983 members of Congress cited the Resolution and insisted on specifically knowing how long the Marines would be stationed in Lebanon. A precise timetable would certainly have benefited terrorist groups in terms of their own strategy and whether they could simply outlast the United States.<sup>112</sup> When the U.S. agreed to reflag ships traveling through the Persian Gulf in the late 80's, there was some concern that this reflagging action required the President to report to Congress the possibility of hostilities. Some in the international community may have been concerned that the notice to Congress of possible hostilities could have been a masked indication of the real U.S. intent to use the reflagging operations as a

pretext introduce combat forces in the area for follow on combat activities in the region.<sup>113</sup>

Critics point out that the Resolution places citizens abroad at greater risk because the Resolution does not permit the President to send troops to rescue Americans overseas.<sup>114</sup> Americans overseas may have been placed at greater risk in Vietnam had the President sought congressional authority to conduct a rescue when Vietnam collapsed, in Grenada when Cubans took control of that country, and in Panama when Americans were subject to attack prior to the removal of Noriega. Certainly Congress would have granted authority to rescue in these cases; however, having to seek permission takes time where time is often of the essence. Where secrecy is paramount, having to go to Congress would threaten compromise.

Although Presidents have asserted the Resolution is unconstitutional, various Presidents have made decisions in order to avoid triggering certain provisions of the Resolution and thereby placing troops at risk. For example, US soldiers in El Salvador were not allowed to carry M16s in order to avoid triggering the “equipped for combat” provisions.<sup>115</sup> Marines in Lebanon were not permitted to carry loaded weapons and were under a very defensive ROE so that the President would not have to report to Congress that the Marines were facing “imminent involvement in hostilities.”<sup>116</sup>

As with the creation of many laws, there are potential unintended consequences. The timetables in the Resolution grant the President the ability to operate up to 90 days in certain cases without reporting to Congress. Critics of the Resolution have argued that a President may elect to bring far greater military force to bear on an opponent than is reasonable in order to ensure any military action would be complete prior to

exceeding the time limits listed in the Resolution.<sup>117</sup> Conversely, these same time tables might give strength to an enemy trying to hold on for 90 days and incite the enemy to surge and to create maximum U.S. casualties in during that same 90 day period.<sup>118</sup>

Finally, the Resolution seeks to limit a President's authority to introduce forces into hostilities based on a mutual defense treaty unless Congress specifically grants the executive the power to deploy forces into hostilities as part of congressional implementation of such a treaty.<sup>119</sup> These means that in a regional arrangement such as NATO, where an attack on one is considered an attack on all, the President could not come to the defense of the relevant ally without first getting a green light from Congress. This might give potential treaty partners cause for concern because although the President is promising support, his promise is contingent on congressional support and the time it takes to secure that support.

#### Defects Cured in the Proposed 2009 War Powers Consultation Act

Although the War Powers Commission concluded that the 1973 War Powers Resolution is unworkable, the Commission concurs that creating an effective legislative framework requiring both branches to participate in any decision to commit U.S. armed forces is worth pursuing. The Commission has proposed a statute that addresses the shortcomings of the 1973 War Powers Resolution by "eliminating aspects of the War Powers Resolution of 1973 that have opened it to constitutional challenge," and by ". . . promoting meaningful consultation between the branches without tying the President's hands." The Act also focuses on "providing a heightened degree of clarity and striking a realistic balance that both advocates of the Executive and Legislative Branches should want."<sup>120</sup>

If the proposed 2009 War Powers Consultation Act (Act) is enacted, it will repeal the 1973 War Powers Resolution.<sup>121</sup> It does not seek to “define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative Branches of government. . . .”<sup>122</sup> Its primary purpose is to require the participation of both political branches of government when American armed forces are involved in “significant armed conflict.”<sup>123</sup> The proposed Act defines “significant armed conflict” as any conflict “expressly authorized by Congress,” or “any combat operation by U.S. armed forces lasting more than a week or expected by the President to last more than a week.”<sup>124</sup>

The drafters of the proposed Act wanted to involve Congress “only where consultation seems essential.”<sup>125</sup> As an example of the application of the definition of significant armed conflict, the Commission points out that President Reagan’s “limited air strikes against Libya would not be considered ‘significant armed conflicts’”, but conversely, the “two Iraq Wars clearly would be . . .” the later would require consultation, the former would not.<sup>126</sup>

Certain types of combat or combat like operations are specifically exempted from coverage by the statute. For example, the Act would not be triggered when the President is acting to “repel attacks, or prevent imminent attacks” against the “United States, its territorial possessions, its embassies, its consulates, or its armed forces abroad.”<sup>127</sup> The Act also exempts “limited acts of reprisal against terrorists or states that sponsor terrorism.”<sup>128</sup> Other types of troop deployments expressly exempt from the coverage of the statute include foreign disaster relief,<sup>129</sup> “acts to prevent criminal activity abroad,”<sup>130</sup> covert operations,<sup>131</sup> training exercises,<sup>132</sup> and rescuing U.S. citizens

abroad.”<sup>133</sup> Therefore, the Act would not apply in a Grenada-like rescue of American citizens.

Unlike the War Powers Resolution of 1973, the proposed Act clearly lays out with whom in Congress the President must consult when the statute is applicable.<sup>134</sup> The Act further requires the President to consult with the listed members of Congress, “Before ordering the deployment of United States armed forces into significant armed conflict . . .”<sup>135</sup> However, where the “need for secrecy or other emergent circumstances precludes consultation. . .” prior to deploying forces, the President must consult with the members of Congress listed in the Act within “three calendar days after the beginning of the significant armed conflict.”<sup>136</sup> The President is required to consult with Congress on matters of national security and foreign policy “regularly.”<sup>137</sup> Where a “significant armed conflict” is involved, the statute requires continued consultation every two months.<sup>138</sup>

In addition to consultation with Congress, the Act requires the President to submit a written “classified” report to Congress “setting forth the circumstances necessitating the significant armed conflict, the objectives, and the estimated scope and duration of the conflict.”<sup>139</sup> The President must submit the report prior to ordering or approving sending of troops into significant armed conflict.<sup>140</sup> Where however, there is a need for “secrecy” or where “emergent circumstance” exists, he must submit the report within three calendar days after the beginning of any significant armed conflict.<sup>141</sup> The Act also creates an annual written reporting requirement for the President “due each first Monday of April each year” regarding all ongoing operations.<sup>142</sup>

Section 5 has been described as “the heart” of the Proposed War Powers Consultation Act of 2009.<sup>143</sup> If Congress has not authorized the commitment of U.S.

forces in a “significant armed conflict” after receiving presidential notice, then the Act states that the, “Joint Consultation Committee shall introduce an identical concurrent resolution in the Senate and House of Representatives calling for [its] approval.”<sup>144</sup> If a concurrent resolution supporting the action is defeated, then any Senator or Representative may file a joint resolution of disapproval which “shall” be voted on within five calendar days.<sup>145</sup> The joint resolution will have the force of law only if signed by the President, or if approved by Congress over the President’s veto.<sup>146</sup>

Section 5 recognizes that the framers of the Constitution intended Congress to play a role in foreign affairs and to influence the use of military force abroad. This Act requires Congress to vote up or down on a President’s decision to commit military forces in a significant armed conflict. Unlike the 1973 War Powers Resolution, the Act does require the President to remove forces from hostilities where Congress fails to act. Forcing those in Congress to vote early either places the entire strength of the government behind the action, or, in the alternative, may require the removal of troops where the entire body politic, and by extension, the American people do not support the effort. While the Act does not delineate which branch has primacy in war making decisions, or who ultimately has the responsibility to decide, , or exactly what roles the respective branches are to play; it does establish a framework requiring each branch is required to participate and work together in a cooperative and deliberative fashion when deciding whether to employ military force.<sup>147</sup>

### Conclusion

It is in the United States’ best interests to enact the proposed 2009 War Powers Consultation Act on the grounds that it will encourage shared decision making for any

significant use of the armed forces. Joint, rather than unilateral, congressional and presidential foreign policy decisions to use the military are more consistent with the national security framework in the Constitution. The Framers intentionally built a framework which would prevent an overly aggressive government from engaging military forces without deliberate and thoughtful consideration,<sup>148</sup> but one which would also be able to take resolute action and defend itself and its interests when necessary.<sup>149</sup>

Both branches of government have certain indispensable keys relating to the effective use of the military as an instrument of power.<sup>150</sup> The constitutional requirement for near simultaneous use of these keys creates a shared power framework. However, Presidents have often been willing to commit troops without first consulting with Congress and Congress has simply gone along. This phenomenon has been described by one scholar as, "Executive custom and Congressional acquiescence."<sup>151</sup>

The proposed 2009 War Powers Consultation Act preserves the spirit and objectives of the 1973 War Powers Resolution. The Act facilitates the participation of both political branches of government in any decision to commit forces in any significant operation, while addressing the constitutional and policy defects associated with the Resolution. Passage of the Act should not only serve to protect the American people from an adventurous President, but citizens will also benefit because the Act seeks to force a reluctant Congress to debate and participate in these most important governmental decisions.

The Act will go a long way toward restoring the balance of power established by the Framers in the Constitution. In a democracy built on the rule of law, it is imperative

that the government comply with the ideals enunciated in the Constitution even though this might, on occasion, mean more time and debate. As discussed above, the Act carves out exceptions to the consultation and voting requirements for emergency situations where time is of the essence. Congress is the peoples' branch of government and the people need to be heard when their sons and daughters are sent into harms way.<sup>152</sup>

Moreover, when the government adheres to constitutional provisions in matters of national security, strategic advantages will follow. First, in the general sense, the government will appear strong when in compliance with its own rules. The government will not appear panicked or stressed. Second, with regard to the specific conflict involved, when both branches of government support a military action, it will be clear to allies, neutrals and enemies alike the United States means business and is willing to use its military element of power to resolve the issue. Third, a declaration of war or similar statutory pronouncement would have the pragmatic advantage of legal sanction and all that that entails. A declaration of war or similar vote as required by the 2009 War Powers Consultation Act would serve to mobilize the American public.<sup>153</sup>

And finally, U.S. commanders and soldiers on the ground we be in a better position to plan and execute military operations on the ground. The political objectives established by the policy makers will be more clear. Commanders will have a better idea of how the civilian leadership defines success when national interest are at stake. Where the entire government supports a military action, commanders and soldiers will have reason for faith that the government will provide the resources and personnel required. As has been said,

Unless Congress has un-equivocally authorized a war at the outset, it is a good deal more likely to undercut the effort, leaving it in a condition that satisfies neither the allies we induced to rely on us, our troops who fought and sometimes died, nor for that matter anyone else except, conceivably the enemy.<sup>154</sup>

Congress can easily strangle any war effort where it has not been consulted in advance.<sup>155</sup>

Of course there are potential risks involved with any attempt to shore up the Constitution with statutory law. First, any legislative framework carries with it the possibility of creating new and unforeseen problems. An overly ambitious attempt to create a more shared balance of power between the Executive and the Legislature, could cause the system to take on the nature of a more parliamentary form of government, which, when viewing the European experience since 9/11, and our own experience during the Revolutionary War, may not be in the United States' best security interests.

Others may argue that we do not need a legislative solution which attempts to mandate exactly how the two branches are to balance the war making power. What we currently have works. Our current system, as flawed as it may be, is one born both of constitutional theory and the "gloss" of historical practice. As Justices Jackson and Douglas teach us in *Youngstown*,<sup>156</sup> both political branches have participated to varying degrees in the decisions to use the armed forces. These two justices seem to be suggesting that the Constitution created a theoretical framework of balanced or shared power, leaving it to history and application to fill in the details. Statutory refinements may only serve to frustrate the application of the Constitution.

And finally, it is questionable whether the 2009 War Powers Consultation Act would be enforced anymore than the 1973 War Powers Resolution has been. As with

the 1973 War Powers Resolution, there is no guarantee that one or both branches will not simply ignore the law. Furthermore, based on the political question doctrine, the Supreme Court may be just as reluctant to enforce or interpret the Act as it has been the Resolution.

These potential risks are minimal as compared to the likely benefits of the Act. The potential restoration of a balanced and shared war making power as originally intended by the Framers outweighs the risks. After 35 years of War Powers Resolution experimentation, the drafters have been able to create a statute which will alleviate the constitutional and policy problems with the Resolution. And as a pragmatic benefit, compliance with the act will lead to greater strategic certainty. From the trench, that sounds like a strategy worth pursuing.

## Endnotes

<sup>1</sup> Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret, eds. (Princeton, NJ: Princeton University Press 1984), 605.

<sup>2</sup> National War Powers Commission, *National War Powers Commission Report*, The Miller Center of Public Affairs, University of Virginia (Charlottesville, VA: University of Virginia Press 2009), 6. The National War Powers Commission was organized at the Miller Center of Public Affairs at the University of Virginia and partnered with the James A Baker III Institute for Public Policy, Rice University; the Freeman Spough Institute for International Studies and Stanford Law School, Stanford University; the University of Virginia School of Law; and William and Mary School of Law. James A. Baker, III and Warren Christopher, both former Secretaries of State served as Commission Co-Chairs. The Commission Co-Directors were John C. Jeffries, Jr., Dean, University of Virginia School of Law, and W. Taylor Reveley, III, Interim President, College of William and Mary. Commission members included, Slade Gordon, former U.S. Senator; Lee H. Hamilton, former member of Congress and Director, Woodrow Wilson Int'l Center for Scholars; Carla A. Hills, former U.S. Trade Representative; John O. Marsh, Jr., former Secretary of the Army; Edwin Meese, III, former Attorney General; Abner J. Mikva, former Judge, U.S. Court of Appeals for the District of Columbia Circuit; J. Paul Reason, former Commander, U.S. Atlantic Fleet; Brent Scowcroft, former National Security Advisor; Anne-Marie Slaughter, Dean, Woodrow Wilson School, Princeton University; and Strobe Talbot, President, Brookings Institute and former Deputy Secretary of State. The Commission also heard from a number of current and former government officials and members of academia.

<sup>3</sup> John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton, NJ: Princeton University Press 1993), 48; Donald Westerfield, *War Powers: The President, the Congress, and the Question of War* (Westport, CT: Praegar Publishers 1996), 3; Robert F. Turner, *The War Powers Resolution: Its Implementation in Theory and Practice* (Philadelphia, PA: Foreign Policy Research Institute 1983).

<sup>4</sup> Congressional Research Service, *The War Powers Resolution: After 34 Years* (Washington, DC: Congressional Research Service, March 10, 2008), 1; National War Powers Commission, *National War Powers Commission Report*, 35.

<sup>5</sup> Senator Sam Nunn, *Democratic Leadership Council Speech* (Williamsburg, VA: February 29, 1988) 4. Senator Nunn stated that the War Powers Resolution is “riddled with defects.”

<sup>6</sup> *Ibid.*; Congressional Research Service, *The War Powers Resolution: After 34 Years*, 1; National War Powers Commission, *National War Powers Commission Report*, 35.

<sup>7</sup> National War Powers Commission, *National War Powers Commission Report*, 12. The Supreme Court has treated decisions deploy the armed forces of the United States into hostilities a political question within the exclusive purview of Congress and the President.

<sup>8</sup> *Ibid.*, 21, citing *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>9</sup> U.S. Constitution, art. I, sec. 8, cl. 12.

<sup>10</sup> *Ibid.*, art. II, sec. 2, cl. 1.

<sup>11</sup> Donald Westerfield, *War Powers: The President, the Congress, and the Question of War* (Westport, CT: Praegar Publishers 1996), 13; National War Powers Commission, *National War Powers Commission Report*, 6; John Lehman, *Making War: The 200 Year-Old Battle Between the President and Congress over How America Goes to War* (New York, NY: Macmillan Publishing Company 1992), 59; Louis Fisher, “Historical Survey of the War Powers and the Use of Force,” in *The United States Constitution and the Power to Go to War*, ed. Gary M. Stern and Morton H. Halperin (Westport, CT: Greenwood Press 1994); William Conrad Gibbons, “The Origins of the War Power Provision of the Constitution,” in *Congress and United States Foreign Policy: Controlling the Use of Force in the Nuclear Age*, ed. Michael Barnhart (Albany, NY: University of New York Press 1987), 9; L. Gordon Crovitz & Jeremy A. Rabkin, eds., *The Fettered Presidency: Legal Constraints on the Executive Branch* (Washington DC: American Enterprise Institute 1989).

<sup>12</sup> Lehman, *Making War: The 200 Year-Old Battle Between the President and Congress over How America Goes to War*, 60. Others however, have argued that the Founding Fathers did in fact resolve the foreign relations and war powers issues. They argue that certainly the Founders would not have left this crucial issue to chance, to be resolved in the future. For example, Professor Turner argues that is not reasonable to believe the Founders intended for there to be a “jump ball” approach to national security. Professor Turner believes that there was actually substantial consensus with respect to the distribution of foreign affairs or national security powers. Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (Riverside, NJ: Brassey’s Inc. 1991), 51-52, 56.

<sup>13</sup> W. Taylor Reveley III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* (Charlottesville, VA: University of Virginia Press 1981), 71.

<sup>14</sup> Edward S. Corwin, *The President: Office and Powers*, 5<sup>th</sup> ed. (New York, NY: New York University Press 1984), 201.

<sup>15</sup> John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," *Calif. L. Rev.* 84 (March 1996): 167, citing Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*; Michael J. Glennon, *Constitutional Diplomacy* (Princeton, NJ: Princeton University Press 1990); Louis Fisher, *Presidential War Power* (Lawrence, KA: University Press of Kansas 2004); Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York, NY: Columbia University Press 1990); Harold H. Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven, CT: Yale University Press 1990); Francis D. Wormuth et al., "To Chain the Dog of War," *Duke L. J.* 41 (1991): 27; Jane E. Stromseth, "Rethinking War Powers: Congress, the President, and the United Nations," *Geo. L. J.* 81 (1993): 597; Thomas F. Eagleton, *War and Presidential Power: A Chronicle of Congressional Surrender* (New York, NY: Liveright 1974); Louis Henkin, ed., *Foreign Affairs and the U.S. Constitution* (Oxford, England: Oxford University Press 1990); Edward Keynes, *Undeclared War: Twilight Zone of the Constitutional Power* (University Park, PA: Pennsylvania State University Press 1982); Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*; Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston, MA: Houghton Mifflin Company 1973); Ann Van Wynen Thomas & A.J. Thomas, Jr., *The War-Making Power of the President: Constitutional and International Aspects* (Dallas, TX: SMU Press 1982); William Van Alstyne, "Congress, the President, and the Power to Declare War: A Requiem for Vietnam," *U. Pa. L. Rev.* 121 (1972): 1; Arthur Bestor, "Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined," *Seton Hall L. Rev.* 5 (1974): 527; Alexander M. Bickel, "Congress, the President and the Power to Wage War," *Chi.-Kent L. Rev.* 48 (1971): 131; Gerhard Casper, "Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model," *Chi. L. Rev.* 43 (1976): 463; Leonard G. Ratner, "The Coordinated Warmaking Power – Legislative, Executive, and Judicial Roles," *S. Cal. L. Rev.* 44 (1971): 461; Stephen L. Carter, "The Constitutionality of the War Powers Resolution," *Va. L. Rev.* 70 (1984): 101; John H. Ely, "Suppose Congress Wanted a War Powers Act That Worked," *Colum. L. Rev.* 88 (1988): 1379; Eugene V. Rostow, "Once More Into the Breach: The War Powers Resolution Revisited," *Val. U. L. Rev.* 21 (1986): 1.

<sup>16</sup> U.S. Constitution, art. I, sec. 8.

<sup>17</sup> *Ibid.*, art. 1, sec. 9, cl. 7, and sec. 10, cl. 1 and 3. While many believe Congress can simply stop funding military activities it is opposed to, some question whether, Constitutionally speaking, Congress can simply "pull the plug" on a military action underway using the appropriations power. The Constitution does not give Congress a "War Veto Power" but the power to declare war. Peter Raven-Hansen, "Constitutional Constraints: The War Clause," in *The United States Constitution and the Power to Go to War*, ed. Gary M. Stern and Morton H. Halperin (Westport, CT: Greenwood Press 1994), 46.

<sup>18</sup> Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 3, citing U.S. Constitution, art. I, sec. 8, cl. 11; *Bas v. Tingy*, 4 U.S. 32, 35-36 (1800); *Talbor v. Seeman*, 5 U.S. 1, 18 (1804); *The Federalist No. 25* at 211 (Hamilton) (B. Wright ed. 1961) and War Powers Resolution of 1973, Note 21 to the appendix. Professor Ely further argues that,

"The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war to the Legislature." Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 4, citing Letter from James Madison to Thomas Jefferson, James Madison, "Letter to Thomas Jefferson," April 2, 1798, [http://www.constitution.org/jm/17980402\\_tj.txt](http://www.constitution.org/jm/17980402_tj.txt) (Accessed November 11, 2008).

<sup>19</sup> See generally, Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," 167, citing Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*; Michael J. Glennon, *Constitutional Diplomacy* (Princeton, NJ: Princeton University Press 1990); Fisher, *Presidential War Power*; Henkin, *Constitutionalism, Democracy, and Foreign Affairs*; Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair*; Wormuth, "To Chain the Dog of War," 27; Stromseth, "Rethinking War Powers: Congress, the President, and the United Nations," 597; Eagleton, *War and Presidential Power: A Chronicle of Congressional Surrender*; Henkin, *Foreign Affairs and the U.S. Constitution*; Keynes, *Undeclared War: Twilight Zone of the Constitutional Power*; Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*; Schlesinger, *The Imperial Presidency*; Thomas, *The War-Making Power of the President: Constitutional and International Aspects*; Van Alstyne, "Congress, the President, and the Power to Declare War: A Requiem for Vietnam," 1; Bestor, "Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined," 527; Bickel, "Congress, the President and the Power to Wage War," 131; Casper, "Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model," 463; Ratner, "The Coordinated Warmaking Power – Legislative, Executive, and Judicial Roles," 461; Carter, "The Constitutionality of the War Powers Resolution," 101; Ely, "Suppose Congress Wanted a War Powers Act That Worked," 1379; Rostow, "Once More Into the Breach: The War Powers Resolution Revisited," 1.

<sup>20</sup> National War Powers Commission, *National War Powers Commission Report*, appendix 4, page 3.

<sup>21</sup> Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*, 81-85. Alexander Hamilton argues the President is nothing more than the "First General" or "Admiral" and that unlike the King, he has no power to declare war, raise or regulate fleets and armies. Alexander Hamilton, "The Federalist No. 69, The Real Character of the Executive," March 14, 1788, [http://avalon.law.yale.edu/18th\\_century/fed69.asp](http://avalon.law.yale.edu/18th_century/fed69.asp) (accessed November 11, 2008). However, just four days later, Hamilton wrote, "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. . . . In the legislature, promptitude of decision is oftener an evil than a benefit." Alexander Hamilton, "The Federalist No. 70, The Executive Department Further Considered," March 18, 1788, [http://avalon.law.yale.edu/18th\\_century/fed70.asp](http://avalon.law.yale.edu/18th_century/fed70.asp) (accessed November 11, 2008).

<sup>22</sup> Turner, *The War Powers Resolution: Its Implementation in Theory and Practice*, 17.

<sup>23</sup> U.S. Constitution, art. II, sec. 2, cl. 2.

<sup>24</sup> *Ibid.*, art. I, sec. 8. This also suggests that the argument that the President can commit forces in order to execute a treaty, without consultation with Congress, is questionable.

<sup>25</sup> Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 4.

<sup>26</sup> Stephen Dycus, Arthur L. Berney, William C. Banks and Peter Raven-Hansen, *National Security Law 2<sup>nd</sup>* ed. (Boston, MA: Little, Brown and Company 1997), 20.

<sup>27</sup> *Ibid.*, 18.

<sup>28</sup> *Ibid.*, 20; Williamson Murray, MacGregor Knox, and Alvin Bernstein, eds., *The Making of Strategy: Rulers, States and War* (New York, NY: Cambridge University Press 1994), 208-216; Peter Irons, *War Powers: How the Imperial President Hijacked the Constitution* (New York, NY: Metropolitan Books 2005), 12; Gary M. Stern and Morton H. Halperin, eds., *The United States Constitution and the Power to Go to War* (Westport, CT: Greenwood Press 1994), 1.

<sup>29</sup> Irons, *War Powers: How the Imperial President Hijacked the Constitution*, 12. Professor Yoo explains, "Hence, the story of the Continental Congress is a tale of failed attempts to organize its executive, not legislative power effectively." Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, (Chicago, IL: The University of Chicago Press 2005), 76.

<sup>30</sup> *Ibid.*, at 88; Dycus, Berney, Banks and Raven-Hansen, *National Security Law 2<sup>nd</sup>* ed., 19; Robert B. Zoellick, "Congress and the Making of US Foreign Policy," *Survival* 41, no. 4 (Winter 1999/2000): 31.

<sup>31</sup> Westerfield, *War Powers: The President, the Congress, and the Question of War*, 38. The Constitution explains the legislative power granted to Congress with great specificity and detail concerning the substantive areas in which Congress can legislate. However, Article II lacks any real specificity in terms of what authority is included with the Commander and Chief and executive powers. This has led courts and many scholars alike to conclude that the Framers must have intended for the President to have all the powers generally associated with being the chief Executive and Commander in Chief, even though these powers were not enumerated. The Framers wanted to clearly enumerate congressional power, but wanted to give general guidance in terms of Presidential power.

<sup>32</sup> *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936). In *Curtis-Wright*, Congress had authorized the President to place an embargo on arms sales to certain countries in South America. President Roosevelt executed such an embargo. In the face of criminal charges that it had sold arms to Bolivia, the corporation argued that Congress did not have the power to grant to the President the power to make a fundamentally legislative determination. The Court disagreed, finding that with regard to external decisions, a specific enumerated power need not always be present in the Constitution.

<sup>33</sup> Lehman, *Making War: The 200 Year-Old Battle Between the President and Congress over How America Goes to War*, 64, citing, *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936). John Lehman writes, "In what amounted to a clear affirmation of presidential primacy, the court held that 'the powers of external sovereignty do not depend upon the affirmative grants of the Constitution' and endorsed the existence of the 'very delicate plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress.'"

<sup>34</sup> *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936).

<sup>35</sup> National War Powers Commission, *National War Powers Commission Report*, appendix 5, page 5.

<sup>36</sup> Lehman, *Making War: The 200 Year-Old Battle Between the President and Congress over How America Goes to War*, 64.

<sup>37</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 636, note 2 (1952).

<sup>38</sup> Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 6. However, not all emergencies justify unilateral executive action. In *Youngstown*, President Truman attempted to improperly nationalize the steel industry during the Korean War. Justice Douglas wrote, "There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised." *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 629 (Douglas, J. concurring, 1952).

<sup>39</sup> Thomas Jefferson wrote, "The transaction of business with foreign nations is executive altogether." *The Papers of Thomas Jefferson*, ed. Boyd, vol. 6 (Princeton, NJ: Princeton University Press 1961), 378-79. Robert Bork explains, "The need for Presidents to have the power [to use force abroad without congressional approval], particularly in the modern age, should be obvious to almost everyone." Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 5, citing Robert H. Bork, "Erosion of the President's Power in Foreign Affairs," *Wash. U. L. Q.* 68 (1990): 693, 698.

<sup>40</sup> Caspar W. Weinberger, "Dangerous Constraints on the President's War Powers," in *The Fettered Presidency: Legal Constraints on the Executive Branch* ed. L. Gordon Crovitz & Jeremy A. Rabkin (Washington DC: American Enterprise Institute 1989) 97.

<sup>41</sup> Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, 47-80. Alexander Hamilton wrote, "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. . . . In the legislature, promptitude of decision is oftener an evil than a benefit." Alexander Hamilton, "The Federalist No. 70, The Executive Department Further Considered," March 18, 1788, [http://avalon.law.yale.edu/18th\\_century/fed70.asp](http://avalon.law.yale.edu/18th_century/fed70.asp) (accessed November 11, 2008). Contrast this however with Hamilton's Federalist No. 69, written just four days earlier where Hamilton explains that the President is nothing more than the "First General" or "Admiral" and that unlike the King, he has no power to declare war, raise or regulate fleets and armies. Alexander Hamilton, "The Federalist No. 69, The Real Character of the Executive," March 14, 1788, [http://avalon.law.yale.edu/18th\\_century/fed69.asp](http://avalon.law.yale.edu/18th_century/fed69.asp) (accessed November 11, 2008).

<sup>42</sup> Robert H. Bork, "Forward" in *The Fettered Presidency: Legal Constraints on the Executive Branch* ed. L. Gordon Crovitz & Jeremy A. Rabkin (Washington DC: American Enterprise Institute 1989).

<sup>43</sup> Westerfield, *War Powers: The President, the Congress, and the Question of War*, 18-19; John Norton Moore, Frederick S. Tipson and Robert F. Turner, *National Security Law* (Durham, NC: Carolina Academic Press 1990), 817.

<sup>44</sup> Westerfield, *War Powers: The President, the Congress, and the Question of War*, 18-19; Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, 68-69.

<sup>45</sup> Dycus, Berney, Banks and Raven-Hansen, *National Security Law* 2<sup>nd</sup> ed., 22.

<sup>46</sup> Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, 144.

<sup>47</sup> John Yoo, "War and the Constitutional Text," *U. Chi. L. Rev.* 69, (2002): 1639, 1670.

<sup>48</sup> *Ibid.*, 1671.

<sup>49</sup> Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*: The University of Chicago Press 2005), 33, 42. A declaration of war served two purposes. First, it notified the enemy that a state of war existed. It made it clear that future hostilities were sanctioned by the government, and were not a criminal or private affair and so that the citizens of the other state could be attacked. Secondly, a declaration served to inform citizens of the declaring state that their legal status had been altered. It was necessary for a nation to warn its own citizens of their new relationship with their own state and the other hostile party. A declaration merely perfected or made "completely effectual" the hostilities between two or more parties.

<sup>50</sup> *Ibid.*

<sup>51</sup> Turner, *The War Powers Resolution: Its Implementation in Theory and Practice*, 21; Mark R. Shulman, "The Legality and Constitutionality of the President's Authority to Initiate an Invasion of Iraq," in *The Imperial Presidency and the Consequences of 9/11*, eds. James R. Silkenat & Mark R. Shulman (Westport, CT: Prager Security International 2007), 44, 47. Dean Shulman argues that President Bush could not claim that he was repelling an attack or anything like it and so this was not a defensive war and President Bush therefore needed a declaration of war by Congress to send troops to Iraq.

<sup>52</sup> J. Hamilton ed., *Works of Alexander Hamilton* (1851), 746-47, quoted in "Congress, the President, and the Power to Commit Forces to Combat," in 1779. Alexander Hamilton explained, "But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress in nugatory; it is at least unnecessary." Some have argued that a post-UN Charter declaration of war may be illegal under international law because offensive war is aggression. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, 85-92.

<sup>53</sup> *Ibid.*, art. 1, sec. 10, cl. 3.

<sup>54</sup> National War Powers Commission, appendix 4, page 5.

<sup>55</sup> U.S. Constitution, art. III, sec. 1.

<sup>56</sup> *Ibid.*, art. III, sec. 2.

<sup>57</sup> Proposed War Powers Resolution Act of 2009, Preamble, printed in National War Powers Commission, *National War Powers Commission Report*, appendix 8, page 2.

<sup>58</sup> See generally, *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

<sup>59</sup> National War Powers Commission, *National War Powers Commission Report*, 12.

<sup>60</sup> U.S. Constitution, art. I, sec. 8, cl. 12.

<sup>61</sup> *Ibid.*, art. I, sec. 9, cl. 7.

<sup>62</sup> *Ibid.*, art. II, sec. 2, cl. 1.

<sup>63</sup> *Ibid.*, art. II, sec. 2, cl. 2.

<sup>64</sup> Dycus, Berney, Banks and Raven-Hansen, *National Security Law* 2<sup>nd</sup> ed., 29.

<sup>65</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 596 (Frankfurter, J. concurring, 1952), quoting *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579. Justice Frankfurter wrote, "The pole-star for constitutional adjudications is John Marshall's greatest judicial utterance that 'it is a constitution we are expounding.'" Justice Frankfurter explained that:

. . . a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . making as it were such an exercise of power part of the structure of government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.

*Ibid.*, 610-611.

<sup>66</sup> Lehman, *Making War: The 200 Year-Old Battle Between the President and Congress over How America Goes to War*, 58; Raven-Hansen, "Constitutional Constraints: The War Clause," 29; Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," 177. The five declarations of war include the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, World War I and World War II.

<sup>67</sup> U.S. Constitution, art. I, sec. 8, cl. 11.

<sup>68</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 643, n. 10 (Jackson, J. concurring, 1952).

<sup>69</sup> Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," 175 citing Act of May 28, 1798, ch. 48, 1 Stat. 561 (France); Southeast Asia (Tonkin Gulf) Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (Vietnam); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) (Persian Gulf).

<sup>70</sup> Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," 177.

<sup>71</sup> National War Powers Commission, *National War Powers Commission Report*, appendix 4, page 5; Raven-Hansen, "Constitutional Constraints: The War Clause," 45.

The Korean War is often cited as an example of where the President committed US forces in a significant armed conflict without congressional authority. President Truman argued that as the chief Executive, he was merely enforcing the UN Charter, a treaty entered into with the consent of Congress. He believed he had the congressional consent required. However, a treaty only requires the participation of the Senate, whereas a declaration of war would also require the consent of the House. See generally, Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," 177; Jane E. Stromseth, "Treaty Constraints: The United Nations Charter and War Powers" in *The United States Constitution and the Power to Go to War*, ed. Gary M. Stern and Morton H. Halperin (Westport, CT: Greenwood Press 1994), 85; and Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 10 citing Hearings on Assignment of Ground Forces of the U.S. to Duty in the European Area before the Senate Comms. On Foreign Relations and Armed Services, 82<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 88-93 (1951) (testimony of Secretary Acheson).

<sup>72</sup> Raven-Hansen, "Constitutional Constraints: The War Clause," 45.

<sup>73</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). While *Youngstown* is a widely cited case in the area of shared powers, some have argued that in reality, it is not a foreign affairs case but instead a case involving the domestic seizure of private property under the due process clause of the Fifth Amendment. For example, see Moore, Tipson and Turner, *National Security Law*, 773. However, there is no disputing the fact that the Court analyzed the President's Commander in Chief and executive powers in relation to congressional legislative power in the context of the Korean War.

<sup>74</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585-589 (1952).

<sup>75</sup> *Ibid.*, 635 (Jackson, J. concurring, 1952).

<sup>76</sup> *Ibid.*, 637.

<sup>77</sup> *Ibid.*

<sup>78</sup> National War Powers Commission, *National War Powers Commission Report*, 32.

<sup>79</sup> *Ibid.*

<sup>80</sup> Proposed War Powers Resolution Act of 2009, Preamble, printed in National War Powers Commission, *National War Powers Commission Report*, appendix 8, page 2.

<sup>81</sup> *Ibid.*

<sup>82</sup> Clausewitz, *On War*, 89.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, 607. Clausewitz is arguably the military strategist who most clearly understood and articulated the nexus between policy and war. Bernard Brodie, *War & Politics* (New York, NY: MacMillan Publishing Co., INC. 1973), 438, 441.

Clausewitz wrote:

We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. . . . The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.

Clausewitz, *On War*, 87. See also, Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York, NY: Columbia University Press 1995), 184. Hedley Bull argues that war is “organised violence carried on by political units against each other.”

<sup>86</sup> Basil Henry Liddell Hart, *Strategy*, 2<sup>nd</sup> ed. (New York, NY: Penguin Books 1967), 338; Brodie, *War & Politics* 3), 38. Brodie explains that fighting for a political purpose does not always mean fighting to win the military sense.

<sup>87</sup> Colin S. Gray, *Modern Strategy* (New York, NY: Oxford University Press 1999), 17.

<sup>88</sup> *Ibid.*, 55.

<sup>89</sup> *Ibid.*, 29.

<sup>90</sup> Clausewitz, *On War*, 92.

<sup>91</sup> Gray, *Modern Strategy*, 1. Gray explains, “Poor strategy is expensive, bad strategy can be lethal, which when the stakes include survival, very bad strategy is almost always fatal.”

<sup>92</sup> Clausewitz, *On War*, 81. Clausewitz writes, “The political object – the original motive for war – will thus determine both the military objective to be reached and the amount of effort it requires.”

<sup>93</sup> Edward N. Luttwak, *Strategy: The Logic of War and Peace*, rev. ed. (Cambridge, MA: The Belknap Press of Harvard University Press 2001), 221.

<sup>94</sup> *The War Powers Resolution of 1973*, Public Law 93-148, 93<sup>rd</sup> Cong., (November 7, 1973), sec. 1-10.

<sup>95</sup> *Ibid.*, sec. 2(a).

<sup>96</sup> *Ibid.*, sec. 2(c).

<sup>97</sup> Congressional Research Service, *The War Powers Resolution: After 34 Years*, 8, citing U.S. Congress, House Committee on International Relations, *War Powers: A Test of Compliance relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident*. Hearings, May 7 and June 4, 1975. Washington, U.S. Gov’t Printing Off., 1975 p. 69.

<sup>98</sup> National War Powers Commission, *National War Powers Commission Report*, 21.

<sup>99</sup> *Ibid.*

<sup>100</sup> *The War Powers Resolution of 1973*, sec. 2(c).

<sup>101</sup> *Ibid.*, sec. 3.

<sup>102</sup> National War Powers Commission, *National War Powers Commission Report*, 23.

<sup>103</sup> *The War Powers Resolution of 1973*, sec. 4.

<sup>104</sup> *Ibid.*, sec. 5. See generally, National War Powers Commission, *National War Powers Commission Report*, 24.

<sup>105</sup> National War Powers Commission, *National War Powers Commission Report*, 24. Presidents have reported to Congress approximately 115 times. However, they have not reported entirely consistent with the requirements of the War Powers Resolution. In only one instance, the *Mayaguez* situation, has a President stated that the forces were being introduced into hostilities or imminent hostilities as required by Section 4(c). Congressional Research Service, *The War Powers Resolution: After 34 Years*, summary page.

<sup>106</sup> *The War Powers Resolution of 1973*, sec. 5(c).

<sup>107</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>108</sup> National War Powers Commission, *National War Powers Commission Report*, 21, citing *INS v. Chadha*, 462 U.S. 919 (1983). Unlike a statute which requires the approval of both houses of Congress, a concurrent resolution only requires the vote of one house of Congress.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, 18, 19.

<sup>111</sup> Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, 129.

<sup>112</sup> *Ibid.*, 140.

<sup>113</sup> *Ibid.*, 145-46.

<sup>114</sup> *The War Powers Resolution of 1973*, sec. 2(c).

<sup>115</sup> Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, 139. See also, Congressional Research Service, *The War Powers Resolution: After 34 Year*, 12-17.

<sup>116</sup> Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, 139. See also, Congressional Research Service, *The War Powers Resolution: After 34 Year*, 12-17.

<sup>117</sup> Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, 147.

<sup>118</sup> *Ibid.*, 148-49.

<sup>119</sup> *The War Powers Resolution of 1973*, sec. 8(a)(2).

<sup>120</sup> National War Powers Commission, *National War Powers Commission Report*, 30.

<sup>121</sup> Proposed War Powers Resolution Act of 2009, Section 1, printed in National War Powers Commission, *National War Powers Commission Report*, appendix 8, page 2.

<sup>122</sup> *Ibid.*, sec. 2.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, sec. 3(A).

<sup>125</sup> National War Powers Commission, *National War Powers Commission Report*, 36.

<sup>126</sup> *Ibid.*

<sup>127</sup> Proposed War Powers Resolution Act of 2009, sec. 3(B)(i).

<sup>128</sup> *Ibid.*, sec. 3(B)(ii).

<sup>129</sup> *Ibid.*, sec. 3(B)(iii).

<sup>130</sup> *Ibid.*, sec. 3(B)(iv).

<sup>131</sup> *Ibid.*, sec. 3(B)(v).

<sup>132</sup> *Ibid.*, sec. 3(B)(vi).

<sup>133</sup> *Ibid.*, sec. 3(B)(vii).

<sup>134</sup> *Ibid.*, sec. 3(C). The statute creates a “Joint Consultation Committee” which consists of the Speaker of the House and the Majority Leader of the Senate, the Minority Leaders of the House and Senate, the Chair and Ranking Minority Members of the House Committees on Foreign Affairs, Armed Services, Appropriations, and Intelligence, and the Chair and ranking Member of the Senate Committees on Foreign Relations, Armed Services, Appropriations, and Intelligence.

In order to “consult,” the President “shall provide an opportunity for the timely exchange of views regarding whether to engage in the significant armed conflict, and not merely notify the Joint Consultation Committee that significant armed conflict is about to be initiated.”

<sup>135</sup> *Ibid.*, sec. 4(B).

<sup>136</sup> *Ibid.*, sec. 4(C).

<sup>137</sup> *Ibid.*, sec. 4(A).

<sup>138</sup> *Ibid.*, sec. 4(F).

<sup>139</sup> *Ibid.*, sec. 4(D).

<sup>140</sup> *Ibid.*

<sup>141</sup> Ibid., sec. 4(E).

<sup>142</sup> Ibid., sec. 4(G).

<sup>143</sup> National War Powers Commission, *National War Powers Commission Report*, 39.

<sup>144</sup> Proposed War Powers Resolution Act of 2009, Section 5(A), printed in National War Powers Commission, *National War Powers Commission Report*, appendix 8, page 4.

<sup>145</sup> Ibid., Section 5(C).

<sup>146</sup> Ibid.

<sup>147</sup> National War Powers Commission, *National War Powers Commission Report*, 41.

<sup>148</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 633 (Douglas, J. concurring, 1952). As Justice Douglas explains, “Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers.”

<sup>149</sup> Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 3.

<sup>150</sup> *Myers v. United States*, 272 U.S. 52, 293 (1926). The Supreme Court wrote:

The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

<sup>151</sup> Dycus, Berney, Banks and Raven-Hansen, *National Security Law* 2<sup>nd</sup> ed., 49.

<sup>152</sup> J General Alexander Haig testified at his confirmation hearing for Secretary of State, “Heaven help us as a nation if we once again indulge in the expenditure of precious American blood without a clear demonstration of popular support for it. I think the legislature is the best manifestation of popular support.” Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 5, citing Hearings before the Senate Comm. on Foreign Relations, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 39 (1981).

<sup>153</sup> Harry G. Summers, Jr., *On Strategy: A Critical Analysis of the Vietnam War* (Novato, CA: Presidio Press 1982), 14, 16, 17, 19.

<sup>154</sup> Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 3.

<sup>155</sup> Ibid., 5.

<sup>156</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

