

The War Powers Resolution: Time to Say Goodbye

LOUIS FISHER
DAVID GRAY ADLER

The War Powers Resolution (WPR) of 1973 is generally considered the high-water mark of congressional reassertion in national security affairs. In fact, it was ill conceived and badly compromised from the start, replete with tortured ambiguity and self-contradiction. The net result was to legalize a scope for independent presidential power that would have astonished the Framers, who vested the power to initiate hostilities exclusively in Congress. The resolution, however, grants to the president unbridled discretion to go to war as he deems necessary against anyone, anytime, anywhere, for at least ninety days. As Arthur Schlesinger Jr. has observed, before “the passage of the resolution, unilateral presidential war was a matter of usurpation. Now, at least for the first ninety days, it was a matter of law.”¹

Implementation of the War Powers Resolution has revealed further deficiencies. After occupying Haiti, the Clinton administration actually cited the resolution favorably as another weapon to add to its ever-expanding arsenal of claims for presidential warmaking power. After nearly twenty-five years of experience, it would be better for both branches—and for constitutional government—to repeal the War Powers Resolution and rely on traditional political pressures and the regular system of checks and balances, including impeachment. There is some risk that repeal might indirectly signal a reduced role for Congress, but that role has reached a minimal level anyway, in part because of the War Powers Resolution. Over the long term, outright repeal would be less risky than continuing along the present path.

¹ Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1989), 434–35.

LOUIS FISHER is senior specialist in separation of powers at the Congressional Research Service of the Library of Congress. His most recent book is *Presidential War Power*. DAVID GRAY ADLER is professor of political science at Idaho State University. His most recent book, which he edited with Larry N. George, is *The Constitution and the Conduct of American Foreign Policy*.

PASSAGE OF THE RESOLUTION

In drafting the War Powers Resolution, the House and the Senate began with incompatible principles. In the insightful words of Senator Tom Eagleton (D-MO), they “marched down separate and distinct roads, almost irreconcilable roads.”² In 1970, members of the House were willing to recognize that the president, in certain extraordinary and emergency conditions, had the authority to defend the United States and its citizens without prior authorization from Congress. Instead of trying to define the precise conditions under which presidents may act, the House relied on procedural safeguards. The president would be required, “whenever feasible,” to consult with Congress before sending American forces into armed conflict. He was also to report the circumstances necessitating the action; the constitutional, legislative, and treaty provisions authorizing the action, together with his reasons for not seeking prior congressional authorization; and the estimated scope of activities.³

The Senate did not act on this measure. In 1973, the House tightened the language somewhat by placing a time limit on presidential initiatives. Unless Congress declared war within 120 days or specifically authorized the use of force, the president had to terminate the commitment and remove the troops. The House bill also allowed Congress, by concurrent resolution, to direct disengagement at any time during the 120-day period.⁴ Concurrent resolutions must pass both chambers but are not presented to the president for his signature or veto.

Senators refused to give the president such unilateral authority, and certainly not to make war wherever he liked, for whatever reason, for up to 120 days. Instead, the Senate tried to spell out the conditions under which presidents could act singlehandedly. Armed force could be used in three situations: first, to repel an armed attack upon the United States, its territories and possessions, retaliate in the event of such an attack, and forestall the direct and imminent threat of such an attack; second, to repel an armed attack against U.S. armed forces located outside the United States, its territories and possessions, and forestall the direct and imminent threat of such an attack; and third, to rescue endangered American citizens and nationals in foreign countries or at sea. The first situation (except for the final clause) conforms to the understanding developed by the Framers. The other situations reflect the changes that have occurred in the concept of defensive war and life-and-property actions.

The Senate bill required the president to cease military action unless Congress within thirty days specifically authorized the president to continue. A separate provision allowed him to sustain military operations beyond the thirty-day limit if he determined that “unavoidable military necessity respecting the

² 119 *Congressional Record* [hereafter *Cong. Rec.*] 33555 (1973).

³ 116 *Cong. Rec.* 37398-408 (1970). This measure passed again the next year under suspension of the rules, which requires two-thirds support; 117 *Cong. Rec.* 28870-78 (1971).

⁴ 119 *Cong. Rec.* 24653-708 (1973).

safety” of the armed forces required continued use for purposes of bringing about a prompt disengagement.⁵ This effort to codify presidential war powers carried a number of risks. Because of imprecise language, legislation might widen presidential power instead of restricting it. Executive officials could interpret in broad fashion such terms as “necessary and appropriate retaliatory actions,” “imminent threat,” and “endangered citizens.”

Pressured to produce a bill, House and Senate conferees fashioned a compromise product. Splitting the difference between the two chambers is natural and acceptable for most bills, but the WPR was more than a compromise between two conflicting bills. It compromised the institutional and constitutional integrity of Congress by giving the president a green light to use force anywhere in the world, for whatever reason, and without seeking congressional authority. Section 2(c), the heart of the resolution, attempts to tie presidential use of force to constitutional considerations: a congressional declaration of war, statutory authorization, or an attack on the United States, its territories, or its military forces. This effort, fully in accord with the Framers’ constitutional blueprint, is then undermined and contradicted by other provisions in Sections 4 and 5, which allow the president to act unilaterally for sixty or ninety days. In deference to the Senate, the House shortened the time period from 120 days to sixty days. The president could take an additional thirty days to withdraw troops.

The conference version retained the House provisions regarding reporting and consultation. Under Section 3, the president is required “in every possible instance” to consult with Congress before he introduces troops into “hostilities” or into “situations where imminent involvement in hostilities is clearly indicated by the circumstances.” This provision obviously vests the president with discretion to determine at a minimum whether consultation is “possible” and, even more generously, whether it is desirable. It permits the president to determine when, how, and even whom to consult. The ambiguity of this provision creates a constitutional problem, since Congress cannot delegate to a subunit the constitutional power to decide for war.

The meaning of “consultation” has been debated ever since 1973. Presidents have tended to treat it as a synonym for notification after the fact, while defenders of congressional power have viewed it as joint deliberation on a pending issue or problem. But Section 3 contains a deeper, more fundamental, constitutional flaw. Since the provision empowers the president to introduce troops into combat without prior congressional authorization, it not only repudiates the resolution’s stated aim in Section 2(c) of ensuring the “collective judgment” of both branches, but vests in the president authority that far exceeds his constitutional powers. Bluntly stated, Section 3 unconstitutionally delegates the power to make war to the president.

The resolution’s claim in Section 8(d)(1) that it does not intend “to alter the constitutional authority of the Congress or the President” cannot survive

⁵ *Ibid.*, 25051–120.

scrutiny. Indeed, the principal vice of the resolution is that it radically tilts the balance of power between Congress and the president, and grants the president more power than he can derive from the Constitution.

President Richard Nixon vetoed the bill, primarily because he regarded it as impractical and dangerous to fix in a statute the procedure by which president and Congress should share the war power. He also believed that the legislation encroached upon the president's constitutional responsibilities as commander in chief. Both Houses mustered a two-thirds majority to override the veto: the House narrowly (284 to 135), the Senate by a more comfortable margin (75 to 18).

Although the War Powers Resolution overcame a veto, it did not survive doubts about its quality and motivation. Some of the congressional support relied on party politics: efforts to score some short-term political points at the cost of long-term institutional and constitutional interests. Many legislators took comfort in the resolution's symbolic value rather than its contents.

Consider the voting record of fifteen members of the House.⁶ Initially they voted against the House bill and the conference version because they considered the legislation inadequate and unsound. To be consistent, they should have voted to sustain Nixon's veto to prevent the bill from becoming law. Instead, they switched sides and delivered the decisive votes for enactment.

These members reversed course for several reasons. Some feared that a vote to sustain would lend credence to the views of presidential power advanced in Nixon's veto message.⁷ Others thought that an override might be a step toward impeaching Nixon. Congresswoman Bella Abzug (D-NY) voted against the House bill and the conference version because they expanded presidential war power. As she noted during debate on the conference report: "[It] gives the President 60 to 90 days to intervene in any crisis situation, or any pretext, while Congress merely asks that he tell us what he had done."⁸ Yet she strongly supported a veto override: "This could be a turning point in the struggle to control an administration that has run amuck. It could accelerate the demand for the impeachment of the President."⁹

The thought of overriding a Nixon veto was tempting. Eight times during the 93rd Congress he had vetoed legislation; eight times the Democratic Congress came up short on the override. Some legislators regarded the override vote on the War Powers Resolution as an essential means of reasserting congressional power, particularly in the midst of the Watergate scandals.¹⁰ The Saturday Night Massacre, which sent Special Prosecutor Archibald Cox, Attorney General Elliot Richardson, and Deputy Attorney General William Ruckel-

⁶ Representatives Bella Abzug, Robert Drinan, John Duncan, John James Flynt, Jr., William Harsha, Ken Hechler, Elizabeth Holtzman, William Hungate, Phillip Landrum, Trent Lott, Joseph Maraziti, Dale Milford, William Natcher, Frank Stubblefield, and Jamie Whitten.

⁷ For example, 119 *Cong. Rec.* 36220 (1973) (Cong. Elizabeth Holtzman).

⁸ *Ibid.*, 33870.

⁹ *Ibid.*, 36221.

¹⁰ Thomas F. Eagleton, *War and Presidential Power* (New York: Liveright, 1974), 213–20.

haus out of the government, occurred just four days before Nixon's veto of the War Powers Resolution. Ten days before the Saturday Night Massacre, Vice President Spiro Agnew's resignation in disgrace further heightened the cry for partisan and institutional blood.

Even with these intense politics, several Democrats in the House recognized that the conference product tilted power decisively toward the president. William Green, from Pennsylvania, remarked that the War Powers Resolution "has popularly been interpreted as limiting the president's power to engage our troops in a war." Because he had opposed such unilateral presidential action, he wanted to explain that a careful reading of the bill indicated that it "is actually an expansion of Presidential warmaking power, rather than a limitation."¹¹ Vernon Thomson of Wisconsin had no illusions about the bill: "The clear meaning of the words certainly points to a diminution rather than an enhancement of the role of Congress in the critical decisions whether the country will or will not go to war."¹² Bob Eckhardt of Texas condemned the abdication of congressional power. By allowing the president to engage U.S. troops for up to ninety days, "the Congress provides the color of authority to the President to exercise a warmaking power which I find the Constitution has exclusively assigned to the Congress."¹³ Ronald Dellums of California, having opposed the House bill and the conference version, held firm and voted to sustain the veto: "Richard Nixon is not going to be President forever. Although many people will regard this as a victory against the incumbent President, because of his opposition, I am convinced that it will actually strengthen the position of future Presidents."¹⁴

There were fewer clear thinkers in the Senate during the override vote. Senator Eagleton, a principal sponsor of the War Powers Resolution, denounced the bill that emerged from conference as a "total, complete distortion of the war powers concept."¹⁵ Instead of the three exceptions specified in the Senate bill and the thirty-day limit, the conference product gave the president *carte blanche* authority to use military force for up to ninety days. Although the media continued to describe the bill as a constraint on presidential war power, Eagleton punctured this misconception: "The bill gives the President of the United States unilateral authority to commit American troops anywhere in the world, under any conditions he decides, for 60 to 90 days. He gets a free 60 days and a self-executing option for an additional 30 days, making 90."

Even those who continued to support the bill and urged the override of Nixon's veto admitted the broad sweep of presidential power conferred by Congress. Senators Jacob Javits and Ed Muskie, in a "Dear Colleague" letter distributed to other legislators, conceded that nothing in the bill would have prevented President Nixon from sending U.S. troops to the Middle East to as-

¹¹ 119 *Cong. Rec.* 36204 (1973).

¹² *Ibid.*, 36207.

¹³ *Ibid.*, 36208.

¹⁴ *Ibid.*, 36220.

¹⁵ *Ibid.*, 36177.

sist Israel against Egyptian threats. The bill, they said, “would have required the President only to report to the Congress within 48 hours in writing with respect to the deployment of U.S. Armed Forces in foreign territory, airspace and waters.”¹⁶ The president could commit U.S. troops to the volatile Middle East with no nod to Congress other than having aides prepare a written report.

Eagleton confessed to being “dumbfounded.” With memories so fresh about presidential extension of the war in Southeast Asia, “how can we give unbridled, unlimited total authority to the President to commit us to war?” He charged that the bill, after being nobly conceived, “has been horribly bastardized to the point of being a menace.”¹⁷

THE FRAMERS’ INTENT

According to Section 2(a) of the War Powers Resolution, it was the purpose of Congress “to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.” Seldom has a statute misfired to such an extent on a basic purpose. The resolution does violence to the intent of the Framers and has not in any sense insured the collective judgment of Congress and the president in the use of military force.

The Constitution vests in Congress the sole and exclusive authority to initiate military hostilities, including full-blown, total war, as well as lesser acts of armed force. While the “original intent” of the Framers toward some constitutional provisions may be unclear or beyond recovery, there is, remarkably, no doubt about their decision to establish Congress as the repository of the power to commence war on behalf of the American people.¹⁸ A more impressive and even stunning feature of the Framers’ design, however, is the fact that it constituted a dramatic break from the existing models of government throughout Europe, which had placed the war power and foreign affairs firmly in the grasp of the monarch.

The Framers’ departure from prevailing schemes reflected their intellectual orientation, their understanding of history, and their own practical experi-

¹⁶ *Ibid.*, 35953.

¹⁷ *Ibid.*, 36178.

¹⁸ See, generally, Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 1995); John Hart Ely, *War and Responsibility* (Princeton: Princeton University Press, 1993); David Gray Adler, “The Constitution and Presidential Warmaking: The Enduring Debate,” *Political Science Quarterly* 103 (Spring, 1988): 1–35; Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Powers of Congress in History and Law* (Urbana: University of Illinois Press, 1986); Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (University Park: Pennsylvania State University Press, 1982).

ences.¹⁹ In their aspiration to effectuate a republican government, the Founders drafted a Constitution that “allowed only Congress to loose the military forces of the United States on other nations.”²⁰ Deliberations at the Constitutional Convention demonstrate that the delegates embraced the principle of collective decision making, the concept of shared power in foreign affairs, and the cardinal tenet of republican ideology that the conjoined wisdom of many is superior to that of one.

The fact that the power of war and peace was historically associated with the monarchy was addressed repeatedly at the convention. On 1 June 1787, Charles Pinckney said he was for a vigorous president but was afraid that some of the proposals “would render the Executive a Monarchy, of the worst kind, towit an elective one.”²¹ John Rutledge wanted the executive power placed in a single person, “tho’ he was not for giving him the power of war and peace.” James Wilson sought to reassure the delegates. The prerogatives of the British monarchy were not “a proper guide in defining the executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.” Edmund Randolph worried about executive power, calling it “the foetus of monarchy.” The delegates at the convention, he said, had “no motive to be governed by the British Governmt. as our prototype.” If the United States had no other choice he might adopt the British model, but the “fixt genius of the people of America required a different form of Government.” Wilson agreed that the British model “was inapplicable to the situation in this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”²²

Alexander Hamilton, a favorite among extollers of a strong presidency, also rejected the British model of executive prerogatives in the conduct of foreign affairs and the exercise of the war power. While he explained in a lengthy speech to the Convention on 18 June that in “his private opinion he had no scruple in declaring . . . that the British Govt. was the best in the world,”²³ he nevertheless agreed that the English scheme would have no application in the United States. He proposed that the Senate would have the “sole power of declaring war” and, in language that would anticipate the role of the president as commander in chief, the president would be authorized to have “the direction of war when authorized or begun.”²⁴

The Framers’ determination to preclude unilateral presidential authority to initiate military actions was demonstrated in the debates that surrounded the

¹⁹ Fisher, *Presidential War Power*, 1–6; David Gray Adler and Larry N. George, eds., *The Constitution and the Conduct of American Foreign Policy* (Lawrence: University Press of Kansas, 1996), 3–6.

²⁰ Edwin B. Firmage, “War, Declaration of” in Leonard W. Levy and Louis Fisher, eds., *Encyclopedia of the American Presidency* (New York: Simon & Schuster, 1994), vol. 4, 1573.

²¹ *The Records of the Federal Convention of 1787*, Max Farrand, ed., (New Haven: Yale University Press, 1937), vol. i, 65.

²² *Ibid.*, 65–66.

²³ *Ibid.*, 288.

²⁴ *Ibid.*, 292.

crafting of the war clause. On 6 August, the Committee of Detail circulated a draft that provided that the legislature shall have the power “to make war.”²⁵ This bore sharp resemblance to the Articles of Confederation, which vested the “sole and exclusive right and power of determining on peace and war” to the Continental Congress.

When the war clause was considered in debate on 17 August, Charles Pinckney opposed placing the power in the full Congress. “Its proceedings, he said, were too slow. . . . The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions.”²⁶ Pierce Butler “was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.” Butler’s opinion shocked Elbridge Gerry, who said that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” Butler stood alone in the Convention; there was no support for his opinion and no second to his motion.²⁷

The draft proposal to vest the legislature with the power to make war proved unsatisfactory to Madison and Gerry. As a consequence, they moved to substitute “declare” for “make,” leaving the president “the power to repel sudden attacks.” The meaning of the motion is unmistakable. Congress was granted the power to make, that is, initiate war; the president, for obvious reasons, could act immediately to repel sudden attacks without authorization from Congress. In genuine emergency situations, allowing no time for congressional deliberation, the president could order *defensive* actions. Roger Sherman spoke in support of the motion and thought it “stood very well. The Executive shd. be able to repel and not to commence war.” George Mason “was agst giving the power of war to the Executive, because not <safely> to be trusted with it. . . . He was for clogging rather than facilitating war.”²⁸

The debates and vote on the war clause make it clear that Congress alone possesses the authority to initiate war. The warmaking power was specifically withheld from the president; he was given only the authority to repel sudden attacks. Confirmation of that understanding was provided by remarks of ratifiers in various state conventions, as well as by the early practice and contemporaneous statements of political actors.

In Pennsylvania, James Wilson expressed the prevailing sentiment that the system of checks and balances “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.”²⁹ In North Carolina, James Iredell compared

²⁵ *Ibid.*, vol. ii, 182.

²⁶ *Ibid.*, 318.

²⁷ *Ibid.*

²⁸ *Ibid.*, 318–319.

²⁹ *The Debates in the Several State Conventions*, Jonathan Elliot, ed. (Philadelphia: Lippincott, 1836), vol ii, 528.

the limited powers of the president with those of the British monarch. The king of England was not only the commander in chief “but has power, in time of war, to raise fleets and armies. He has also the authority to declare war.” By contrast, the president “has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands.”³⁰

The meaning of the war clause was thus settled at the dawn of the republic. The word “declare” enjoyed a settled understanding and an established usage. As early as 1552, the verb “declare” had become synonymous with the verb “commence.” They both meant the initiation of hostilities.³¹ This was the established usage in international law as well as in England, where the terms declare war and make war were used interchangeably.

This practice was familiar to the Framers. As Chancellor James Kent of New York, one of the leading jurists of the founding period, stated: “As war cannot lawfully be commenced on the part of the United States, without an act of Congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration.” While Kent interpreted “declare” to mean “commence,” he did not assert that the Constitution requires a congressional declaration of war before hostilities could be lawfully commenced, but merely that it be initiated by Congress. What is “essential,” according to Kent, is “that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact.”³² Thus, Congress need not declare war. All that is required under American law is a joint resolution or an explicit congressional authorization of the use of military force against a named adversary.

The Constitution grants to Congress the sum total of the nation’s power to commence hostilities. There was in the Convention no doubt about the limited scope of the president’s war power. The duty to repel sudden attacks represents an emergency measure that permits the president to take actions necessary to protect the United States. The president was never vested with a general power to deploy troops whenever and wherever he thought best, and the Framers did not authorize him to take the country into full-scale war or to mount an offensive attack against another nation. John Bassett Moore, an eminent international law scholar, justly stated:

There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the

³⁰ Ibid., vol. iv, 107.

³¹ Huloet’s dictionary provided this definition: “Declare warres. *Arma canere, Bellum indicere.*” We have here two meanings: to summon to arms; to announce war. Quoted in Wormuth and Firmage, *To Chain the Dog of War*, 20.

³² James Kent, *Commentaries on American Law* (New York: Da Capo reprint, 1971), vol. i, 53.

fitness of things, as long as he refrained from calling his action war or persisted in calling it peace.³³

The Framers did not create the title of commander-in-chief, but adopted it in light of the 150-year-old English tradition of entitling the office at the apex of the military hierarchy as commander in chief and of subordinating the office to a political superior, such as a king or parliament. The office carried with it no warmaking power whatever. This practice was thoroughly familiar to the Framers, and perhaps this settled understanding and the consequent absence of concerns about the nature of the office accounts for the fact that there was no debate on the commander-in-chief clause at the Convention. Hamilton laid bare the dimensions of the office in *The Federalist*, No. 69: "The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature."³⁴

This model of republican government, so carefully crafted by the Framers to avoid the monarchical excesses of England, was abandoned by those who drafted and enacted the War Powers Resolution.

EXPERIENCE UNDER THE WPR

Both Presidents Gerry Ford and Jimmy Carter understood the need to heal the wounds from the Vietnam War. During their administrations the executive branch did little to flex its muscles in warmaking. Ford used military force for the evacuations from Southeast Asia and during the *S.S. Mayaguez* capture, while Carter used military force in the attempted rescue of hostages in Iran. But those actions were limited in scope and did not greatly threaten the balance between the executive and legislative branches.

The record from Ronald Reagan to Bill Clinton has been one of increasing use of presidential war power, with Congress progressively marginalized. Reagan introduced U.S. troops to Lebanon, invaded Grenada, carried out air strikes against Libya, and maintained naval operations in the Persian Gulf. In none of these actions did he ask Congress for authority. Congress eventually passed legislation in the fall of 1983 to authorize military action in Lebanon for a period of eighteen months. President George Bush relied on independent

³³ *The Collected Papers of John Bassett Moore* (New Haven: Yale University Press, 1944), vol. v, 195–196.

³⁴ Alexander Hamilton, James Madison, and John Jay, *The Federalist*, Benjamin Fletcher Wright, ed. (Cambridge, MA: Harvard University Press, 1961), 446.

executive power to invade Panama and only at the last minute did he come to Congress for support in acting offensively against Iraq. Clinton has used military force repeatedly without congressional authority: launching missiles against Baghdad in 1993, carrying out combat operations in Somalia, threatening to invade Haiti, conducting air strikes in Bosnia followed by the dispatch of 20,000 ground troops, and authorizing further air strikes of Iraq in 1996.

Military initiatives from Reagan to Clinton have revealed a glaring deficiency in the War Powers Resolution. Because of the Senate's capitulation to House conferees, the statute granted to the president for a period of sixty to ninety days the authority to conduct military operations on his own initiative, but after that point he needed explicit authority from Congress. The problem of presidential accountability is compounded by the fact that the resolution is written in such a way that the sixty-to-ninety day clock begins ticking only if the president reports under a very specific section: not Section 4, not Section 4(a), but only under Section 4(a)(1).³⁵

Not surprisingly, presidents do not report under 4(a)(1). They report, for the most part, "consistent with the War Powers Resolution." The only president to report under 4(a)(1) was Ford in the *Mayaguez* capture, and his report had no substantive importance because it was released after the operation was over. The true meaning of the War Powers Resolution, then, was that presidents could unilaterally use military force against other countries for as long as they liked, until Congress got around to adopting some kind of statutory constraint.

The threatened invasion of Haiti disclosed another peculiar quality of the War Powers Resolution. In the past, executive officials had objected that it was too restrictive on the president. The Clinton theory of the Resolution, spun from the legal workshop of Assistant Attorney General Walter Dellinger, claimed that the statute "recognizes and presupposes the existence of unilateral Presidential authority to deploy armed forces [quoting from the statute] 'into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.'" (Dellinger carefully refers to the resolution as an "acknowledgment", not a "source," of executive power, because what Congress grants it may take away.)

To Dellinger, the structure of the resolution "makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress."³⁶ By declining to prohibit the president from deploying troops into situations like Haiti, Dellinger says that Congress "has left the President both the authority and the means to take such initiatives." Later, at a law school conference, he elaborated on that point: "By establishing

³⁵ Section 4(a)(1) applies to any case in which United States armed forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."

³⁶ U.S. Department of Justice, Office of Legal Counsel, letter to Senators Dole, Simpson, Thurmond, and Cohen, September 27, 1994, from Walter Dellinger, 3; reprinted at 140 *Cong. Rec.* S14314 (daily ed. October 6, 1994).

and funding a military force capable of being sent around the globe, and declining in the War Powers Resolution or elsewhere to forbid the President's use of his statutory and constitutional powers to deploy troops into situations of risk such as Haiti, Congress left the President both the authority and the means to take such initiatives.³⁷

Read in that light, the War Powers Resolution grants to the president an unlimited, discretionary authority to choose war or peace. In so doing, it does great violence to the law of delegation. The statute does not attempt, for example, to delegate the war power for specified contingencies, nor does it provide a governing policy or standard. The president is vested with the authority to choose an enemy and to decide when to make war. The law of delegation stands for the proposition that Congress is the principal and the president is the agent. The War Powers Resolution makes the president the principal.

MEMBERS RUSH TO COURT

One of the byproducts of the War Powers Resolution is the frequency with which legislators turn not to their colleagues to challenge the president but rather to the courts. Private parties have also litigated military issues. None of these efforts has been successful.

Former crewmen of the *S.S. Mayaguez* sued the United States for personal injuries resulting from President Ford's rescue attempt. A federal district judge held that Ford's action was immune from judicial review under the political question doctrine. The judge said that it "has long been settled that the underlying factual or legal determinations on the basis of which the President conducts the foreign relations of the United States are not subject to judicial scrutiny."³⁸

On four occasions during the 1980s, members of Congress went to court to charge President Reagan with violations of the War Powers Resolution. President Reagan did not report under any provision of the resolution when he sent military advisers to El Salvador in 1981. The State Department claimed that no report was necessary, because the Americans were not being introduced into hostilities or imminent hostilities. Several legislators filed a suit claiming that Reagan had violated the resolution by sending the advisers. Eventually, twenty-nine members of the House joined the action against Reagan. Arrayed on the opposite side were sixteen senators and twelve representatives who supported Reagan and urged that the case be dismissed. The federal judge, confronted by two congressional factions, refused to do the fact-finding that would have been necessary to determine whether hostilities or imminent hostilities actually existed. The court stated that it lacked "the resources and expertise" necessary to "resolve the disputed questions of fact concerning the military sit-

³⁷ Walter Dellinger, "After the Cold War: Presidential Power and the Use of Military Force," *University of Miami Law Review* 50 (1995): 107, 111-112.

³⁸ *Rappenecker v. United States*, 509 F.Supp. 1024, 1028 (N.D. Cal. 1980).

uation in El Salvador” and dismissed the case on political question grounds, noting that Congress had failed to act legislatively to restrain Reagan.³⁹

In a similar case, eleven members of Congress brought action against President Reagan for his invasion of Grenada in 1983, contending that he had violated the power of Congress to declare war. The judiciary declined to exercise its jurisdiction because of the relief available to members through the regular legislative process. The message was clear: If Congress wants to confront the president, it must do so by exerting legislative powers, not by turning to the courts.⁴⁰

Another suit involving the Reagan administration’s activities in Nicaragua was avoided by the courts on similar grounds. Twelve members of the House of Representatives, relying on a number of statutes including the War Powers Resolution, challenged the legality of Reagan’s actions. The district court referred to the “impossibility of our undertaking independent resolution without expressing a lack of respect due coordinate branches of government.”⁴¹ When this opinion was affirmed by the appellate court, Judge Ruth Bader Ginsburg noted that Congress “has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch. But no gauntlet has been thrown down here by a majority of the Members of Congress.”⁴²

Also unsuccessful was a case brought by members of Congress who claimed that President Reagan’s use of military force in the Persian Gulf in 1987 had not followed the procedures of the War Powers Resolution. The advice from the court was familiar. If Congress failed to defend its prerogatives, it could not expect to be bailed out by the courts.⁴³

A more interesting dispute and a much more successful approach occurred in a 1990 case brought by members of Congress against President Bush’s contemplated use of military force against Iraq. Attorneys for members abandoned reliance on the War Powers Resolution and stood firmly on constitutional provisions governing the war powers. Federal District Judge Harold H. Greene ruled that the issue was not ready for judicial determination, but decisively rejected many of the sweeping claims for presidential warmaking prerogatives promoted by the Justice Department. The court concluded that if Congress confronted the president, and the president refused to accept a statutory restriction, the issue might be ripe for the courts.⁴⁴ If future courts decide to reach the merits of war powers controversies, they would do well to follow Judge Greene’s forceful rejection of a unilateral presidential power to wage war.

³⁹ *Crockett v. Reagan*, 558 F.Supp. 893 (D.D.C. 1982), aff’d, *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983).

⁴⁰ *Conyers v. Reagan*, 578 F.Supp. 324 (D.D.C. 1984), dismissed as moot, *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985).

⁴¹ *Sanchez-Espinoza v. Reagan*, 568 F.Supp. 596, 600 (D.D.C. 1983).

⁴² *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 211 (D.C. Cir. 1985).

⁴³ *Lowry v. Reagan*, 676 F.Supp. 333 (D.D.C. 1987), aff’d, No. 87-5426 (D.C. Cir. 1988).

⁴⁴ *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1990).

Judge Greene stated that if the president “had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an ‘interpretation’ would evade the plain language of the Constitution, and it cannot stand.”⁴⁵

Members might be forgiven their march to court. After all, they have been fully armed with war powers precedents as old or older than *Marbury v. Madison* (1803), the greybeard of all judicial precedents. At the dawn of the republic, the Supreme Court held in several cases that Congress enjoys exclusive authority to initiate military hostilities. No court in the intervening years has departed from that view.

In 1800, the Court held that it is for Congress alone to authorize either an “imperfect” (limited) war or a “perfect” (declared) war.⁴⁶ A year later, the Court stated with great clarity: “The whole powers of war, being by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.”⁴⁷ The words are those of Chief Justice John Marshall, a member of the Virginia ratifying convention. In 1804, the Court held that President John Adams’s instructions to seize ships were in conflict with an act of Congress and were therefore illegal.⁴⁸ Once again the opinion-writer was Chief Justice Marshall. In 1806, the question of whether the president may initiate hostilities was decided by Justice William Paterson, riding circuit, for himself and District Judge Matthias Burnet Tallmadge: “Does he [the president] possess the power of making war? That power is exclusively vested in congress. . . . [I]t is the exclusive province of congress to change a state of peace into a state of war.”⁴⁹ These decisions established the constitutional fact that it is for Congress alone to initiate hostilities, whether in the form of a general or a limited war. They remain the supreme law of the land.

AMEND THE RESOLUTION?

During House debate on the conference version of the War Powers Resolution, Congressman Robert Drinan (D-MA) acknowledged that “it is an imperfect bill—I voted twice against it already on that basis—but it is a bill that can be improved in the days and months to come.”⁵⁰ In the years following 1973, there has not been a single amendment to the War Powers Resolution. To the extent that amendments are put forth, they typically widen the scope of independent presidential power.

⁴⁵ *Ibid.*, 1145.

⁴⁶ *Bas v. Tingy*, 4 U.S. 37 (1800).

⁴⁷ *Talbot v. Seeman*, 5 U.S. 1, 28 (1801).

⁴⁸ *Little v. Barreme*, 6 U.S. (2 Cr.) 169 (1804).

⁴⁹ *United States v. Smith*, 27 Fed. Cas. 1192, 1230 (C.C. N.Y. 1806) (No. 16,342).

⁵⁰ 119 *Cong. Rec.* 36207 (1973).

One proposal would replace the War Powers Resolution with a Use of Force Act, which would delegate to the president a number of authorities, including the right “to protect and extricate citizens and nationals of the United States located abroad in situations involving a direct and imminent threat to their lives, provided they are being evacuated as rapidly as possible.”⁵¹ Such language could have been used to justify U.S. invasions of the Dominican Republic in 1965, Grenada in 1983, Panama in 1989, and Haiti in 1994. Americans abroad are abused and threatened every year.

The Use of Force Act would also authorize the president to use force abroad “to participate in multilateral actions undertaken under urgent circumstances and pursuant to the approval of the United Nations Security Council.” This kind of language would have sanctioned Truman’s use of military force against North Korea in 1950, Bush’s operation against Iraq in 1990-1991, and Clinton’s invasion of Haiti in 1994. In each of those situations the administration was able to get resolutions adopted by the UN Security Council authorizing the use of military force. Should the president seek authority from Congress? The Use of Force Act claims that a UN resolution would suffice.

The Use of Force Act would permit the president to use force abroad “to participate in multilateral actions undertaken in cooperation with democratic allies under urgent circumstances wherein the use of force could have decisive effect in protecting existing democratic institutions in a particular nation against a severe and immediate threat.” All the president need do is get approval from NATO countries to order air strikes in Bosnia or send ground forces there. No need to involve Congress.

A number of bills, including the Use of Force Act, would create a congressional consultative group (a core group of about eighteen legislators) to meet regularly with the president to discuss potential situations in which military action might be necessary. This body might be useful, but consultation can never be a legal substitute for full congressional action. Congress cannot delegate to a subunit the constitutional decision to go to war.

On 7 June 1995, The House of Representatives narrowly failed to repeal the War Powers Resolution. Full repeal might have attracted more votes, because opposition to the resolution comes from both flanks: those who say it usurps presidential authority and those who believe it abdicates congressional prerogatives. Instead of full repeal, the proposal chose to retain two elements of the resolution: consultation and presidential reporting. That left the impression that presidents could do pretty much as they pleased in initiating military action, so long as they consulted a few people in Congress and sent regular reports. Congressman David Skaggs (D-CO) feared that a partial repeal would carry “an unfortunate implication” by suggesting that presidential authority in war “is restrained only by a consultative and reporting requirement.”⁵²

⁵¹ Joseph R. Biden, Jr. and John B. Ritch III, “The War Power at a Constitutional Impasse: A ‘Joint Decision’ Solution,” *Georgetown Law Journal* 77 (1988): 367, 398.

⁵² 141 *Cong. Rec.* H5667 (daily ed. June 7, 1995).

Toward the end of the debate, it appeared that a significant motivation behind partial repeal was augmentation of presidential power. Speaker Newt Gingrich appealed to the House “to, at least on paper, increase the power of President Clinton.” He said he wanted to “strengthen the current Democratic President because he is the President of the United States. And the President of the United States on a bipartisan basis deserves to be strengthened in foreign affairs and strengthened in national security.”⁵³ Forty-four Republicans, repelled by that philosophy, abandoned Gingrich. With their exodus the repeal effort fell short of votes, 201 to 217.

CONCLUSIONS

The War Powers Resolution has failed to achieve the basic purpose announced in Section 2(a): “to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” The resolution undermines the intent of the Framers and has not insured collective judgment. Instead, unilateral presidential action is now routine.

Experience under the resolution has proved to be disappointing and frustrating. It is riddled with contradictions, ambiguities, and constitutional flaws. The American public and press have been thoroughly baffled about the application, implementation, and enforcement of the statute. The citizenry is understandably confused about the relationship of the resolution to the Constitution.⁵⁴ When, exactly, does the statute apply? Upon what occasions, conditions, and circumstances? The role of Congress has been confounded as well. Many members have been distracted from constitutional considerations and issues of policy by narrowly focused debates on definitional matters and procedural requirements that lie at the core of the resolution, but which have been routinely ignored and dismissed by the executive branch.

During earlier administrations, such as President Reagan’s action in Grenada and President Bush’s invasion of Panama, executive officials occasionally behaved as though the sixty-day clock was running, even if it had not been legally triggered by a report under Section 4(a)(1). Under those conditions it could be argued that the War Powers Resolution did have a constraining effect on presidential initiatives.⁵⁵ But we have had one-year commitments of military action in Haiti and Bosnia, with the latter now extended to a multiyear timeta-

⁵³ Ibid., H5672–73.

⁵⁴ Michael J. Glennon, “Too Far Apart: Repeal the War Powers Resolution,” 50 *University of Miami Law Review* 17 (1995).

⁵⁵ Military operations in Panama and Grenada were conducted as though the sixty-day limit was enforceable, if not legally then politically. Fisher, *Presidential War Power*, 133, 142.

ble, with no involvement at all by Congress. The executive branch no longer seems restricted to any time limit in using military force.

Repeal of the War Powers Resolution would eliminate the concession of 1973 that presidents may use military force anywhere in the world, for whatever reason, for up to ninety days, if not longer. There is no constitutional warrant for that proposition. Repeal would remove that source of presidential power and put an end to fruitless legislative debate over whether presidential "consultation" had been sufficient, whether presidential reports were timely and complete, and whether the president should have reported under Section 4(a)(1), 4(a)(2), or some other provision. Repeal would eliminate the current futile dashes to federal court, hoping for some kind of judicial answer. Members of Congress would understand that only legislative action can stop the president: withholding funds, prohibiting specific actions, and taking other concrete measures.

Impeachment remains a legitimate response to presidential usurpations. The congressional power of impeachment was for the Framers a cornerstone in the foundation of the state, an ancient weapon reserved for "acts of great injury to the community."⁵⁶ The Framers' fear of unilateral presidential war-making, the deep-seated concern that one person might plunge the nation into a rash of chaos, misery, and disaster, drove them to vest the warmaking authority in Congress, and they did so in unmistakable terms. Presidential aggrandizement of that power—an act subverting the Constitution—is precisely the sort of abuse of power, trust, and office that epitomized what George Mason characterized as the "great and dangerous offenses" that would invite impeachment.⁵⁷

The powerful engine of impeachment, of course, is not to be started whimsically. But the Framers expected it to be unleashed in response to actions that rocked the foundation of the state. If for reasons of character, political motives, arrogance, or contempt of Congress, the Constitution, or the rule of law, a president refuses to adhere to the constitutional constraints surrounding the war power, impeachment is warranted. Events from Vietnam to Iran-contra have made members of the executive branch more sensitive to the threat of impeachment.⁵⁸

⁵⁶ Elliot, *Debates*, vol. iv, 113.

⁵⁷ Farrand, *Records of Federal Convention*, vol. ii, 550. Madison said that if the president were to commit "any thing so atrocious as to summon only a few states [to consider a treaty]," he would be impeached for a misdemeanor. Elliot, *Debates*, vol. iii, 500. James Iredell, member of the first Supreme Court, asserted at the North Carolina convention that the president would face impeachment for concealing "important intelligence" from the Senate in matters of foreign affairs. *Ibid.*, vol. iv, 127. These concerns apply even more forcefully to executive usurpation of the war power.

⁵⁸ Theodore Draper, *A Very Thin Line* (New York: Hill and Wang, 1991), 521–22, 524, discussed the fear within the Reagan administration that President Reagan might have been impeached for his actions in Iran-contra. Draper explains that Attorney General Edwin Meese III testified at Oliver North's trial that Meese was concerned that Reagan might be impeached if he did not expose the diversion of funds of the contras. The same theme appears in Lawrence E. Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-up* (New York: Norton, 1997), 3, 24, 189, 355, 358–59, 360, 379, 397, 407, 494, 499. In 1974, the House Judiciary Committee seriously considered adding to the articles of impeachment against Nixon his bombing of Cambodia. *1974 CQ Almanac* (Washington, DC: Congressional Quarterly, 1975), 888–89, 896.

Whether the War Powers Resolution exists or not, there are bound to arise situations in which a president may wish to use military force without obtaining prior authorization from Congress. He might commence war in violation of the supreme law of the land and then attempt to justify it on grounds of necessity. But he cannot be the judge of his own actions. He must seek immunity and exoneration from Congress in the way of retroactive authorization, a practice which is deeply embedded in American tradition.⁵⁹ The legal cloud over the president's action can be removed only by congressional approval. Our constitutional system is better protected by requiring presidents to act in the absence of law and later obtain legal sanction from Congress, rather than by having Congress authorize in advance, as with the War Powers Resolution, unilateral presidential action.

If Congress intends to recapture its dignity and control over warmaking on behalf of the American people, and if it intends to preserve the integrity of the Constitution, its prerogatives, and public control, it must learn to act with confidence and conviction in the exercise of its political and legal powers. On matters of war, the Constitution sides with Congress.*

POSTSCRIPT: CLINTON, THE WAR POWER, AND IRAQ

In February 1998, President Clinton was prepared to order heavy air strikes against Iraq to force Saddam Hussein to permit UN inspectors to search sites for weapons of mass destruction. The bombing was postponed when UN Secretary General Kofi Annan visited Baghdad and negotiated a settlement with Iraq. The Clinton administration accepted the settlement, with reservations, but made clear that military force remained an option if Iraq failed to comply with the new agreement.

Among the more remarkable features of the latest Gulf crisis was the fact that no one in the administration or in Congress ever mentioned the War Powers Resolution and how it might limit or empower the president. It was not a frame of reference. Surprisingly, the administration did not even advance a legal analysis to justify its use of force against Iraq.

The closest anyone ever came to a legal justification involved the vague intimation that Congress in passing the authorization bill in January 1991, somehow gave advance blessing to whatever the UN Security Council might do in the future in issuing resolutions on Iraq. On its face, such a claim—the delegation of the war power in perpetuity—would seem preposterous. Congress could no more surrender to an international body its prerogatives over foreign policy than it could its power of the purse. Let us consider this viewpoint.

⁵⁹ David Gray Adler, "The Constitution and Presidential Warmaking" in Adler and George, *The Constitution and the Conduct of American Foreign Policy*, 206–07, 215–16; Fisher, *Presidential War Power*, 38–39.

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On 14 January 1991, in Public Law 102-1, Congress authorized the use of U.S. armed force against Iraq. President Bush was authorized to use armed force pursuant to UN Security Council resolution 678 (1990) "in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677."

This statute is usually interpreted as congressional authority for Bush to drive Iraq out of Kuwait, which was the purpose of resolution 678, adopted on 29 November 1990. That resolution authorized member states to use "all necessary means" (that is, military force) unless Iraq withdrew from Kuwait on or before 15 January 1991. All the earlier resolutions set the stage for 678. Resolution 660, passed on 2 August 1990, condemned Iraq's invasion of Kuwait and demanded immediate withdrawal. Resolution 661 imposed economic sanctions. Resolutions 662 to 677 reinforced resolutions 660 and 661 and added other restrictions.

How could it be argued that Congress on 14 January 1991, had transferred its constitutional power to the Security Council? Here is the reasoning. Resolution 678 authorized member states to use all necessary means "to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." The phrase "all subsequent relevant resolutions" is taken to mean that whatever the Security Council promulgated after 14 January 1991 in the form of a resolution would be automatically sanctioned by Public Law 102-1.

First, the language in resolution 678 is ambiguous. What does "subsequent" refer to? Any resolution issued after 678? Or any resolution issued after 660 but before 678? It can be read either way. The natural reading in terms of the purpose of Public Law 102-1 is to refer to the resolutions from 660 to 678. After all, the objective was to oust Iraq from Kuwait. President Bush never had authority to send ground troops north to Baghdad in an effort to remove Saddam Hussein. He would have exceeded his statutory authority and violated the understanding of other nations that had joined the alliance.

The most unnatural reading would be to conclude that Congress, on 14 January 1991, had abdicated its constitutional powers to the Security Council, that henceforth the magnitude of the American military commitment would be decided by UN resolutions, not congressional statutes, and that whatever the Security Council decided would compel Congress to vote the necessary appropriations. This theory is too far-fetched to be taken seriously.

Grasping at these straws, shadowy as they are, underscores our central concern. We should not be trying to divine authority from various interpretations of the War Powers Resolution or Security Council resolutions. The touchstone for authority is the U.S. Constitution. There should be no doubt that whenever the president contemplates the use of offensive force he must go to Congress for authority.

That brings us to a final point. On 19 February 1998, during a visit to Tennessee State University, Secretary of State Madeleine Albright was asked how Clinton could order military action against Iraq after opposing American policy

in Vietnam. Her response: “We are talking about using military force, but we are not talking about a war. That is an important distinction.”

As a matter of constitutional law, this is a distinction without a difference. The Constitution, as we have seen, vests in Congress the sole and exclusive authority to initiate military hostilities, regardless of their scope or magnitude. Efforts like Albright’s would eviscerate the congressional war power.

For the past half century, presidents have resorted to the use of word games to justify their military adventures, but semantics are a poor substitute for legal analysis. On 29 June 1950, at a news conference, President Truman denied that the United States was “at war” in Korea. Rather, it was a “police action under the United Nations.” In fact, it was an American war—measured by troops, money, casualties, and deaths—from start to finish. A federal district court noted in 1953: “We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war” (*Weissman v. Metropolitan Life Ins., Co.*, 112 F.Supp. 420, 425 (S.D. Cal. 1953)).

When Bush invaded Panama in December 1989, the State Department called it a “humanitarian intervention.” The Organization of American States, pointing to language in the OAS Charter that regards the territory of a nation as inviolable, condemned the invasion by a vote of 20 to 1.

A year later, the Justice Department argued in court that Bush could order offensive actions against Iraq without seeking advance authority from Congress. According to this theory, the use of 500,000 ground troops and air strikes fell short of war. As we noted, Judge Greene found no merit in this argument, dismissing it as a mere semantic ploy to avoid the plain language of the Constitution.

The Framers recognized that the president might have to respond promptly on his own initiative to “repel sudden attacks” against the United States. But the Framers reserved to Congress the authority and responsibility for taking offensive actions against other nations. The president could repel, but not commence war. As James Wilson explained at the Pennsylvania ratifying convention, it “will not be in the power of a single man” to take us to war.

The Framers’ fear that one man might—for reasons of political motive, imprudence, or recklessness—thrust the nation into war, drew from their knowledge that kings, tyrants, and despots had gone to war for less than meritorious reasons. Those policy concerns are as compelling today as they were two centuries ago. The intense political pressures, legal controversies, and personal travails that may surround and convulse this or any president may well cloud his personal judgment. Such concerns reaffirm the wisdom of the Framers’ penchant for collective decision making in foreign affairs.

The Framers adopted a set of principles that are fundamental to self-government. The constitutional requirement of congressional authorization for offensive actions represented a radical break from monarchical rule in England, and it reflected the Framers’ commitment to republican principles in the conduct of foreign policy. Word games by presidents to get around this requirement do much to harm and undermine the values of our constitutional democracy.