

# A FUNCTIONAL DISTRIBUTION OF WAR POWERS

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## INTRODUCTION

Whether the President or Congress has the power to initiate the deployment of military troops remains a debated and unsettled area of constitutional law. Presidents have long insisted that they could initiate military conflicts without congressional approval while Congress has consistently responded to the contrary.<sup>1</sup> Congress attempted to

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1. Perhaps no man better encapsulates this dichotomy than Abraham Lincoln as [w]hen Lincoln was a Congressman, . . . he and some of his colleagues criticized President James Polk for his unilaterally beginning the Mexican-American War. Later, as President, Lincoln faced similar challenges—and was also the subject of impeachment threats—for his

resolve this controversy after the public response to Vietnam by passing the War Powers Resolution of 1973 (WPR),<sup>2</sup> but this has done little to slow the debate. While the WPR was supposed to impose a limit on what the President could do unilaterally, Congress has never enforced it.<sup>3</sup>

Thus, instead of resolving the debate, the WPR has been criticized by scholars as being everything from ineffective to unconstitutional.<sup>4</sup> Despite the pleas by numerous academics<sup>5</sup> and Congressmen,<sup>6</sup> no amendment to the WPR has ever passed and no alternate statute has been enacted to replace it. The most recent suggestion to garner significant public attention in this area was undertaken by the Miller Center's National War Powers Commission.<sup>7</sup> The Commission, chaired by former Secretaries of State James A. Baker and Warren Christopher, proposed a new statute called the War Powers Consultation Act of 2009 (WPCA),<sup>8</sup> which they hoped would be both politically viable and constitutionally sound.<sup>9</sup> The statute would enhance the degree to which the President consults with Congress before engaging in military operations,<sup>10</sup> but would not require congressional authorization for war.<sup>11</sup> While a noticeable improvement,

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conduct of the Civil War, especially for his unilateral actions in the early days of the war and for his alleged violations of civil liberties.

NAT'L WAR POWERS CMM'N, MILLER CTR. OF PUB. AFFAIRS, NAT'L WAR POWERS CMM'N REPORT 15 (2008), <http://millercenter.org/policy/commissions/warpowers/report> [hereinafter WAR POWERS COMMISSION REPORT].

2. See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541 (2006)).

3. Philip Bobbit, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364 (1994) (book review) ("No president has ever agreed to comply with [the WPR], and no Congress has ever taken steps to enforce it."); see WAR POWERS COMMISSION REPORT, *supra* note 1, at 7. ("[N]o President in the past 35 years has filed a report 'pursuant' to [the resolution's] triggering provisions.")

4. See WAR POWERS COMMISSION REPORT, *supra* note 1, at 6.

5. See, e.g., Charles L. Black, Jr., *The Year of Pride and Shame*, 67 B.U. L. REV. 783, 792 (1987); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); The George Washington University Law School War Powers Project, *Legislative Reforms*, 2 J. NAT'L SECURITY L. 157 (1998).

6. See, e.g., War Powers Resolution Amendments of 1988, S.J. Res. 323, 100th Cong. (1988); Consultation Act of 1993, H.R. 3405, 103rd Cong. (1993); H.R.J. Res. 53, 110th Cong. (2007).

7. WAR POWERS COMMISSION REPORT, *supra* note 1.

8. *Id.*

9. See *id.* at 7-8 (guiding principles of the War Powers Commission).

10. See *id.* at 8.

11. See *id.* at 37 ("The President need not obtain the consent of Congress to order such a deployment, but consultation is required.")

this attempt to alter the war powers distribution still fails to effectively empower Congress in this arena.<sup>12</sup>

Part I of this Note summarizes the relevant text of the Constitution. It analyzes the traditional Congress-First and President-First theories of constitutional interpretation advocated by originalists and concludes that an originalist approach cannot adequately settle this debate. Part II argues that a functionalist analysis is better suited to resolving this dispute and analyzes the functionalist arguments for both the President-First and Congress-First approaches. This section concludes that the Congress-First approach is more desirable because it would likely produce a world with fewer wars, greater checks on Presidential power, and more deliberative decision making. In Part III, the WPR is evaluated via the functionalist approach and is determined to be inadequate as it vests too much power in the executive branch and allows Congress to easily avoid responsibility. The WPCA is then evaluated in the same way and this Note determines that, while an improvement, it remains an insufficient solution. Part IV proposes an alternate solution, amending the WPCA, which better meets the functional analysis presented earlier, while maintaining its constitutionality. Appended to the end of this Note is the full text of this proposed solution.

## I.

### THE CONSTITUTION AND THE ORIGINALIST APPROACH

This first section begins with a summary of the relevant provisions in the Constitution. Once the relevant text is understood, a summary of the two dominant interpretations will be presented. While either interpretation is plausible, the originalist debate is at a standstill as both sides search for new historical evidence to prove their points. Both the Congress-First and President-First advocates view the historical record as clear and see little room for compromise.<sup>13</sup>

#### A. *The Constitution*

The Constitution explicitly grants some war powers to the legislative branch of government and some to the executive branch. Article I gives Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land

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12. See *infra* Part III.B.

13. WAR POWERS COMMISSION REPORT, *supra* note 1, at 12 (“Advocates 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.”).

and Water.”<sup>14</sup> Beyond that, Congress is authorized to “raise and support Armies,”<sup>15</sup> to “provide and maintain a Navy,”<sup>16</sup> to “make Rules for the Government and Regulation of the land and naval Forces,”<sup>17</sup> to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”<sup>18</sup> and, finally, to “provide for organizing, arming, and disciplining, the Militia.”<sup>19</sup> At the same time, Article II states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”<sup>20</sup>

The Constitution’s language has been open to multiple interpretations throughout the history of the United States. Most commonly, academics have tried to find meaning in the text through the prism of originalist ideology. Originalists “assert[ ] the existence of an objective, discoverable, fixed constitutional meaning capable of directing judicial decision-making in a value-neutral manner.”<sup>21</sup> Furthermore, “originalism made an enticing promise—a way to ensure that judges do not subvert democracy and the rule of law by reading their personal values into the Constitution.”<sup>22</sup> Originalists like Justice Antonin Scalia believe the courts should strive to base rulings not on what the drafters of the Constitution intended but on the original meaning of the text.<sup>23</sup> While this arguably should produce a single result, the application of this theory is extremely difficult.<sup>24</sup>

Indeed, an examination of war powers has led to the development of two diametrically opposed ways of understanding the distribution of powers, which this Note will call Congress-First and President-First. The President-First viewpoint contends that “the framers wanted to put the authority for making war in the hands of the government official who has the most information and the best ability to

14. U.S. CONST. art. I, § 8, cl. 11.

15. *Id.* cl. 12.

16. *Id.* cl. 13.

17. *Id.* cl. 14.

18. *Id.* cl. 15.

19. *Id.* cl. 16.

20. *Id.* art. II, § 2, cl. 1.

21. Thomas B. Colby, *The Federal Marriage and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 530 (2008).

22. *Id.*

23. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY 3, 38 (Amy Gutmann, ed., 1997).

24. Antonin Scalia, *Originalism: The Lesser Evil*, William Howard Taft Constitutional Law Lecture (Sept. 16, 1988) in 57 U. CIN. L. REV. 849, 856 (1989).

execute—the President.”<sup>25</sup> Alternatively, the Congress-First approach argues, “by vesting Congress with the power to declare war, the framers stripped the Executive of the powers the English king enjoyed.”<sup>26</sup>

### B. *President-First: The Executive Acting Alone*

President-First advocates argue that the War Powers Clause<sup>27</sup> 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.<sup>28</sup> In essence, “the power to declare war is a quasi-judicial power: Congress determines whether to make a legal declaration that a state of war exists.”<sup>29</sup> Instead of initiating hostilities, the declaration merely classifies them. This distinction is critical because declarations of war rarely occur. In fact, Congress has declared war only five times,<sup>30</sup> while the U.S. has deployed or maintained troops in hostilities abroad at least 125 times.<sup>31</sup> Congress has instead chosen to pass statutes and resolutions authorizing military operations in some cases,<sup>32</sup> while remaining silent in others.<sup>33</sup> Indeed, while congressional authorization occurs frequently, pro-Executive academics argue that the President seeks it voluntarily and that congressional silence before committing the country to military campaigns is perfectly acceptable, as Congress can only declare that a state of war exists and nothing more.<sup>34</sup>

25. WAR POWERS COMMISSION REPORT, *supra* note 1, at 13.

26. *Id.* at 12.

27. U.S. CONST. art. I, § 8, cl. 11.

28. See Eugene V. Rostow, *Once More unto the Breach: The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 5–7 (1986).

29. William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 708 (1997).

30. Those instances would be the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. See BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* 169 (1998).

31. See Leonard C. Meeker, Legal Adviser of the Department of State, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484 (1966), *reprinted in* 75 YALE L.J. 1085, 1101 (1966); Congressional Research Service, *Instances of Use of United States Armed Forces Abroad, 1798–2008* (Richard F. Grimmett ed., Feb. 2, 2009).

32. See *e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

33. During the Korean War “congressional authorization in the form of a resolution or declaration of war was not sought.” See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 178 (1996).

34. See WAR POWERS COMMISSION REPORT, *supra* note 1, at 13.

To reinforce this pro-Executive ideology, scholars argue that “[t]he pattern of constitutional practice, however, has been fairly clear cut in recognizing a distinct executive power to act in the field of foreign affairs.”<sup>35</sup> Indeed, both Jefferson’s decision to send the Navy to the Mediterranean<sup>36</sup> and Lincoln’s actions at the outset of the Civil War<sup>37</sup> reflect a tradition of unilateral Executive action regarding the use of force. Therefore, it is argued, the practices of congresses and executives over the last two centuries reinforce this traditional understanding of separation of powers and, even if inaccurate, create a gloss which must be maintained.<sup>38</sup> Ultimately, these scholars argue that the framers’ intent was to grant authority to the Executive, since he is “the government official who has the most information and the best ability to execute.”<sup>39</sup>

### C. Congress-First: A Powerful and Involved Congress

However, many others view the President-First approach as an incorrect interpretation of the Constitution; instead, they claim that the original understanding of the Constitution was for Congress to act

35. Eugene V. Rostow, Panel Remarks at the Symposium on Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts (Nov. 6–7, 1987), in *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 194 (1988).

36. In 1801, “President Jefferson, pursuant to his article II powers and without consulting, much less obtaining the approval of, Congress, sent American military forces half way around the world with explicit orders to engage in hostilities [with Barbary pirates] if necessary. Not only did Jefferson take this initiative on his own authority, he did not even inform Congress of the episode until six month later.” Charles J. Cooper, Panel Remarks at the Symposium on Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts (Nov. 6–7, 1987), in *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 177 (1988).

37. For a discussion of Lincoln’s decision to suspend the writ of habeas corpus see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 11–25 (1998); see also MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 7–9 (1991). See generally Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213 (1998) (discussing Lincoln’s theory of military necessity).

38. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

39. WAR POWERS COMMISSION REPORT, *supra* note 1, at 13; see also THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”).

before the Executive. They argue that the President must seek the consent of the Senate and House before engaging troops in combat.<sup>40</sup>

This debate has produced different interpretations of the language of the Constitution. Those advocating for a larger congressional role advocate for terms to have broader definitions. This reading of the Constitution begins by looking at the definition of “declare.” Professor Charles Lofgren argues that the Constitution grants the word a broad meaning beyond the traditional definition because that is what people understood it to mean at the time.<sup>41</sup> When this clause is read with the phrase “Letters of Marque and Reprisal,”<sup>42</sup> it implies that Congress has the power to initiate all conflicts other than sudden attacks.<sup>43</sup>

Comments made by the founders reinforce this interpretation. Thomas Jefferson wrote that “[w]e 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.”<sup>44</sup> This sentiment was also present in the writings of James Madison,<sup>45</sup> Alexander Hamilton,<sup>46</sup> James Wilson,<sup>47</sup> and John Marshall,<sup>48</sup> among others.

Other Congress-First scholars argue that the Constitution’s text and the Framers’ comments should be understood in light of the eighteenth-century definition of declaring war.<sup>49</sup> As Professor Ramsey argues, “declaring war was not limited to formal declarations . . . [but]

40. See, e.g., John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1386 (1988).

41. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 699–701 (1972).

42. U.S. CONST. art. I, § 8, cl. 11.

43. See Lofgren, *supra* note 41, at 695–97; see also Treanor, *supra* note 29, at 709.

44. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *The Papers of Thomas Jefferson* 392, 397 (Julian P. Boyd ed., 1958).

45. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798) in 6 *The Writings of James Madison* 311, 312 (Gaillard Hunt, ed., 1906) (“[T]he 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 in the Legislature.”).

46. “[T]he Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility. . . .” Letters of Pacificus No 1, in 4 *The Works of Alexander Hamilton* 432, 443 (Henry Cabot Lodge, ed., 1904).

47. “This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men to involve us in such distress; for the important power of declaring war is vested in the legislature at large. . . .” Jonathan Elliot, 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528 (2d ed. 1836).

48. “[T]he whole powers of war being, by the constitution of the United States, vested in congress. . . .” *Talbot v. Seeman*, 5 US (1 Cranch) 1, 28 (1801) (Marshall, C.J.).

49. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1545 (2002).

meant initiating a state of war by a public act, and it was understood that this could be done either by a formal declaration *or* by commencing armed hostilities.”<sup>50</sup> This is not a new theory, as eighteenth century Swiss philosopher and diplomat Emmerich de Vattel long ago stated that “when one nation takes up arms against another, she from that moment declares herself an enemy to all the individuals of the latter.”<sup>51</sup> Thus, these notions all broaden the meaning of “declare” beyond a formal declaration, and to instead mean that Congress alone had the capability to commence a war. Given that the Constitution unequivocally gives Congress the authority to declare war, the definition of the word declare is critical. Therefore, all wars have to be “legislatively authorized,” even if no formal declaration of war is enacted by Congress. Yet even this more expansive definition leaves the status of military incursions, like targeted missile strikes, unclear.

#### D. *The Originalists at a Standstill*

Because “[n]either wars nor revolutions are conducted in as clear-cut or mannerly a fashion as they once were,”<sup>52</sup> this debate has become more prevalent. Yet the originalist debate discussed above shows that the history of congressional authorization for war is far more complicated than history books would suggest. While the Founders’ meaning and the historical meaning has become a common analytic tool used by the court today,<sup>53</sup> the historical record is so rife with controversy that this analysis has not produced a coherent conclusion. This has become so apparent that even those partaking in this discussion have concluded that both sides are entrenched<sup>54</sup> and that the historical evidence remains ambiguous.<sup>55</sup> It appears that the legal academic world has been caught in a common error, “engag[ing] in the practice of selectively using sources to support their desired results, of refusing to acknowledge contrary evidence, and generally of ignoring context and the work of historians.”<sup>56</sup> This mistake leads advocates on both sides to see clarity where none exists.<sup>57</sup>

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50. *Id.*

51. EMMERICH DE VATTEL, *THE LAW OF NATIONS* 399 (Joseph Chitty ed., 1863).

52. *Quinn v. Robinson*, 783 F.2d 776, 804 (9th Cir. 1986).

53. *See, e.g., District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

54. Treanor, *supra* note 29, at 698.

55. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 111 (1984).

56. John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1169 (1999).

57. *Id.* at 1171. *See, e.g.,* Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 625 (2008) (“The failings of plain-meaning originalism are particularly egregious in this regard. Plain-

Not only does originalism produce an opaque answer, it is also not the ideal method for fulfilling the legislature's responsibility of passing effective legislation. Originalism is the search for the correct interpretation as a limitation on Congress or the Executive, but Congress should be striving for more than what the Constitution says. Because the distribution of war powers is unclear, and it is difficult to determine the true constitutional division, Congress should instead be attempting to legislate the most effective and efficient war powers distribution. Some argue the Supreme Court should determine the constitutional interpretation, but the Court has cautiously resisted ruling on separation of powers issues when foreign affairs are involved.<sup>58</sup> This may be the case because the Court fears non-compliance and a loss of institutional legitimacy,<sup>59</sup> or because of its traditional adherence to the political question doctrine.<sup>60</sup> If the Court does not wish to clarify the distribution of war powers, the legislature will do so on its own terms without a judicial check. When this occurs, there will be no check on congressional action, meaning Congress will be able to pass any law that does not openly threaten the Court.

Perhaps the legislature is the best forum for holding the debate. Unlike the Court, which arguably must ask what the Framers intended, members of the legislature may and should ask themselves "[w]hat war powers system would enhance the effectiveness of the United States in making decisions about war and peace"<sup>61</sup> when formulating war powers legislation. The Constitution will still serve as a check on congressional action, so that Congress can focus on creating the most effective war powers system, knowing the Court will monitor congressional overreaching. But the Court will be apt to defer to congressional interpretation where the Constitution is vague and where the issue is so politically charged, allowing Congress some latitude in

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meaning originalists continue to cherry pick quotes and present this amateurish research as systematic historical inquiry. In this method there is no serious attention to establishing the relative influence of particular texts. Indeed, all texts are created equal in this bizarre anti-method. The version of reality conjured up by originalists is a caricature of the history it purports to represent.") (footnote omitted). While Professor Yoo notes this error, he too makes this same mistake by arguing that "careful attention to the historical sources suggests that the Framers did not have a fixed vision of the correct method to begin war." Yoo, *supra* note 56, at 1171.

58. See Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1060 (2006).

59. See *id.*

60. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying six situations in which a non-justiciable political question exists).

61. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2515 (2006).

crafting a war powers system.<sup>62</sup> Answering that question will lead to greater efficiency, rather than greater historical fidelity. The next section will examine such an approach.

## II.

### A FUNCTIONALIST APPROACH: A NEW WAY TO ANSWER AN AGE OLD QUESTION

As explained in the previous section, originalism has taken the war powers debate as far as it can go, and it is time to answer this question by an alternative means. Functionalism is a “doctrine or practice that emphasizes practical utility”<sup>63</sup> and is therefore useful in determining what distribution of war powers would be socially optimal.<sup>64</sup> The ideal distribution of war powers would be a system in which the United States does not enter “bad” wars (what are called Type I errors or False Positives) while still engaging in “good” wars (avoiding what are called Type II errors or False Negatives).<sup>65</sup> The goal then would be to enter all good wars and avoid all of the bad wars. Some would argue that this utilitarian view of war is too limited. However, since a utilitarian view of war can include such factors as moral imperatives, the analysis is more complete, if also more diffi-

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62. The political question doctrine has evolved over the years. Since the Korean War,

courts have begun to openly question the President’s authority to unilaterally deploy troops. For example, during the Vietnam War, Supreme Court Justice Thurgood Marshall stated that if he decided the issue, he “might well [have] conclude[d] on the merits that continued American military operations in Cambodia [were] unconstitutional.” Nevertheless, while not expressly expanding the President’s war power, the courts during this time period have chosen not to influence the balance of war power by relying on two rationales. First, the courts have declined jurisdiction under the political question doctrine which suggests that war power issues should be resolved solely between Congress and the President.

Timothy D. A. O’Hara, *Without Justification: Misplaced Reliance on United Nations Security Council Resolutions for Presidential War Making*, 31 J. MARSHALL L. REV. 583, 599 (1998) (alteration to original) (internal citations omitted).

63. Webster’s Third New International Dictionary of the English Language Unabridged 921 (3d. 1993).

64. See Nzelibe & Yoo, *supra* note 61, at 2515.

65. See *id.* at 2517–18. A good war is one in which the benefits outweigh the costs, while bad wars are ones in which the costs are greater than the benefits. See *id.*; see also ALAN AGRETI & BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 175–77 (1997) (discussing the differences between Type I and Type II errors). Obviously, accurate valuation of wars is a complex task and is far from precise; however, avoiding both of these types of errors is exactly what governments attempt to do.

cult to calculate. Professors Jide Nzelibe and John Yoo,<sup>66</sup> who first applied this analysis to the war powers arena, fail to identify what criteria should be used to evaluate wars and do not mention examples of either good wars or bad wars.<sup>67</sup> Most would consider the United States' delay in entering World War II to be a Type II error, as most consider the fight against fascism in Europe a "good" war in the sense that the physical and human capital lost was worth the significant human gains from defeating the Nazis. Yet, the U.S. Congress effectively stopped President Roosevelt from joining the war effort. With regards to Type I errors, the most famous example is Vietnam. The costs of waging that war were drastic and there were very few benefits from the combat.

The goal, then, is to use the functionalist approach to determine whether more Type I and Type II errors occur under a President-First or a Congress-First approach.<sup>68</sup> However, the analysis is not clear-cut and most likely depends upon the type of military action being deployed. First, Section A will analyze whether a President-First or Congress-First approach is more effective when dealing with traditional warfare. This section will conclude that it does not matter what nation the Executive is dealing with, consulting with Congress is always valuable. Section B performs the same analysis for situations that do not resemble traditional wars, such as limited police action or repelling attacks. This section concludes that while there are certain scenarios in which President-First is apt, most situations are better evaluated and resolved under a Congress-First approach. Finally, in

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66. John Yoo has recently become a very controversial legal, political, and academic figure. See e.g., Dan Eggan, *Bush Policy Authors Defend Their Actions*, WASH. POST (June 27, 2008) (reporting on John Yoo's testimony before a House Judiciary Subcommittee regarding the Bush administration's policy toward detainees). Furthermore, there have been insinuations that Yoo's analysis is far from impartial. However, few have been willing to engage in a full functional analysis on its face and he has begun to work with Nzelibe, a political scientist who has not been implicated in Yoo's more controversial work. While there are theoretically other structures for this analysis,

Nzelibe and Yoo do a fundamental service by bringing the political science literature to bear on normative questions of constitutional design. Scholars in the field of international relations have accumulated a vast body of knowledge on the theory and practice of war and peace which is too often ignored in the contentious 'politics by other means' of the legal academy.

Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT'L L. 1239, 1239-40 (2006). Indeed, much of the Congress-First analysis has been written as a response to their paper. E.g., *id.*

67. Nzelibe and Yoo, *supra* note 61.

68. See Nzelibe and Yoo, *supra* note 61, at 2518.

Section C it is considered whether terrorism has changed the way in which the U.S. government can or should function in terms of war power distribution. Ultimately, this section concludes that terrorists are not a unique paradigm and the distribution of war powers should be the same as it would be if the opponent were a nation state.

#### A. *Traditional Warfare*

A natural place to begin this analysis is with traditional warfare involving two nation-states. This is the most basic and, historically, the most common form of military engagement. Professors Nzelibe and Yoo, two leading President-First scholars, argue that the Executive is best equipped to deal with military actions with nation-states and that there is “little or no empirical data” supporting the opposing view.<sup>69</sup> They argue that defining the ideal separation of powers model requires a determination as to which branch is more effective at limiting the principal-agent problem.<sup>70</sup> The principle-agent problem exists because the President (the agent) has a different objective—reelection—than the public (the principal)—effective policy. This problem can be mitigated through strong oversight by the principal, but when the decisions are complicated or classified oversight becomes increasingly difficult. Nzelibe and Yoo propose three evaluative criteria through which to accomplish this analysis: domestic political accountability, domestic expertise, and effective international signaling.<sup>71</sup>

Nzelibe and Yoo begin with the premise that the President is held more accountable than Congress in matters of foreign affairs and national security.<sup>72</sup> The Executive will take “the lion’s share of the electoral consequences of victory or defeat in war.”<sup>73</sup> However, there is also the possibility that the benefits of delegating the power to initiate war to the Executive will be outweighed by a myriad of other agency costs,<sup>74</sup> such as the President’s catering only to the majority that elected him, lame duck status, thinking only about reelection, or seeking to expand executive power.<sup>75</sup> But Yoo and Nzelibe question whether the principal-agent problem would be any less strong with

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69. *Id.*

70. *Id.* at 2519. “In a democracy, the public is typically seen as the principal and the politicians the agents, whose job is to accomplish certain tasks on behalf of the public.” Diehl & Ginsburg, *supra* note 66, at 1244.

71. Nzelibe & Yoo, *supra* note 61, at 2519.

72. *Id.* at 2519–20.

73. *Id.* at 2520.

74. *Id.*

75. *Id.*

Congress acting as the agent.<sup>76</sup> Furthermore, even if stripped of the power to do anything more than to officially declare war, Congress would retain the power of the purse to constrain the President ex post.<sup>77</sup> Thus, in a functionalist approach the only justification for ex ante participation by Congress would be if “Presidents systematically misread the national interests,” and Nzelibe and Yoo think that there is no reason to believe that Congress is any better than the President at making this determination.<sup>78</sup>

Nzelibe and Yoo’s next argument for the President-First perspective is that, while “[i]n many circumstances, considering multiple perspectives can improve the quality of decision-making by elected officials,”<sup>79</sup> in war powers situations the consideration of multiple perspectives is less likely to be beneficial because of the “peculiar institutional deficits and disabilities”<sup>80</sup> of Congress. Indeed, the Executive can be the more effective principal, in part, because it has access to the full intelligence apparatus of the federal government and deeper knowledge of international relations.<sup>81</sup> The Executive receives information from a wide variety of sources, many of which are unavailable to Congress.<sup>82</sup> While Congress is capable of analyzing some of this information, the Executive branch has a far larger staff dealing with intelligence gathering.<sup>83</sup>

Next, Nzelibe and Yoo argue that legislative authorization is a costly way for government to signal its intent to wage war.<sup>84</sup> Swaying Congress in favor of war is a major undertaking that forces the President to expend extensive political capital and reveal information on both the justification for, and the plan of, attack.<sup>85</sup> Signaling escalation is risky because “the historical norm seems to have domestic audiences punishing or criticizing leaders more for escalating a confrontation [and] then backing down than for choosing not to escalate at

76. *See id.* at 2520–21.

77. *Id.* at 2521.

78. *Id.* at 2522.

79. *Id.*

80. *Id.*

81. *See id.* at 2523.

82. *Id.*

83. *Id.*; *see also* THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”).

84. *See Nzelibe & Yoo, supra* note 61, at 2530.

85. *Id.*

all.”<sup>86</sup> Alternately, Congress’s voice in support sends a signal to potential adversaries that the President’s threats are indeed serious. Given the cost of signaling government intent, Nzelibe and Yoo argue it should only be used against regime types that are likely to be swayed by it. For example, signaling works with other democracies because they understand the political ramifications that leaders are to experience if they back down in an international confrontation.<sup>87</sup> Conversely, “because rogue states and terrorist organizations face little or no political accountability for their foreign policy failures, they can afford to ignore their domestic audiences and take more aggressive stances in initiating international conflicts.”<sup>88</sup> Not only does congressional signaling fail to lead to successful bargaining with rogue states, it ignores the possibility that preemptive strikes may be the more effective method of dealing with this type of threat and may impact their effectiveness.<sup>89</sup>

Another risk associated with congressional authorization is that it could lead the executive to engage in wars that otherwise would be too politically risky. Specifically, congressional authorization diffuses the cost of military failure, acting as a form of insurance.<sup>90</sup> Given that legislators lose more by voting against winning wars than voting for losing wars,<sup>91</sup> Congress members are likely to defer to the President and approve most wars. In fact, “risk-averse members of Congress may actually prefer that the President go solo without consulting them because this gives them the flexibility to jump on the . . . bandwagon if things go well, or to sharpen their swords and distances themselves politically from the President if things go badly.”<sup>92</sup> This means that the Executive selectively uses congressional authorization in times when the wars pose the greatest risk because he feels confident that he will get political support and, at the same time, will share responsibility for any political failure. Therefore, the congressional authorization is insurance for the Executive’s political career, not the public.

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86. See James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 586 (1994) (“I have argued that states resolve this dilemma by ‘going public’—by taking actions such as troop mobilizations and public threats that focus the attention of the relevant political audiences and create costs that leaders would suffer if they backed down.”).

87. See Nzelibe & Yoo, *supra* note 61, at 2533.

88. *Id.*

89. See *id.* at 2534.

90. Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 910 (2007).

91. *Id.* at 911.

92. Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1014 (2006).

This notion is made worse since Congress will likely “delegate authority over issues that are either informationally complex or in which the consequences of government are difficult to predict.”<sup>93</sup> By consulting with Congress on the decision to go to war, the Executive limits the opposing party’s ability to gain politically from military failure,<sup>94</sup> as flip-flopping on support for a war tends to be politically costly.<sup>95</sup> Neutralizing the opposition is smart politically, but it can be used to facilitate reelection of those politicians that make the decision to enter bad wars. As discussed above, Congress’s political motivation will lead to frequent approvals, and this pattern will likely repeat itself frequently. Therefore, congressional authorization would not be deliberative; it would incentivize excessive war-making, and it would limit the opposition’s ability to effectively mount a response to an unpopular war. If Congress is approving wars due to its incentive structure, and doing so limits opponents’ ability to respond, this could suggest that congressional involvement produces the worst results and the least ability to correct those results.

While Nzelibe and Yoo’s model is clearly plausible, it misses certain critical institutional constructs. Their analysis attempts to determine which branch is the more effective agent in this principal-agent problem; however, they fail to realize that the institutional design is not an either-or choice.<sup>96</sup> The whole notion of separation of powers or checks and balances is rooted in the idea of having one agent checking the other agent.<sup>97</sup> The system’s design “promote[s] deliberation among multiple agents, which encourages them to reveal private information that might otherwise remain hidden.”<sup>98</sup> While there is little empirical evidence on the value of deliberation, Professor James Fishkin has found evidence that “significant shifts in opinion” take place after participating in public policy deliberations.<sup>99</sup> Studies

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93. Nzelibe & Yoo, *supra* note 61, at 2524.

94. See Nzelibe, *supra* note 90, at 918. Considering the asymmetrical harm for opposing a winning war, it is no surprise such a vote could represent simple risk-aversion.

95. *Id.* at 919. Senator John Kerry faced significant questions during his presidential campaign in 2004 for his changing positions on the Iraq War. See, e.g., William Saletan, *Would Kerry Vote Today for the Iraq War?*, SLATE, Aug. 12, 2004, <http://slate.msn.com/id/2105096/>.

96. See Diehl & Ginsburg, *supra* note 66, at 1244.

97. M.J.C. VILE, CONSTITUTIONALISM AND SEPARATION OF POWERS 2 (2d ed. 1998).

98. See Diehl & Ginsburg, *supra* note 66, at 1245.

99. John S. Dryzek & Valerie Braithwaite, *On the Prospects for Democratic Deliberation: Values Analysis Applied to Australian Politics*, 21 POL. PSYCHOL. 241, 242 (2000). Deliberation has been considered important for centuries, in fact; Aristotle “under[ood] politics to be an associative practice grounded primarily in citizens’

such as this one show that there is value to deliberating. Thus, there must be something unique and different about war powers that justifies abandoning the traditional and effective means of coming to a decision.

The first argument offered by Nzelibe and Yoo reasons that presidents tend to be held more democratically accountable for foreign policy than Congress and should therefore be given significant power in this area, and asserts that ex post congressional action is sufficient to mitigate the effects of poor decisions.<sup>100</sup> First of all, while the President may be seen as the key decision maker in the war powers arena, that does not mean that congressional actors are immune from being held democratically accountable for the decision to engage in significant armed conflict.<sup>101</sup> Beyond overestimating the negative accountability effects of going to war, Nzelibe and Yoo fail to account for the numerous benefits from going to war. Professors Cecil Crabb and Pat Holt observed that “once a president has made a foreign affairs decision that becomes known to the public, he automatically receives the support of at least 50 percent of the American people, irrespective of the nature of the decision.”<sup>102</sup> This is commonly known as the “rally around the flag” effect.<sup>103</sup> This surge of patriotic sentiment is temporary,<sup>104</sup> but very real. When this sentiment evaporates, the President can react in a multitude of ways. While accountability can breed prudence, it can also lead to “gambl[ing] for resurrection.”<sup>105</sup> This is an

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capacity for deliberation.” Susan Bickford, *Beyond Friendship: Aristotle on Conflict, Deliberation, and Attention*, 58 J. POL. 398, 399–400 (1996). *But see* Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY, 347 (1997) (arguing that deliberation is both overrated and, at times, in conflict with democratic ideals). *See generally* JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS* (2004).

100. Nzelibe & Yoo, *supra* note 61, at 2520–22.

101. In 2006, the Democrats retook the House, in large part due to the public’s dissatisfaction with the President’s, and therefore the Republican Party’s, handling of the war in Iraq. Thus the national party can be held accountable for the actions of the Executive. *See* Dana Blanton, *National Exit Poll: Midterms Come Down to Iraq, Bush*, FOXNEWS.COM, Nov. 8, 2006, <http://www.foxnews.com/story/0,2933,228104,00.html>.

102. CECIL V. CRABB, JR. & PAT M. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY* 21 (2d ed. 1980).

103. *See, e.g.*, RICHARD A. BRODY, *ASSESSING THE PRESIDENT: THE MEDIA, ELITE OPINION, AND PUBLIC SUPPORT* 66 (1991); JOHN MUELLER, *WAR, PRESIDENTS, AND THE PUBLIC OPINION* 208 (1973); Helmut Norpoth, *Politics, Economics and the Cycle of Presidential Popularity*, 6 POL. BEHAV. 253, 262 (1984).

104. Norpoth, *supra* note 103, at 287.

105. GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION: DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS* 58 (1995).

agency problem in which leaders prolong unsuccessful wars in the hope that the tides of war will eventually turn, saving the leader's legacy.<sup>106</sup> Ultimately, unilateral Executive action does garner increased accountability, but can lead to short-term political gain and an unwillingness to concede defeat.

Furthermore, *ex post* congressional constraints on presidential actions are insufficient. The fact is, “[*e*]x *post* congressional involvement can only terminate some presidential mistakes and can never recover the sunk costs of bad presidential decisions.”<sup>107</sup> Not only are there sunk costs, but “even some opponents of the initial decision to go to war recognize that overly hasty withdrawal could be a poor policy at later stages.”<sup>108</sup> *Ex post* decisions are made in response to a new status quo, one in which use of the power of the purse can be viewed as endangering troops<sup>109</sup> or giving America a weaker image abroad.<sup>110</sup>

The second way in which Nzelibe and Yoo justify expansive executive powers is by arguing that the President has superior information to Congress.<sup>111</sup> Yet, allowing for a second opinion on the same information will reduce the likelihood of poor decision making, while not positively or negatively impacting the quality of the information in and of itself.<sup>112</sup> Therefore, Type I errors<sup>113</sup> are less likely when Congress is consulted. Nzelibe and Yoo cite the Iraq War as proof that intelligence failures can occur with or without congressional involvement.<sup>114</sup> However, it could instead be argued that the failure was caused by “executive manipulation of information to exaggerate a threat.”<sup>115</sup> The problem was not the informational asymmetry, but rather the use of that information. One logical solution to this problem would be to increase the information gathering and interpreting capabilities of Congress. Nzelibe and Yoo mistakenly take the Executive's informational advantage as a given when it is entirely alterable.

106. *Id.*

107. Diehl & Ginsburg, *supra* note 66, at 1250.

108. *Id.*

109. Stuart Streichler, *Mad About Yoo, or Why Worry About the Next Unconstitutional War*, 24 J.L. & POL. 93, 118 (2008).

110. *Id.*

111. Nzelibe & Yoo, *supra* note 61, at 2523.

112. See Diehl & Ginsburg, *supra* note 66, at 1246.

113. See *supra* note 65 and accompanying text for discussion of Type I errors.

114. Nzelibe & Yoo, *supra* note 61, at 2525 (“But other wars that ended on an unpopular note, such as Vietnam and perhaps the current Iraq occupation, do not suggest a clear relationship between *ex ante* statutory authorization and American success.”).

115. Diehl & Ginsburg, *supra* note 66, at 1247.

Therefore, the information advantage can be lessened, which would greatly diminish the odds of Type I errors. Any shift in an independent variable should lead to a corresponding shift in the causal variable. In this case, to the extent that the frequency of Type I errors is correlated with informational disparities, correcting the disparities should negate the odds of Type I errors occurring.

The third functional argument presented by Nzelibe and Yoo concerns the relative value of signaling to different regime types.<sup>116</sup> Given that they advocate for a President-First approach, but concede that congressional authorization has value in disputes between democratic states,<sup>117</sup> there is no real disagreement about the value of congressional authorization in these disputes. That leaves conflicts between democratic nations and rogue states or terrorist organizations as the lone area where the two sides disagree on this issue. Even before one can question this distinction, the definition of a rogue nation must be determined. Nzelibe and Yoo leave this task to the President. Nzelibe and Yoo believe that the leaders of rogue states are insulated from domestic political pressure,<sup>118</sup> but this is simply not true, as “[a]ll leaders are answerable to some coalition of domestic political forces on which their power and political survival rests. Failure in conflict and war helps shorten the tenure of such leaders.”<sup>119</sup> All leaders pursue a rational strategy to maintain power.<sup>120</sup> Wars occur when political leaders attempt to rally the masses behind a national cause via aggressive rhetoric and policies. Thus, all leaders, whether of rogue nations or of first world countries, are subject to popular pressure and suffer consequences at home for losing wars. Nonetheless, elected presidents are more concerned with national support and are therefore more likely to engage in such rhetoric and promote war, since it has been shown to increase the approval rating of presi-

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116. Nzelibe & Yoo, *supra* note 61, at 2532–36.

117. *Id.*

118. *Id.* at 2533 (“On the other hand, because rogue states and terrorist organizations face little or no political accountability for their foreign policy failures, they can afford to ignore their domestic audiences and take more aggressive stances in initiating international conflicts.”).

119. Diehl & Ginsburg, *supra* note 65, at 1256.

120. This claim remains contentious, yet it is a common assumption. See, e.g., BRUCE BUENO DE MESQUITA, *WAR TRAP 20* (1981). For a recent example of underlying rationality, FBI interviews with Saddam Hussein reveal that he denied weapons inspectors out of a greater fear of Iran than the United States, illustrating his rational decision-making process, even if it ultimately proved unsuccessful. David de Sola, *FBI Interviews Detail Saddam Hussein Fear of Iran, WMD Bluff*, CNN, July 2, 2009, <http://www.cnn.com/2009/WORLD/meast/07/02/fbi.saddam.hussein.interview/index.html>.

dents.<sup>121</sup> On the other hand, the Legislature has more localized interests and would be resistant to using such rhetoric. Localized interests are not rallied by promoting a national identity or a national battle but by catering to a smaller community's needs and interests. Because of the political advantages gained by a president going to war and the Legislature's inclination to shirk the issue,<sup>122</sup> unilateral presidential action is likely to lead to an overly aggressive position on military engagements. Therefore, congressional involvement should decrease the likelihood of Type I errors with respect to all regimes.

The totality of the analysis suggests that deliberation decreases the likelihood of Type I errors. This type of deliberation cannot occur within the Executive branch alone. While the president consults with staffers and cabinet secretaries, they are likely to "succumb to groupthink, as it has been called—the overt and subtle pressures driving group cohesiveness that can distort the decision-making process."<sup>123</sup> When a group decides upon a view, dissent becomes difficult and there is pressure to reject alternatives.<sup>124</sup> Furthermore, even before coalescing around a particular opinion, executive staffers are likely to possess policy preferences.

Type II errors (not entering "good" wars) would only be more likely under the Congress-First approach if Congress were more likely than the Executive to be opposed to good wars. However, since research shows that Congress is likely to approve most wars independent of circumstances<sup>125</sup> that is highly unlikely to be the case. But there is no reason to believe that Congress has any aversion to good wars.<sup>126</sup> Ultimately, a Congress-First system would decrease Type I errors and have little impact on Type II errors when dealing with traditional warfare, and it is the institutional design that would better accommodate functionalists' concerns and desires.

### B. *Military Actions Less Than War*

Nonetheless, there are instances where the use of force does not amount to war and where the cost-benefit analysis may reveal differ-

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121. See *supra* note 102–104 and accompanying text for discussion of rally-around-the-flag effect.

122. See *supra* note 95 and accompanying text for discussion of Congress's incentive to approve of most wars.

123. Streichler, *supra* note 109, at 124.

124. See *id.* at 124–25.

125. See *supra* notes 91–95 and accompanying text.

126. Some may cite President Roosevelt's struggle for congressional approval for World War II as one such example; however, this is just one example and it is unclear what can be extrapolated from this instance.

ent results. Therefore, we must analyze the Congress-First and President-First approaches with regard to these unique situations. For example, judges and legal theorists have long argued that the Constitution allows the President to repel an invasion without first addressing Congress.<sup>127</sup> Functionally, this makes sense, as waiting is not an acceptable option when lives are in danger.<sup>128</sup> But defining the scope of this authority is critical. Some argue that the President's authority to repel attacks extends to all situations in which national security interests are threatened and a sudden military response is necessary.<sup>129</sup> Others counter that the President can only commit U.S. forces to repel an attack upon its territory or its armed forces.<sup>130</sup> Since the functional justification for defensive action is the need for quick decisive action, that justification should apply equally to attacks on our soldiers as it does to our embassies or citizens.

Actions of self-defense pose little challenge with regard to Type I or Type II errors because the decision to begin hostilities is not based upon a perceived threat but an effectuated attack. Thus preemptive strikes would be exempted from this type of analysis and need to be addressed separately. A President-First policy should not lead to any greater number of bad wars because actions are only taken to repel an imminent attack. The point at which a defensive action becomes an offensive assault on another nation is when multiple opinions on the accurate scope of those actions can develop; and it is at that point where congressional oversight has a value. With regard to Type II errors, there is little reason to believe that Congress is more interested in defending the nation than the Executive, and thus a President-First system for self-defensive actions should lead to similar results more quickly.

One of the most important and controversial components of American foreign policy is the use of covert wars. Any war powers solution must consider the President and Congress's role in covert wars. Statutorily, covert wars must be deemed by the President to be "important to the national security of the United States" and must be reported to congressional intelligence committees.<sup>131</sup> While Congress may have ceded its authority on this issue, that does not mean it was

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127. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist by force.").

128. *See* ELY, *supra* note 5, at 109.

129. *See id.* at 6–7 (1993).

130. FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 299 (2d ed. 1989).

131. *See* 50 U.S.C. §§ 413–413b (2006).

required to do so by the Constitution nor that this arrangement is best for the country. The argument presented in favor of neutralizing Congress on this issue is that publicizing the war would hamper military effectiveness.<sup>132</sup> Given that covert wars rarely remain covert for long,<sup>133</sup> however, there is little difference between a covert war and an overt war that had to be launched in secrecy. Ultimately both covert wars and overt wars are discussed openly by the public and therefore should be treated no differently from each other. Alternatively, it has been argued that even if authorization is required, the statutes provide blanket authorization to engage in covert war. Blanket authorization is unacceptable, however, because “[n]ot only must Congress make the decision whether we go to war, it must decide whom we go to war against.”<sup>134</sup> Furthermore, given that presidents are likely to reap political benefits from beginning hostilities,<sup>135</sup> wars that begin covertly are likely to be those that do significant harm to our nation at home and abroad,<sup>136</sup> since the President is forsaking the rally-around-the-flag benefits that typically are associated with hostilities. The United States has also been less successful in covert wars, which some say is due to the lack of public debate on them.<sup>137</sup> Ultimately, the President must be allowed some latitude to initiate hostilities in secret; however, congressional authorization should still be required and sought in order to allow for a timely but full debate on the issue.

Covert wars lack the immediacy of defensive actions and thus it seems as if the risk of Type I and Type II errors is similar to the risk in traditional warfare. While the President may not gain political support domestically—since the populace is unaware of the war—the Executive branch would still be more susceptible to groupthink. Thus covert wars would likely be more successful with greater deliberation. While the President may currently know more about foreign affairs, any informational imbalance between the branches can be rectified. Type I errors should be reduced by greater deliberation, and there is still no reason to believe that Congress would be any more inclined to stop good wars (Type II errors) than the Executive.

Another concern is that of small-scale military and police missions. These missions are critical because small-scale police operations have become the principal use of force since the end of the Cold

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132. See ELY, *supra* note 5, at 108–09.

133. See *id.* at 110–12.

134. *Id.* at 108.

135. See *supra* note 102–104 and accompanying text for discussion of rally-around-the-flag effect.

136. See ELY, *supra* note 5, at 109.

137. DAN REITER & ALLAN C. STAM, *DEMOCRACIES AT WAR* 161 (2002).

War.<sup>138</sup> Some people have argued that these are not actions taken in accordance with war powers, but are authorized through the police powers. If that is the case, “the only authority a President needs in order to launch a military operation is a United Nations Security Council Resolution, leaving Congress ‘out of the loop’ even for full-scale engagements.”<sup>139</sup> One example of these police missions emerges with foreign law enforcement. Such enforcement is performed by small groups of DEA agents or other police forces and these agents fight with sidearms or other light weapons, rather than with tanks and fighter jets.<sup>140</sup> These actions more closely resemble domestic law enforcement than the traditional image of warfare that was the focus of the WPR.<sup>141</sup> Law enforcement actions have always been in the exclusive purview of the executive branch.

Where the small-scale mission resembles law enforcement, it is beyond the purview of the war powers and it is exclusively the domain of the Executive. However, when small-scale operations begin to resemble traditional warfare, the analysis of Type I and Type II errors above continues to apply and congressional authorization becomes a necessity.

### C. *Responding to Terrorism—War Powers in the Twenty-First Century*

The current global climate leads many to believe that the new dominant force of aggression is international terrorism. Are the rules different when dealing with and responding to acts of terrorism? Nzelibe and Yoo argue that non-national terrorist actors are “immune to pressure short of force” and that congressional involvement would be at best ineffective and, at worst, harmful to the prevention of terrorist attacks.<sup>142</sup> The goal when responding to terrorist attacks remains limiting bad wars (Type I errors) and engaging in good wars (minimize Type II errors). Thus, the critical determination is whether a Congress-First or President-First system is more effective in preventing these errors.

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138. Kenneth B. Brown, *Scope of the War Powers Resolution: Section 2*, 2 J. NAT'L SECURITY L. 23, 38 (1998); see also *The Peace Powers Act (S 5) and the National Security Revitalization Act (H.R.7): Hearings Before the Comm. on Foreign Relations*, 104th Cong. (1995).

139. Brown, *supra* note 138, at 38–39.

140. See *id.* at 39.

141. See Marian Nash Leich, *Contemporary Practice of the United States: Use of Force*, 80 AM. J. INT'L 632, 639 (1988) (quoting State Department Legal Adviser Abraham D. Sofaer).

142. See Nzelibe & Yoo, *supra* note 61, at 2534–36.

In their argument, Nzelibe and Yoo wrongfully assume that all uses of military force are subject to the same guidelines. Calling an attack on a terrorist cell a war is fallacious because “[w]ar has traditionally been understood as involving nation-states,”<sup>143</sup> while al Qaeda and other terrorist organizations are not nation states.<sup>144</sup> Under international law, “insurgent” is the lowest status for a type of warfare combatants and requires the group:

- (1) to represent an identifiable group of people or to have a relatively stable . . . base of support within a broader population; (2) to have the semblance of a government; (3) to have an organized military force and to be able to field its military units in hostilities; and (4) to control significant portion of territory as its own.<sup>145</sup>

Al Qaeda fails to meet this definition, as it does not possess anything that resembles a government and does not control significant territory of its own.<sup>146</sup> While including terrorism in the international law definition of war may sound appealing, there are reasons to be cautious.

Even if the United States and al Qaeda cannot officially be at war, the United States may use armed forces in self-defense under the United Nations Charter. Under the Charter, attacks by non-state actors give the victim the right of selective and proportionate self-defense against those directly involved in the attack, even if it involves using force in a foreign country.<sup>147</sup> “In fact, during war, the selective killing of persons who are taking a direct part in armed hostilities, including enemy combatants, unprivileged combatants, and their civilian leaders (thus excluding captured persons of any status), would not be impermissible assassination.”<sup>148</sup> The Charter does not “require[ ] the permission of the state on whose territory a self-defense action

143. See Diehl & Ginsburg, *supra* note 66, at 1255.

144. See Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 326–27 (2003) (noting that “any conflict between the United States and al Qaeda as such cannot amount to war”).

145. Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759, 760 (2007) (hereinafter Paust, *Responding Lawfully*) (internal quotation marks and citations omitted).

146. *Id.* at 760–61; see also *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1013–15 (2d Cir. 1974) (holding that the United States could not have been at war with the Popular Front for the Liberation of Palestine because, while they engaged in terrorism, they were not a state).

147. Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 533–34 (2002) (“The use of military force by the United States in Afghanistan on October 7, 2001 against Mr. bin Laden and members of his al Qaeda network was permissible under both international and U.S. constitutional law.”); see Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 821 (2005).

148. Paust, *Responding Lawfully*, *supra* note 145, at 765.

takes place . . . nor does the language require direct involvement of the state in the non-state actor attack of such a nature as to justify ‘attribution’ to the state.”<sup>149</sup> Essentially, this means that the United States need not consult with nor get permission from Afghanistan before attacking al Qaeda within its borders. This provides a legally recognized mechanism for engaging in armed combat with a terrorist organization that lacks statehood.

Traditionally, the United States responded to acts of terrorism through use of the legal system.<sup>150</sup> Criminal prosecution was possible because U.S. law considers all attacks on U.S. interests to be acts of terrorism and not acts of war. The U.S. Code defines terrorism as violent acts that apparently intended to “coerce a civilian population [or] to influence the policy of a government by intimidation or coercion.”<sup>151</sup> However, the use of formal criminal proceedings may be limited by geographic constraints and jurisdictional requirements.<sup>152</sup>

The history of the United States shows us that there are a litany of different ways in which we can respond to terrorism, including criminal prosecutions,<sup>153</sup> limited acts of reprisal,<sup>154</sup> and war or significant military engagements. Each response to terrorism has characteristics analogous to actions taken when engaging with other nation states. When engaging in long-term warlike engagements, it should make no difference if the nation is Afghanistan, Germany, or Vietnam; the functional benefits of congressional involvement will be the

149. *Id.* at 763 (citation omitted).

150. See Ronald J. Sievert, *War on Terrorism or Global Law Enforcement*, 78 *NORE DAME L. REV.* 307, 310 (2003).

151. 18 U.S.C. § 2331(1)(B)(i)-(ii) (2000).

152. According to the Restatement of the Foreign Relations Law of the United States, the courts may have jurisdiction for “certain offenses recognized by the community of nations as of universal concern, such as . . . certain acts of terrorism.” *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 404 (1987); see also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582–83 (6th Cir. 1985) (“When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations.”). However, there are those that doubt that the courts will fully utilize universal jurisdiction in the prosecution of suspected terrorists. See *Sievert, supra* note 150, at 350. Beyond the jurisdictional dilemma, operation within the law enforcement paradigm requires that criminal trials comply with the Bill of Rights and sentencing limitations.

153. See Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 *B.C. INT’L & COMP. L. REV.* 23, 32 (2006) (“In the United States, criminal prosecution of terrorists is a critical, if not the dominant, method of counterterrorism.”).

154. Paust, *Responding Lawfully, supra* note 145, at 762–63.

same. However, when dealing with strategic strikes or the criminal investigation and apprehension of suspected terrorists, “[s]uch engagements are better perceived as police actions than war.”<sup>155</sup> If war powers legislation is conceived of in such a light, the Executive will maintain the flexibility to act quickly in certain situations while still lacking the capacity to engage the military in an extended occupation without congressional oversight. War powers legislation, such as that proposed in this Note, should balance the President-First approach with regard to police powers activities and the Congress-First view with regard to traditional war powers activities.

#### D. Summary of Analysis

This analysis demonstrates that the Congress-First approach is superior to the President-First approach in almost all scenarios. When dealing with traditional warfare, consultation and authorization from Congress leads to fewer Type I and Type II errors. There are some situations that are better suited for a President-First approach and it is critical that they are identified and protected from an overly intrusive Congress. Furthermore, this section addresses concerns over whether this model can be applied to terrorists or rogue states. Although in police powers scenarios the need for a President-First approach remains, it appears that, in true war powers scenarios, terrorists are subject to the same constraints as nations. Therefore, war powers legislation should emphasize congressional authorization more thoroughly to prevent Type I and Type II errors in warfare decisions.

### III.

#### PROMINENT POSSIBLE SOLUTIONS

In the previous section, this Note discussed numerous war-related situations and analyzed them to determine whether a President-First or Congress-First system is more effective. With those conclusions in mind, I will evaluate whether either the WPR or the proposed WPCA properly determine when the Executive should need congressional approval and when it should be allowed to act independently. This section concludes that neither the WPR nor the WPCA require

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155. See Diehl & Ginsburg, *supra* note 66, at 1255; see also *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, Int'l Security and Science of the House Comm. on Foreign Affairs*, 99th Cong. 42 (1986) (testimony of Abraham Sofaer) (claiming use of anti-terrorist units does not fall under War Powers Resolution because such use is more analogous to law enforcement than to war).

congressional authorization at the appropriate times, and that both grant the Executive too much independence.

### A. *The War Powers Resolution*

The War Powers Resolution of 1973 was passed in response to the Vietnam War over a Presidential veto.<sup>156</sup> Congress believed that “it had been dodging its constitutional duty to make the decision whether to commit American troops to combat”<sup>157</sup> and the WPR was supposed to prevent this pattern from continuing.

Section 2(c) states that the President may only exercise his commander-in-chief powers pursuant to a declaration of war, specific statutory authorizations, or a national emergency.<sup>158</sup> Section 3 requires that the President consult with Congress before engaging troops whenever possible.<sup>159</sup> Section 4(a) requires the Executive to submit a report to Congress no more than forty-eight hours after introducing United States forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”<sup>160</sup> Subsequently, according to section 5(b), within sixty days of filing a report (or sixty days from when the report must be filed),

the President shall terminate any use of United States Armed Forces . . . unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.<sup>161</sup>

However, section 5(c) allows for Congress to compel the removal of troops by concurrent resolution.<sup>162</sup>

There have been numerous arguments against the framework of interactions between the branches of government delineated in the WPR. There is some debate whether or not Section 2(c) “too narrowly defines the President’s war powers.”<sup>163</sup> Presidents have sent troops into conflict without any of the section 2(c) preconditions.<sup>164</sup> The WPR also fails to detail which members of Congress should be consulted. A study by the Congressional Research Service concluded,

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156. Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 84–85 (1993).

157. Ely, *supra* note 40, at 1379.

158. War Powers Resolution, 50 U.S.C. § 1541(c) (2006).

159. *See id.* § 1542.

160. *Id.* § 1543(a).

161. *Id.* § 1544(b).

162. *See id.* § 1544(c).

163. WAR POWERS COMMISSION REPORT, *supra* note 1, at 21.

164. *Id.* at 23 (referencing conflicts in Grenada, Yugoslavia, and Haiti).

“there has been very little consultation with Congress under the Resolution when consultation is defined to mean seeking advice prior to a decision to introduce troops.”<sup>165</sup> One of the most consistent complaints has been that “no President has ever filed a report ‘pursuant to’ Section 4(a)(1).”<sup>166</sup> Indeed, the sixty-day window has never been triggered. Furthermore, even if a section 4(a)(1) report was filed, many argue that section 5(c) is an unconstitutional legislative veto in light of the Supreme Court’s ruling on this type of congressional action in *Chadha*.<sup>167</sup> This would mean Congress would have no mechanism of ending a conflict during the sixty-day window.

The WPR fails to address the concerns discussed in the previous section, as it has not given Congress a voice in the decision to go to war. Instead, it forces Congress to take a stand after the fact, within sixty days of the commencement of hostilities. Some have said that the true problem is not in the framework itself but that “the President has refused to obey the law.”<sup>168</sup> This interpretation is flawed, in that it ignores the fact that the policy options are more limited once troops have been deployed<sup>169</sup> and public pressure is greater. Therefore, it does not matter whether section 5(c) is unconstitutional, as political

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165. Congressional Research Service, War Powers Resolution: Presidential Compliance, (Richard F. Grimmett ed., Nov. 15, 2004).

166. WAR POWERS COMMISSION REPORT, *supra* note 1, at 24.

167. *INS v. Chadha*, 462 U.S. 919 (1983). The Supreme Court in *Chadha* rejected the congressional practice of one-house “legislative vetoes” to undo federal administrative agency decisions.

The Supreme Court held that both Houses of Congress needed to vote to approve a measure and then, pursuant to the ‘Presentment Clause’ in the Constitution, present the bill to the President for his signature or veto if the measure is to have the force of law. The general view is that if the War Powers Resolution were put to the same test in *Chadha*, Section 5(c) of the Resolution, and perhaps other provisions, would fail.

War Powers Commission Report, *supra* note 1, at 23; *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 218 n.25 (2d ed. 1988); EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 301 (Randall W. Bland et al., eds., 5th rev. ed. 1984) (suggesting that *Chadha* “clearly lays the ground for a serious constitutional challenge to the entire resolution”). Whether the severability clause protects the remaining sections of the WPR is also debated. *See, e.g.*, R. Scott Thompson, *The War Powers Resolution “Veto”: Section 5(c)*, 2 J. NAT’L SECURITY L. 101, 110 (“A severability clause creates a ‘presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the [challenged provision] was invalid.’ A severability clause does not, however, conclusively resolve the issue of the validity of the balance of an act. It must still be determined whether the act without the unconstitutional provision can operate consistently with the intent of Congress.”) (alteration in original) (internal citations omitted).

168. Ely, *supra* note 40, at 1384.

169. *See supra* notes 107–110 and accompanying text.

theory suggests<sup>170</sup> that Congress will deem it too politically risky to avail itself of the powers the statute gives it, and end a war in such a way.

### B. *The War Powers Consultation Act*

While there have been numerous attempts to reform the WPR over the years,<sup>171</sup> the most recent attempt received significant publicity and was backed by powerful bipartisan figures and deserves a similar analysis. However, it also falls short, since it continues to bestow too much power on the Executive and is still prone to Executive manipulation.

The War Powers Consultation Act, proposed by two bipartisan former Secretaries of State, Warren Christopher and James Baker, greatly differs from the WPR. The WPCA addresses one concern with the WPR, by explicitly describing which conflicts are implicated by the Act.<sup>172</sup> Section 3(A) of the WPCA states that the statute only applies to significant armed conflict, “and not minor hostilities, emergency defensive actions, or law enforcement activities.”<sup>173</sup> The statute defines significant armed conflict as “(i) any conflict expressly authorized by Congress, or (ii) 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>174</sup> To provide greater clarity, Section 3(B) lists the operations that are not covered.<sup>175</sup> Rather than simply requiring consultations with Congress, section 3(C) of the WPCA specifies a body of Congressmen and Senators who will be consulted—the Joint Congressional Consultation Committee—and clearly defines its members.<sup>176</sup>

Section 4(B) of the WPCA requires that the President consult with the Joint Congressional Consultation Committee before de-

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170. *See supra* notes 93–95 and accompanying text.

171. *See supra* notes 5–7 and accompanying text.

172. The WPR “focused on the term ‘hostilities’ and both inadequately defined it and swept too much into its net.” WAR POWERS COMMISSION REPORT, *supra* note 1, at 36.

173. *Id.* at 35.

174. *Id.* at 36.

175. *Id.* (“(i) actions 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; (ii) limited acts of reprisal against terrorists or states that sponsor terrorism; (iii) humanitarian missions in response to natural disasters; (iv) investigations or acts to prevent criminal activity abroad; (v) covert operations; (vi) training exercises; or (vii) missions to protect or rescue American citizens or military or diplomatic personnel abroad.”).

176. *Id.* at 36–37.

ploying troops into significant armed conflict.<sup>177</sup> The consultation requirement in the WPR<sup>178</sup> is vague with regard to timing. While consultation is required in the WPCA, “[t]he President need not obtain the consent of Congress to order such a deployment.”<sup>179</sup> If a section 3(B) conflict becomes a significant armed conflict, consultation also becomes a requirement.<sup>180</sup> However, if secrecy is required, section 4(C) “permits the President to consult with the group within three calendar days *after* significant armed conflict has begun.”<sup>181</sup> As the conflict progresses, section 4(F) requires the President to meet and consult with the Joint Congressional Consultation Committee every two months.<sup>182</sup> To ensure effective deliberation, section 4(H) provides “the Joint Congressional Consultation Committee with a professional staff and access to the needed national security and intelligence information to help it engage on these issues.”<sup>183</sup>

The Supreme Court’s decision in *Chadha* has led many to question the constitutional validity of the WPR’s section 5, which requires congressional approval within sixty days, as it could be conceived of as a legislative veto that violates the holding in *Chadha*.<sup>184</sup> Therefore, section 5 of the WPCA re-imagines the congressional approval mechanism to address these problems. If Congress has not formally authorized the significant armed conflict—either by declaration of war or specific statutory authorization—section 5(A) gives Congress thirty days to “introduce an identical concurrent resolution in the Senate and House of Representatives calling for [its] approval.”<sup>185</sup> Section 5(B) allows for an expedited hearing and vote on this resolution.<sup>186</sup> If the resolution is not approved, section 5(C) states that “any Senator or

177. *Id.* at 37.

178. 50 U.S.C. § 1542 (2006) (“The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.”).

179. WAR POWERS COMMISSION REPORT, *supra* note 1, at 37.

180. *Id.*

181. *Id.*

182. *Id.* at 38.

183. *Id.*

184. 462 U.S. 919 (1983); *see supra* note 167 and accompanying text for a summary of the case; *see, e.g.*, Thomas M. Franck, *Rethinking War Powers: By Law or by “Thaumaturgic Invocation”?*, 83 A.J.I.L. 766, 769 (“With the reporting-cum-termination provisions of the law unenforced and with its other remedy, the legislative veto provision of section 5(c), rendered moot by the Supreme Court’s *Chadha* decision, the two engines of the War Powers Resolution were effectively disabled.”).

185. WAR POWERS COMMISSION REPORT, *supra* note 1, at 39 (alteration in original).

186. *See id.* at 47.

Representative may file a joint resolution of disapproval of the significant armed conflict, and the joint resolution . . . shall be voted on within five calendar days thereafter.”<sup>187</sup> The joint resolution, if approved, must then be presented to the President.

While the WPCA addresses some of the problems with the WPR, it still fails to adequately distribute the war powers. For example, although the WPCA requires consultation with Congress—barring a need for secrecy—it does not require congressional consent before engaging in significant armed conflict. Congressional input before the fact would give the President some sense of Congress’s preference for war; once hostilities begin the choices are irreparably altered.<sup>188</sup> Therefore, even if the Joint Congressional Consultation Committee voices disapproval over beginning the conflict, they may decide that a premature withdrawal would be worse than continuing a poorly conceived war or that the political costs of ending a war that has already begun are too great. Furthermore, the political risks associated with voting against an ongoing combat operation are great and make a subsequent denial politically unviable. Early consultation is a positive first step, but it does not go far enough.

Another critique of the WPCA is that it essentially requires a congressional supermajority to end significant armed conflict.<sup>189</sup> Congressional repudiation of the decision to go to war should not be contingent upon a supermajority when approval only requires a normal majority. The supermajority requirement poses yet another hurdle for Congress to jump over before it can end a significant military engagement. This process will elongate the military engagement, further entrenching U.S. forces and making withdrawal more difficult. While the National War Powers Commission suggests “that each House may specify, through its internal rules, the effect of the passage of any joint resolution of disapproval . . . [by] mak[ing] rules providing, for example, that any new bill appropriating new funds for the armed conflict be out of order,”<sup>190</sup> this requires Congress to use its power of the purse to control the President’s war powers, which presents numerous public relations concerns as it is critical for Congressmen to show support for the troops.<sup>191</sup> While the rules process could prevent Congress from

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187. *Id.* at 47–48.

188. *See supra* notes 107–110 and accompanying text.

189. The WPCA requires that a rebuke by Congress be presented to the President, who will presumably veto it, after which Congress must override the veto, which takes a supermajority. This is an inherent component of the WPCA. WAR POWERS COMMISSION REPORT, *supra* note 1, at 48.

190. *Id.* at 40.

191. *Supra* notes 109–110 and accompanying text.

shirking its responsibility, the public relations nightmare might prompt Congress to circumvent the rules. Furthermore, if Congress can get a supermajority, there probably is enough support to end the conflict through informal means, such as cutting off the funding, thereby rendering the Act completely unnecessary.

Beyond the specific procedures of the WPCA, some of the definitions utilized in the Act are problematic. Section 3(A) defines “significant armed conflict” as anything expected to last longer than a week.<sup>192</sup> The Commission provides no justification for deciding upon this length. While some say that any length of time is arbitrary, the longer the time the greater the flexibility that the Executive has and the easier it would be for the Executive to bypass the consultation of Congress. Furthermore, the exceptions listed in section 3(B) are quite broad. Section 3(B)(ii) exempts “limited acts of reprisal against terrorists or states that sponsor terrorism” from the consultation requirement.<sup>193</sup> While exempting attacks on terrorists makes sense, as such reprisals can be considered police actions, it is unclear why attacks on states that sponsor terrorism should be exempted. Given the state of global affairs, most states with which the U.S. would engage in combat could be considered sponsors of terrorism. The Executive could use this 3(B) exception to begin hostilities and then, as the character of the campaign changes, reclassify it as a significant armed conflict. This would provide significantly delayed congressional consultation, which further limits the likelihood that effective legislative control would be provided. There is also reason to be concerned over the section 3(B)(i) exception, which allows for the prevention of imminent attacks on the United States.<sup>194</sup> While preventing imminent attacks has traditionally been considered the responsibility of the Executive, the rapid expansion of the first strike doctrine by the Bush administration<sup>195</sup> draws this exception into question, as the mere possibility of an attack or of the capability to attack would be sufficient to bypass section 4(B) consultation. It is hard to comprehend a prevention of an imminent attack that would last over one full week, and any action lasting under a week is exempted from coverage under the act.

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192. See WAR POWERS COMMISSION REPORT, *supra* note 1, at 36.

193. *Id.*

194. *Id.*

195. KARL P. MUELLER ET AL., STRIKING FIRST: PREEMPTIVE AND PREVENTATIVE ATTACKS IN U.S. NATIONAL SECURITY POLICY xi (2006) (“[F]ollowing the September 11, 2001, terrorist attacks, President Bush and administration officials announced that under some circumstances in the future the United States would strike enemies before they attack, because deterrence and defense provide insufficient protection against threats.”).

This exception is at the very least redundant but is more likely a way for the President to bypass congressional consultation and engage in warfare whenever and wherever he so chooses.

#### IV.

##### THE WAR POWERS LAW WE NEED

Given the theoretical outline above, this Note will now present an alternative statute, based upon the WPCA, to govern this complex problem. The full text of the statute is appended to the end of this Note. I will explain, section by section, how and why my proposed act differs from the WPCA.

Section 1 includes an alternative title for the act: the War Powers Procedure Act (WPPA). This title reinforces that this new statute does not intend to alter the constitutional distribution of war powers, but simply prescribes a process by which those powers can be effectuated. The title will still include the word “Act,” “to avoid the confusion surrounding the term ‘Resolution.’”<sup>196</sup>

Section 2 of the proposed WPPA still “recognizes that we cannot resolve the constitutional questions underlying the war powers debate,”<sup>197</sup> but only prescribe a process by which they will be exercised. Some have argued that the language of the WPR’s section 2 provides a mechanism for the Executive to circumvent the act.<sup>198</sup> Nonetheless, the proposed language in the WPPA mitigates the risk of the act being deemed unconstitutional just as similar language did so in the WPR. The language simply serves to explain the reasons underlying the adoption of the WPPA.

Just as in the WPCA, section 3 of the WPPA clearly defines the core terms of the statute. This is designed to remedy the ambiguity created by the WPR. Section 3(A) is altered to also include “significant armed conflict” in the definition of “declarations of war.” While formal declarations of war rarely occur and few would debate that they qualify as significant armed conflicts, it is nonetheless important to write a statute that provides for all reasonably foreseeable possibilities. Section 3(A)(iii) is modified to shorten the minimum time period required for a use of force to qualify as a significant armed conflict.

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196. WAR POWERS COMMISSION REPORT, *supra* note 1, at 35.

197. *Id.*

198. ELY, *supra* note 5, at 116 (suggesting that a president could avoid the requirements of the resolution by arguing that “[t]he Resolution itself says it isn’t supposed to cut into my prerogatives, but if I followed [the Act] and reported this to Congress that would cut into my prerogatives, so by disobeying the Resolution I am actually following the Resolution”).

Given that there is substantial reason to require congressional authorization,<sup>199</sup> this qualification is designed only to provide adequate flexibility for small tactical missions that are not included in the exceptions of section 3(B). The list of exceptions in section 3(B) now contains a maximum number of days the exception can last. Rather than use the vague language in the WPCA (e.g. “limited”<sup>200</sup>), the cap on the number of days that each of the exceptions can last provides increased clarity. This alteration ensures that an action in defense of our nation cannot be turned into an extended offensive strike. This is important since it is critical to limit the number of methods by which the Executive can evade congressional authorization. The number of days is capped at 10 because that should be sufficient time for Congress to fully debate the issue at hand.<sup>201</sup> Often times the debate over whether or not to go to war begins long before an action is commenced and, even if it is not, it is critical for decisions to be made quickly before policy options become more limited. The list of exceptions is also altered to no longer include limited acts of reprisal against states that sponsor terrorism. Attacks of reprisal on another state very well could lead to an increase in hostilities and, therefore, could be used as a backdoor around the section 4 requirement of congressional pre-approval.

Section 4 is the first section of the WPCA to be significantly altered. The WPPA would strengthen the reporting requirements, as compared to what appeared in section 4 of the WPCA. Namely, sections 4(A) and 4(B) of the WPCA explain that consultation with Congress is to occur before military engagement, and state what information is to be provided to the Joint Congressional Consultation Committee.<sup>202</sup> The WPPA preserves the Executive’s right to begin military operations unilaterally when secrecy is required, but section 4(C) has been amended to ensure that the President reports immediately to the Committee under such circumstances. By accelerating the process of consultation, fewer policy options are foreclosed and the potential costs of the attack are limited. Section 4(F) is modified to provide greater clarity on what intelligence agencies are required to provide to the Committee’s staff. Information can be distorted in the process of writing and condensing reports; by explicitly requiring raw

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199. See discussion *supra* Part II.

200. WAR POWERS COMMISSION REPORT, *supra* note 1, at 45 (section 3(B) of the WPCA) (excluding from the definition of significant armed conflict “limited acts of reprisal against terrorists or states that sponsor terrorism”).

201. “Even the longest debate on record, that leading to the declaration of the War of 1812, took only seventeen days.” ELY, *supra* note 5, at 236 n.51.

202. WAR POWERS COMMISSION REPORT, *supra* note 1, at 37.

data to be turned over, the Committee can come to its own conclusions with limited distortion by the Executive branch.<sup>203</sup>

Section 5 is the most significantly changed aspect of the WPPA, requiring congressional pre-authorization of military action rather than a congressional vote after hostilities begin. This Congress-First approach is at the heart of the functionalist analysis discussed above. The outlined procedure is reminiscent of that delineated in the WPCA, in that it ensures a speedy decision, but the WPPA goes much further, as the process leads to a vote and deliberation with the entirety of Congress. Section 5(D) provides an avenue for the President to renew his request for congressional authorization; however, the President is required to wait fifteen days. This waiting period is required so that the Executive cannot badger Congress into submission. It also allows both for the Executive to collect more information, and for the circumstances of the conflict to change. While the waiting period may be disconcerting to some, given that certain situations can be urgent, there is a mechanism to temporarily bypass congressional authorization when necessary. In the interim, the President can engage in operations that do not qualify as significant military operations.

In section 6, delayed congressional authorization is explained. The free period is limited to fourteen days, which is significantly shorter than the sixty days written into the WPR<sup>204</sup> and the twenty days written into John Hart Ely's suggested act.<sup>205</sup> Given that the longest deliberation on a declaration of war was seventeen days, and that it occurred in the early part of the nineteenth century,<sup>206</sup> this should still provide ample opportunity for a full discussion of the issue. By requiring immediate production of information by the President, the Act will allow Congress to act faster, as Congress can begin processing the President's proposal immediately. While a longer time period would permit greater deliberation, the policy options become more limited the longer the conflict rages on. If the resolution passes, the military engagement becomes an approved significant armed conflict and the other enumerated sections become binding. Alternatively, if the resolution fails to pass, the President is given ten days to withdraw troops from the area.

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203. Perhaps the most famous recent example of such distortion is Colin Powell's misleading and inaccurate testimony in front of the United Nations regarding the Iraq War. See, e.g., *Colin Powell on Iraq, Race, and Hurricane Relief*, ABC News, Sept. 8, 2005, <http://abcnews.go.com/2020/Politics/story?id=1105979>.

204. War Powers Resolution, 50 U.S.C. § 1544(b) (2006).

205. ELY, *supra* note 5, at 127.

206. *Id.* at 236 n.51.

While the War Powers Commission recommended tying Congress's hands through House rules, the WPPA instead uses a modified version of the spending restrictions advocated by then-Senator Biden in his attempt to amend the WPR, the Use of Force Act.<sup>207</sup> While some have questioned the constitutionality of this provision, it is unlikely the provision would be found unconstitutional, as the Court has already found a constitutional basis for this sort of a funding restriction.<sup>208</sup> Furthermore, there is little reason to believe that anyone would or could challenge the constitutionality of this act.<sup>209</sup>

#### CONCLUSION: THE REAL-WORLD POTENTIAL OF THE WPPA

The distribution of war powers in America has “remain[ed] a dark continent of American jurisprudence”<sup>210</sup> for too long. A consistent procedure by which it is effectuated must be established. The plan proposed in this Note attempts to codify a method backed by an in-depth analysis of the rational incentives of political actors.

Every combat mission is unique and even the most justifiable wars can end in defeat. A war powers law cannot be evaluated based upon how it would function in any single conflict. Instead, it must be evaluated based on whether it creates adequate opportunities for discourse between the branches of government without overly hindering the ability of the government to wage effective warfare. Congress legislated a role for itself after Vietnam with the WPR, but Congress should now pass the WPPA to further clarify its role in one of our nation's most important decisions.

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207. See Senator Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A “Joint Decision” Solution*, 77 GEO. L.J. 367, 404 (1988) (“To underscore the decisiveness of the clock, the law should specifically invoke Congress’ most unquestioned power—the power of the purse—by providing that, in the absence of congressional action, the President’s authority to expend funds expires after the time allowed.”).

208. *Id.* at 386 n.81 (noting that “concurrent resolutions do not require the President’s signature,” which would bypass some of the issues presented in *Chadha*).

209. It is likely that the Court would decline to hear any case on this matter due to a lack of standing by the petitioner. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000) (holding that Congressmen lacked standing to challenge President’s action as either a violation of the War Powers Resolution or of the War Powers Clause of the Constitution, because their dispute was susceptible to political resolution and Congress has legislative authority to stop the President’s war-making).

210. ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., *THE WAR-MAKING POWERS OF THE PRESIDENT* 146 (1982).

## APPENDIX: THE PROPOSED WAR POWERS PROCEDURE ACT

Section 1—Title

The War Powers Resolution of 1973, Pub. L. No. 93-148, is hereby repealed. This Act shall be cited as the War Powers Procedure Act.

Section 2—Purpose

The purpose of this Act is to describe the procedure by which the multiple branches of the Federal Government utilize their constitutionally granted War Powers. This Act is not meant to define, circumscribe, or enhance the constitutional war powers of either the Executive or the Legislative Branches of government.

Section 3—Definitions

3(A). Significant armed conflict is defined as (i) any conflict preceded by a declaration of war; (ii) any conflict expressly authorized by Congress; or (iii) any combat operation by U.S. armed forces expected to last more than four days or that proceeds for more than two days.

3(B). Significant armed conflict shall not include: actions not lasting longer than ten days, that are either (i) actions taken to repel attacks or to prevent imminent attacks on the United States, its territorial possessions, its embassies, its consulates, or its armed forces abroad; (ii) acts of reprisal against terrorists abroad; (iii) covert operations; (iv) humanitarian missions in response to natural disasters; (v) missions to protect or rescue American citizens or military or diplomatic personnel abroad; (vi) training exercises; or (vii) investigations or criminal preventions acts abroad.

3(C). The “Congressional Authorization Committee” consists of:

- (i) the Speaker of the U.S. House of Representatives and the Majority Leader of the Senate;
- (ii) the Minority Leader of the House of Representatives and the Senate;
- (iii) the Chairman and Ranking Minority Members of each of the following Committees of the House of Representatives:
  - (a) the Committee on Foreign Affairs
  - (b) the Committee on Armed Services
  - (c) the Permanent Select Committee on Intelligence
  - (d) the Committee on Appropriations
- (iv) the Chairman and Ranking Minority Members of each of the following Committees of the Senate:
  - (a) the Committee on Foreign Relations
  - (b) the Committee on Armed Services

- (c) the Select Committee on Intelligence
- (d) the Committee on Appropriations

3(D). The Chairmanship and Vice Chairmanship of the Congressional Authorization Committee shall alternate between the Speaker of the House of Representatives and the Majority Leader of the Senate, with the former serving as the Chairman in each odd-numbered Congress and the latter serving as the Chairman in each even-numbered Congress.

#### Section 4—Consultation and Reporting

4(A). Before ordering the deployment of United States armed forces into significant armed conflict, the President must consult with the Congressional Authorization Committee. To consult means that the President shall provide an opportunity for the exchange of views regarding whether to engage in the significant armed conflict.

4(B). During the consultation process, the President shall submit a report to the Committee explaining why the significant armed conflict is necessary, the goal of the operation, the expected duration, and the expected cost.

4(C). If the need for secrecy precludes consultation before significant armed conflict begins, the President shall provide a 4(B) report to the Committee within 12 hours and consult with the Committee within 3 calendar days after the beginning of the significant armed conflict.

4(D). If the conflict has to be reclassified from a 3(B) exemption to a significant armed conflict, the President shall provide a 4(B) report to the Committee within 24 hours and consult with the Committee within 3 calendar days after the decision to reclassify the engagement.

4(E). For the duration of any significant armed conflict, the President shall file a report every other month with the Committee informing them on the extent to which the goals have been achieved. The President shall also consult with the Committee every other month, discussing the extent to which the goals have been achieved and to what extent the financial and duration projections need to be altered.

4(F). Congress shall employ a permanent, bi-partisan professional staff to facilitate the work of the Committee. The Committee and the staff shall be provided all relevant national security and intelligence information, both the reports and the raw data, where applicable.

#### Section 5—Congressional Pre-Authorization

5(A). Following this consultation, the President must, if still intent on engaging in significant armed conflict, request that the Committee in-

introduce concurrent resolutions in the Senate and House of Representatives calling for approval of the significant armed conflict.

5(B). The concurrent resolution shall be referred directly to the entire chamber of both Houses of Congress, shall become the pending business of both Houses, shall be voted in within 10 calendar days, and shall not be susceptible to intervening motions, except that each house may adjourn from day to day.

5(C). If the concurrent resolution is approved then the President has Congressional authorization and must follow the procedure outlined in Section 4(E) of this Act.

5(D). If the concurrent resolution is defeated, the President lacks Congressional authorization and may not proceed with the significant armed conflict. The President reserves the right to return in 15 calendar days to the Committee and request another vote on the concurrent resolution.

#### Section 6—Delayed Congressional Authorization

6(A). If a conflict could not be pre-authorized by Congress due to either a need for secrecy under Section 4(C) or a reclassification under Section 4(D), the President must request within 14 calendar days that the Committee introduce concurrent resolutions in the Senate and House of Representatives calling for approval of the significant armed conflict and follow the procedures outlined in Sections 5(B) and 5(C).

6(B). If the concurrent resolution is approved, the conflict shall be treated as any other significant armed conflict would be treated.

6(C). If the concurrent resolution fails to gain Congressional approval, the action lacks Congressional authorization and, therefore, must end within 10 calendar days.

#### Section 7—Funding

7(A). No funds made available under any provision of law may be obligated or expended for any use of force abroad inconsistent with the provisions of this Act.

7(B). Whenever Congress rejects a concurrent resolution, it shall thereafter not be in order in either House of Congress to consider any bill or joint resolution or any amendment thereto, or any report of a committee or conference, which authorizes or provides budget authority to carry out significant armed conflict.