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2022

## **“Bomb First, Ask Congress Later”: A Proposal to Rebalance War Powers Between the President and Congress**

Christopher Camaj

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**“Bomb First, Ask Congress Later”:  
A Proposal to Rebalance War Powers between the President and Congress**

**Christopher Camaj  
November 27, 2021**

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## I. Introduction

Taken alone, Article I, Section 8 of the Constitution might suggest that Congress decides when we go to war. But a closer look reveals otherwise. The constitutional framework laid down 233 years ago allows for the President to send U.S. troops into war, and to do so unilaterally.<sup>1</sup> To be sure, the Framers reserved the power to declare war—i.e., to initiate a total, national war effort—for Congress. They also vested Congress with the power of the purse; Congress may choose to fund, or not to fund, the Executive’s military operations.

The result is a system in which the President may engage in limited military conflict but requires the assent of Congress to bring the Nation into a total state of war. The question of where to place the dividing line between “limited” military conflict and “total” war splits constitutional scholars. As illustrated throughout this paper, both sides of that debate agree that the President has at least some war-making power, but there is disagreement over the extent of that power.<sup>2</sup>

Over the years, various interested parties attempted to bring the question to the Judiciary, and the Judiciary declined to answer it.<sup>3</sup> In *Campbell v. Clinton*, a number of Congressmen challenged the constitutionality of President Clinton’s actions with regards to the Kosovo War.<sup>4</sup> The court dismissed the claim for lack of standing.<sup>5</sup> Congress possessed the political tools to stop President Clinton’s war-making; it could have demanded the President immediately withdraw

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<sup>1</sup> See *Prize Cases*, 67 U.S. 2 Black 635, 691 (it is “lawful for the President to call forth the militia ... as may be necessary to suppress ... insurrection or obstruction of the laws”); Library of Congress, *Copy of James Madison’s Original Notes on Debates in the Federal Convention of 1787* (Madison’s note that the Declare War Clause leaves the President with authority to repel sudden attacks)

<sup>2</sup> See Section I, Parts A – C

<sup>3</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 – 88 (1952) (holding limited to President’s domestic powers; did not review President Truman’s authority to initiate the Korean War without Congress); *Dellums v. Bush*, 752 F. Supp. 1141, 1149 – 52 (D.D.C. 1990) (holding a Congressman lacked standing to challenge President Bush’s deployment of troops in the Persian Gulf War); *infra* note 4.

<sup>4</sup> *Campbell v. Clinton*, 203 F.3d 19 (D.D.C. 2000)

<sup>5</sup> *Id.*

from Kosovo, or it could have declined the President’s request for the funding necessary to continue the effort in Kosovo.<sup>6</sup> Instead, Congress voted down a measure to demand withdrawal from Kosovo and then doubled the funding that the President requested.<sup>7</sup>

The result was a political dispute—and one from which the Judiciary rightfully abstained. Congress had the political *means* but not the political *will* to either stop or frustrate the President’s war-making effort. The U.S. involvement in the Kosovo War illustrates the political dispute and practicalities surrounding war powers.

But the Kosovo War is no outlier. Four of the six deadliest wars in American history—the Civil War (deadliest), Vietnam War (third deadliest), Korean War (fourth deadliest), and Iraq War (fifth deadliest)—came without any declaration of war from Congress.<sup>8</sup> Notably, three of those are in the last century. The War Powers Resolution (“WPR”), passed during the Vietnam Era, ostensibly sought to rein in the Executive’s war power.<sup>9</sup>

The WPR generally requires the President to transmit notice within forty-eight hours of introducing armed forces into hostilities.<sup>10</sup> Then there is a sixty-day clock: if the President does not obtain some further authorization or declaration from Congress, the President must withdraw from the hostilities in question.<sup>11</sup> In theory, the WPR may appear to tilt the balance of war powers back towards Congress. In practice, that has not been the case. No President ever accepted the constitutionality of the WPR; and some appeared to openly flaunt it.<sup>12</sup>

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<sup>6</sup> *Id.* at 23

<sup>7</sup> *Id.*

<sup>8</sup> Department of Veterans Affairs, *America’s Wars*, Nov 2020, accessible at [https://www.va.gov/opa/publications/factsheets/fs\\_americas\\_wars.pdf](https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf) (last accessed Oct. 20, 2021)

<sup>9</sup> 50 U.S.C. § 1541 (stating the purpose of insuring congressional authorization for the President’s introduction and continued use of military forces in hostilities)

<sup>10</sup> 50 U.S.C. § 1543(a)

<sup>11</sup> 50 U.S.C. § 1544(b)

<sup>12</sup> See *infra* notes 70 - 73

The WPR is fatally flawed. And so is the constitutional framework beneath it. Both fail to account for political reality. As seen in *Campbell v. Clinton*, the President’s exercise of war powers (at least those short of total, national war) is only limited by the political will of Congress. Congress has ample constitutional power to stop or otherwise frustrate presidential war-making. But Congress often lacks the will to do so. There are a number of obvious reasons—most of all, the fear of being cast as undercutting U.S. troops in active combat.

This political reality creates opportunity for Presidents past, present, and future to exercise considerable war power—perhaps far in excess of that envisioned or intended by the Framers.<sup>13</sup> The only limit on most presidential war-making is the collective will of an increasingly fickle and divided Legislature. At times, such as in Kosovo, presidential war-making was relatively limited and brought about desired results. Other times, such as in Korea and Vietnam or in the collective “war on terror”, presidential war-making brought tremendous death and destruction for little to no gain, and often in spite of vast public opposition to those war efforts.

A closer look at the text of the Constitution and the debate around its ratification reveals that the Framers envision at least some presidential war power.<sup>14</sup> Indeed, throughout our Nation’s history, Presidents exercised unilateral war power from time-to-time.<sup>15</sup> But the balance of power is now distorted. Presidents possess vast power to effectively bring the nation into war—this much, the Framers did not intend.<sup>16</sup>

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<sup>13</sup> See Alexander Bickel, *Congress, the President and the Power to Wage War*, 48 Chi.-Kent L. Rev. 131, 133 (1971) (“The text of the Constitution and its history ... plainly limit the President[’s war power] ... [l]ater in practice, however, ... [the President’s war power] has tended to enlarge”).

<sup>14</sup> See *supra* note 1 (at the very least, the President may initiate defensive military action)

<sup>15</sup> See *infra* note 133

<sup>16</sup> Bickel at 131 – 32 (arguing that the Framers intended to “clog war and facilitate peace” but we have reversed that order over the years)

James Madison wrote that war is the most dreaded enemy of public liberty.<sup>17</sup> He noted the cost of war—both as a matter of debt and taxes, and in the sociopolitical sense of the expansion of the Executive’s discretionary powers, as well as the degradation of manners and morals during times of war.<sup>18</sup> Madison concluded that “[n]o nation could preserve its freedom in the midst of continual warfare.”<sup>19</sup>

It may be argued that the United States is a nation in the midst of continual warfare. And the costs of our continual warfare—both economic and political—appear evident. The solution is a new WPR that accounts for political and practical reality and forces Congress to affirmatively authorize or foreclose a President’s war-making effort.

Part II of this paper discusses the allocation of war powers between the Executive and Legislature; it examines: the important distinction of Congress’s power to “declare” war; the President’s power to engage in military conflict short of a “declared” war; and the flaws of both the constitutional framework and WPR passed in an attempt to rebalance war powers back towards Congress. Part III puts it all in practice; it turns back to the example of the Kosovo War and explains why President Clinton’s unilateral military campaign against Serbia was nonetheless constitutional. Finally, Part IV details the fatal flaw of the WPR and proposes a replacement to more effectively limit the Executive’s war power in practice.

## **II. The Allocation of War Powers between the Political Branches**

There are three elements of war powers to consider here. First, there is Congress’s Article I “declare” war power, covered in Section A below. Next, in Section B, there is the President’s

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<sup>17</sup> James Madison, *Political Observations*, Apr. 20, 1795

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

independent war-making ability. Then, in Section D, there is the WPR—which at least purports to answer the flawed system demonstrated in Section C.

### A. Congress’s Power to “Declare” War

Article I, Section 8, of the Constitution vests Congress with broad war powers. Most notably, Congress has the power to “declare” war. But its war powers also include raising and supporting armies, providing and maintaining navies, and making rules and regulations for those land and naval forces. So Congress funds our armed forces; they prescribe rules that govern those forces; and they “declare” when those forces go to war.

To the reader, there may appear to be little controversy here. Congress decides when we go to war; that is what Section 8 says. But it is not that simple. The Framers deliberately used the word “declare”; they reserved for Congress the power to initiate a total, or “general” war.<sup>20</sup> In doing so, the Framers recognized that not all military action meets the threshold of a formally-declared war, and they did not prohibit the Executive—the commander-in-chief—from initiating a lesser, or “limited” war.<sup>21</sup> This is supported both by the eighteenth-century understanding of the term “declare” war and by this Nation’s history and practice.<sup>22</sup>

American troops have been sent into combat at least 125 times in our Nation’s 225-year history.<sup>23</sup> Despite that, Congress has only declared war five times—and not once since World War II.<sup>24</sup> The United States was never formally at war with North Korea nor Vietnam. During the Korean War, President Truman invoked his power as commander-in-chief to deploy troops.<sup>25</sup> And

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<sup>20</sup> See *supra* note 1 (the President may, at least, initiate defensive military action)

<sup>21</sup> *Id.*

<sup>22</sup> See *infra* notes 35 - 36

<sup>23</sup> John C. Yoo, *Point/Counterpoint: Kosovo, War Powers, and the Multilateral Future*, 148 U. Pa. L. Rev. 1673, 1677 (May 2000)

<sup>24</sup> *Id.* at 1677

<sup>25</sup> *Id.*

in Vietnam, President Johnson received, at best, implied congressional authorization via the Tonkin Gulf Resolution, but no congressional declaration of war.<sup>26</sup>

Louis Fisher—constitutional scholar and prominent voice for the “pro-Congress” side of the debate—argues that President Truman’s unilateral action with respect to the Korean War “represented a subversion of the Framers’ design.”<sup>27</sup> Nonetheless, Fisher acknowledges that modern-day Congress largely watches from the sidelines and that, since Truman, “military operations ... ha[ve] been dictated by presidents, not Congress.”<sup>28</sup> Fisher accuses the contemporary Congress of abdicating the war powers entrusted to the legislative branch.<sup>29</sup> Perhaps this is true. But this is a choice made by Congress; it does not mean that the Executive acts unconstitutionally if or when taking military action without the express consent of Congress.

Pro-Congress scholars further argue that the Constitution prohibits the President from initiating “offensive wars” (but not “defensive” ones) without the affirmative authorization of Congress.<sup>30</sup> To that end, Harold Koh, who served as legal adviser to the Obama State Department, maintains that Constitution requires the President to “meaningfully consult[.]” with Congress to “make war”.<sup>31</sup>

But the Constitution speaks of the power to “declare” war, not the power to “make” war, and there is a difference. John Yoo—perhaps most famous for his time in George W. Bush’s Office of Legal Counsel—presents the “pro-Executive” side of the debate, and argues that the Framers did not intend for only one “single, correct method” to go to war.<sup>32</sup> Rather, Yoo notes

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<sup>26</sup> *Id.*

<sup>27</sup> Louis Fisher, *Point/Counterpoint: Unchecked Presidential Wars*, 148 U. Pa. L. Rev. 1637 (May 2000)

<sup>28</sup> *Id.* at 1637

<sup>29</sup> *Id.* at 1637

<sup>30</sup> John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 5 (1995)

<sup>31</sup> Harold Koh, *Presidential War and Congressional Consent: The Law Professor’s Memorandum in *Dellums v. Bush**, 27 Stan. J. Int’l L. 247, 249 (1991)

<sup>32</sup> Yoo at 1688

that “the Constitution vests the political branches with different powers related to war.”<sup>33</sup> To wit, in times of peace, Congress may fund and raise a military; conversely, in times of national emergency, the President may “seize the initiative in war-making.”<sup>34</sup>

Yoo claims that, while “declare war” may ring the same as “commence hostilities”, eighteenth-century Americans understood that “[n]ot all forms of hostilities or military deployments rise to the level of a declared war.”<sup>35</sup> He further points to history: Great Britain and colonial Americans engaged in all sorts of hostile conflict, including direct combat with the military forces of other nations, without any official declaration of war.<sup>36</sup>

The pro-Executive argument reaches into a bag of linguistics and history to urge that the congressional power to “declare” war does not monopolize all war power within Congress, nor does it preclude the Executive from initiating military action *sua sponte*. Of course, Fisher and the pro-Congress side disagree—and in doing so, they build their own argument out of history and the known views and writings of various Framers.

## **B. The Executive’s Power to Initiate Military Action without Congress**

The pro-Congress argument is often colored by quotes from the likes of James Madison, Justice Joseph Story, and others. It also seeks to root itself in textualism and the plain meaning of “declare” war—or at least the pro-Congress interpretation of that plain meaning. And while the pro-Congress side broadly sweeps war powers into the halls of Congress, there is acknowledgement of some “limited” war powers exercisable by the Executive.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Yoo at 1689

<sup>36</sup> *Id.*

Support for the pro-Congress argument may be found in the writings and views of some Framers and early constitutional scholars. Notably, James Madison once wrote to Thomas Jefferson the Constitution “vested the question of war in the Legislature.”<sup>37</sup> But that was a private correspondence, after the ratification of the Constitution.<sup>38</sup> It may indicate at least Madison’s view, but it does not operate to prohibit the Executive from initiating some level of military action.

Justice Joseph Story also lends support to the pro-Congress side. He observed that the Constitution vests Congress with the power to declare war in order to inhibit the ability of any one person to start war; thus, it would be incompatible with the purpose and intent of the Constitution to allow for a single Executive to initiate military conflict.<sup>39</sup> Justice Story was a titan of the early Court, and a nominee of President Madison, but his observations into the intent and meaning behind Article I, Section 8 come as a scholar and not a contemporary; he was only eight years old during the Philadelphia Convention.<sup>40</sup>

Setting aside the views of Madison, Story, and others—coming from outside the margins of the Constitution—there is also a pro-Congress argument that looks to the text itself. The ubiquitously-cited constitutional scholar John Hart Ely noted that academic attempts to “divine” the “original understanding of the Constitution” often “obscure [it] to the point of inscrutability.”<sup>41</sup> Ely argued that the “declare war” clause is simple: it means that all war requires legislative authorization.<sup>42</sup>

But it is not so simple. The Constitutional Convention’s deliberately chose to use the word “declare” war rather than “make” war. This undercuts the argument that the power to “declare”

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Yoo at 1694

<sup>41</sup> John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 3 (1993)

<sup>42</sup> *Id.*

war subsumes all war-making power. For his part, Yoo argues that the change “demonstrates that the Framers understood that the broader power of making war existed”—and the Framers chose to replace that with the “narrower power of declaring war.”<sup>43</sup>

To be sure, the pro-Executive argument is not totally pro-Executive; it does not contend that the Executive can unilaterally commit the nation to total war.<sup>44</sup> Likewise, the pro-Congress argument often concedes that the President has at least some war-making power.<sup>45</sup> And the pro-Congress side also looks to history to support this distinction.

Like the text itself, the history is also characterized differently by the two sides. The pro-Executive side points to the numbers: again, among at least 125 military conflicts in our Nation’s history, only five came with a congressional declaration of war attached.<sup>46</sup> But the pro-Congress side clarifies that—at least before the Korean War—virtually all “major” military action was in some way “authorized” by Congress.<sup>47</sup>

In distinguishing “major” military action, the pro-Congress side again implies that there is at least some level of war-making power left to the President. But the implication is qualified: before the Korean War, the Executive’s unilateral use of military force was “relatively modest in scope and limited in duration.”<sup>48</sup>

Thus emerges a key distinction: “general” war (i.e., a total, national effort) and “limited” war (i.e., “relatively modest in scope and limited in duration”). The pro-Executive side concedes that “general” war, that brings the nation into a state of total war, requires the assent of Congress.<sup>49</sup> Likewise, the pro-Congress side concedes that there are instances that the Executive may use

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<sup>43</sup> Yoo at 1694

<sup>44</sup> *Id.* at 1704

<sup>45</sup> Fisher at 1655

<sup>46</sup> See *supra* note 24

<sup>47</sup> Fisher at 1653

<sup>48</sup> *Id.* at 1655

<sup>49</sup> Yoo at 1687 (“Congress has control over formal, total war”)

military force unilaterally.<sup>50</sup> So the debate really becomes one of where to draw the line between “general” and “limited” war. But the argument may be merely academic. Regardless of where scholars wish to draw the line, the Constitution provides Congress with the political tools to “stop presidential war initiatives” if it believes the President is out of bounds.<sup>51</sup>

And therein lies the problem. Political tools are subject to politics. While Congress has the *ability* to stop presidential war initiatives, it rarely—at least in modern times—has the *will* to stop presidential war initiatives. This makes for a flawed system that allows for modern Presidents to unilaterally exercise more and more war power.

### C. A Flaw in Our Constitutional System

In the simplest terms, war costs money and Congress writes the checks—so if Congress takes issue with military action taken by the Executive, it has “adequate opportunity to use its plenary power over funding to review the merits of [a] war.”<sup>52</sup> In other words, when the President comes asking for money to fund some military action, Congress can stop the President by refusing to write the check.

But that simplistic formulation overlooks a glaring flaw. If Congress needs to use its power of the purse to stop presidential war initiatives, it would need to present a veto-proof bill to the President.<sup>53</sup> This is because the President would presumably veto a bill that stops or otherwise frustrates a presidential war initiative, so Congress would then need an “extraordinary” two-thirds majority to overcome the President’s veto.<sup>54</sup>

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<sup>50</sup> Fisher at 1671

<sup>51</sup> *Id.* at 1666

<sup>52</sup> Yoo at 1704

<sup>53</sup> Fisher at 1666

<sup>54</sup> *Id.*

This is precisely what happened during the Vietnam War. In 1973, Congress “assembled a majority” in each chamber to cut off funding for the war.<sup>55</sup> After President Nixon vetoed the effort, Congress was unable to find the two-thirds majority to override.<sup>56</sup> And as such, Congress—by simple majority—was unable to stop Nixon’s efforts in Vietnam.

The result is that the President only needs “one-third plus one” support in either chamber of Congress to conduct a war.<sup>57</sup> The pro-Congress side urges that this “cannot be the rule”.<sup>58</sup> But this is the rule. It may be a flaw of our Constitution—it is nonetheless the rule.

The Constitution reserves the power of total, national war for Congress. When the Framers deliberately changed the language from “make [w]ar” to “declare [w]ar”, they recognized that there exist different levels of hostilities, and they reserved for Congress a narrower “declare” power. This left room for the Executive to initiate lower levels of military action. And when the presidential war-making contravenes the desires of Congress, the Constitution empowers Congress with the tools to stop the President.

On one hand, it “unreasonable to expect Congress to use its appropriate powers to cut off troops in the field.”<sup>59</sup> Politicians may be wary to take action that might be seen to undermine the military once engaged in combat.<sup>60</sup> But on the other hand, we should not “mistake a failure of political will for a violation of the Constitution.”<sup>61</sup>

Still, we should recognize the reality of politics. The Framers laid the framework for a novel government; they did not and could not foresee the evolution of that government, and of American society, in the decades and centuries that would follow. They reserved the lion’s share

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<sup>55</sup> *Id.* at 1667

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Yoo at 1704

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

of war powers for Congress and further empowered Congress to stymie the President’s own war-making.

Since World War II, however, the Executive has increasingly engaged in unilateral military action. Congress, on the other hand, has grown increasingly dysfunctional—gathering two-thirds of today’s Congress is a Herculean task on any matter. This leaves the Executive considerable daylight to make war without Congress. The War Powers Resolution was supposed to be the congressional answer to this problem.

#### **D. Limiting Presidential War-Making with the WPR**

Following the Korean War, there was increasing concern around the President’s apparently expanding war powers.<sup>62</sup> By the 1970s—and in the midst of President Nixon’s unilateral military actions in Vietnam and Cambodia—the majority view in Congress was that “the constitutional balance of war powers ... swung too far toward the President and needed to be corrected.”<sup>63</sup> And so, in 1973, Congress enacted the WPR to “insure [sic] that the collective judgment of both the Congress and the President will apply to the introduction of the 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.”<sup>64</sup>

The WPR provides three circumstances upon which the President may initiate the use of military force: (1) a declaration of war; (2) a specific statutory authorization; or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”<sup>65</sup> If and when the President does initiate the use of force in the absence of a declaration

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<sup>62</sup> Erica H. Ma, *The War Powers Resolution and the Concept of Hostilities*, 13 *Ne. U. L. Rev.* 519, 523 (May 2021)

<sup>63</sup> *Id.* at 533

<sup>64</sup> *Id.* (quoting 50 U.S.C. § 1543(a))

<sup>65</sup> 50 U.S.C. § 1543(a)

of war, the “triggering provision” of the WPR requires the President to submit a report to Congress within forty-eight hours.<sup>66</sup> After that, the teeth of the WPR create a sixty-day termination clock: unless Congress declares war or otherwise authorizes the military action in question, the President must terminate that action within sixty days.<sup>67</sup>

In his veto of the WPR, Nixon warned that it would “attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years.”<sup>68</sup> The Executive Branch has historically justified its authority to initiate the use of force for a broad range of purposes, including: to rescue Americans abroad, the protect U.S. embassies and delegations, to suppress civil insurrection, to implement the terms of an armistice or cease-fire involving the U.S., and to carry out the terms of treaties.<sup>69</sup>

Notably, no President has accepted the WPR as constitutional.<sup>70</sup> Presidents Ford and Carter never recognized the WPR as binding.<sup>71</sup> President Reagan outright refused to comply with the WPR on multiple occasions in Lebanon, Grenada, Libya, and the Persian Gulf.<sup>72</sup> President George H.W. Bush deployed troops to Iraq longer than the sixty days permitted by the WPR—but even as he asked for the support of Congress, he argued he already had the constitutional authority required.<sup>73</sup>

The Executive’s indifference for the WPR reached new levels under President Clinton, first in Haiti, and later in Kosovo. In 1994, Clinton initiated military intervention in Haiti, pursuant to a U.N. mandate, despite a unanimous Senate resolution declaring that Clinton lacked

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<sup>66</sup> 50 U.S.C. § 1544(a)

<sup>67</sup> 50 U.S.C. § 1544(b)

<sup>68</sup> Ma at 534 (quoting H.R. Doc. No. 93-171)

<sup>69</sup> *Id.* at 534

<sup>70</sup> *Id.* at 538

<sup>71</sup> Yoo at 1677

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

authorization.<sup>74</sup> In 1999, Clinton tested the WPR again, joining NATO in initiating military activity against Serbian forces in Kosovo.<sup>75</sup> But Clinton’s actions with respect to Kosovo were Constitutional—and the U.S. involvement in Kosovo perhaps best illustrates the fractured framework of constitutional war powers.

### **III. President Clinton’s Military Intervention in the Kosovo War**

Before discussing the constitutional issues, it is helpful to first understand some of the history of the Albanian-Serbian dispute. Section A provides that background and further explains why it mattered to the U.S. at all. Section B then details the U.S. involvement in Kosovo. Finally, Section C concludes that President Clinton’s campaign in Kosovo did not run afoul of the Constitution.

#### **A. A Brief History of the Dispute in Kosovo**

During Roman times, the province of Kosovo was part of the Dardanians’s tribal land.<sup>76</sup> Albanian tradition—supported by archaeological evidence—holds that the Dardani were an Illyrian tribe (although there is some dispute that they were actually Thracian).<sup>77</sup> And Albanians today—again supported by archaeological evidence—regard themselves as the modern descendants of ancient Illyrians.<sup>78</sup> All that is to say that Albanians in Kosovo view the province as Albanian land since ancient times.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1673

<sup>76</sup> Noel Malcom, *Kosovo: A Short History*, 31 (1998)

<sup>77</sup> John Wilkes, *The Illyrians*, 224 (1992)

<sup>78</sup> Wilkes at 38

But Kosovo is also central to the history and culture of the Serbian people. In the seventh-century, after the fall of the Roman Empire, Kosovo became a part of the Kingdom of Serbia.<sup>79</sup> Since then, ethnic Serbs viewed Kosovo as “the spiritual center of Serbia and the Serbian Orthodox Christian Church.”<sup>80</sup> But in that time, the map of Serbia has “grown, shrunk, disappeared, and reappeared” several times; sometimes that map included Kosovo, sometimes it did not.<sup>81</sup>

For over four centuries, Kosovo (and most of the Balkan Peninsula) was occupied by the Ottoman Turks.<sup>82</sup> Before that occupation, most people in Kosovo were Christian, regardless of whether they were Albanian or Serb.<sup>83</sup> But under Ottoman rule, the people of Kosovo were presented with the choice of converting to Islam, and becoming full citizens of the Ottoman Empire, or retaining their Christian faith and living as second-class citizens.<sup>84</sup> Many Albanians in Kosovo converted to Islam; many Serbs did not—and this set the foundation of the ethnic tension between Albanians and Serbs that persists to this day.<sup>85</sup>

Over the first half of the twentieth-century, Kosovo changed hands many times before becoming an autonomous province of Serbia.<sup>86</sup> And it remained such for over forty years.<sup>87</sup> That is, until Slobodan Milosevic. Milosevic became President of the Socialist Republic of Serbia in 1989.<sup>88</sup> He came into power in the midst of the collapse of the communist party in Serbia; and so,

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<sup>79</sup> Malcom at 41

<sup>80</sup> *Id.* at 12 - 13

<sup>81</sup> Tim Judah, *Kosovo: What Everyone Needs to Know*, 12 (2008)

<sup>82</sup> *Infra.*

<sup>83</sup> *Infra.*

<sup>84</sup> *Infra.*

<sup>85</sup> Malcom at 93 - 115

<sup>86</sup> In 1912, Serbs retook Kosovo from the Ottomans, only to lose it again during World War II. Judah at 12. Following World War II, Kosovo was designated an autonomous province of Serbia. *Id.*

<sup>87</sup> See *supra* note 85

<sup>88</sup> *Id.* at 66

in an effort to consolidate power and boost his popular standing, he stoked Serbian nationalism around the prospect of reunifying Kosovo into Serbia.<sup>89</sup>

In early 1989, Milosevic removed Albanian leaders from Kosovo’s government and replaced them with “loyal Albanians” who then voted, at Milosevic’s behest, to strip Kosovo of its autonomy and restore Serbia’s power over the province.<sup>90</sup> The ramifications were immediate; Albanians were fired from public service jobs, subject to additional taxes, and generally segregated from their Serbian neighbors.<sup>91</sup>

Over the next decade, civil unrest bubbled into war between Serbian forces and a group of Albanian separatists called the Kosovo Liberation Army (KLA).<sup>92</sup> Hostilities continued to intensify with time. In January 1998, the KLA killed three Serbian policemen.<sup>93</sup> In response, Serbian forces attacked the KLA-held village of Racak.<sup>94</sup> When the Serbs left, the bodies of forty-five Albanians—including women and children—were found shot execution-style and left in a mass grave.<sup>95</sup>

The Racak massacre captured the attention and the ire of the international community.<sup>96</sup> Conflict in the Balkans was sure to raise anxiety in the West. After all, it was Gavrilo Princip, a Serbian teenager, who lit the powder keg of World War I when he assassinated Archduke Franz Ferdinand.<sup>97</sup> More recently than that, the atrocities of the Bosnian War weighed on the collective

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<sup>89</sup> *Id.* at 66 - 67

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 73 - 74

<sup>92</sup> *Id.* at 67 - 77

<sup>93</sup> *Id.* at 84

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 85

<sup>97</sup> David DeVoss, *Searching for Gavrilo Princip*, Smithsonian, 42 (Aug. 2000)

conscious of Western leaders like Bill Clinton and Tony Blair, who hoped to avoid similar massacres in Kosovo.<sup>98</sup>

## **B. U.S. Involvement in the Kosovo War**

Following the Racak massacre, the U.S., U.K., France, Germany, Italy, and Russia came together and gave Serbian leaders and representatives for Kosovar Albanians an ultimatum: come to Rambouillet, France and broker peace.<sup>99</sup> Those peace talks broke down, however, when Serbia refused to allow the indefinite presence of a NATO-led peace-keeping force in Kosovo.<sup>100</sup> A second attempt at peace talks in Paris also failed.<sup>101</sup> Shortly thereafter, Serbian forces launched an offensive, driving thousands of Kosovar Albanians from their villages, executing many, and burning down their homes.<sup>102</sup>

At that point, NATO decided to take action, and the U.S. joined.<sup>103</sup> In March 1999, President Clinton announced the commencement of military strikes against Serbian targets.<sup>104</sup> Two days later, Clinton submitted reports to both the President pro tempore of the Senate and the Speaker of the House informing them of American airstrikes against Serbia.<sup>105</sup> Clinton justified his unilateral use of American force against another nation on his “constitutional authority to conduct U.S. foreign relations and as commander-in-chief and Chief Executive.”<sup>106</sup> He further declared that the operation’s mission was to “demonstrate NATO’s seriousness of purpose”, “deter

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<sup>98</sup> Judah at 87

<sup>99</sup> U.S. Department of State, *Kosovo Chronology*, May 21, 1999, accessible at [https://1997-2001.state.gov/regions/eur/fs\\_kosovo\\_timeline.html](https://1997-2001.state.gov/regions/eur/fs_kosovo_timeline.html) (last accessed Oct. 14, 2021)

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> The White House Office of the Press Secretary, *Statement by the President to the Nation*, March 24, 1999, accessible at <https://clintonwhitehouse5.archives.gov/WH/New/html/19990324-2872.html> (last accessed Nov. 26, 2021)

<sup>105</sup> Yoo at 1680

<sup>106</sup> *Id.*

an even bloodier offensive against innocent civilians in Kosovo”, and to “seriously damage the Serbian military’s capability to harm the people of Kosovo.”<sup>107</sup>

Consistent with the WPR, President Clinton did notify Congress within forty-eight hours of unilaterally initiating a military offensive. Following the lead of Presidents Reagan and Bush, Clinton described his report to Congress as “consistent with”, rather than “pursuant to” the WPR.<sup>108</sup> It may seem like splitting hairs, but the distinction seems to demonstrate the Executive’s continued refusal to recognize the WPR’s constitutionality.<sup>109</sup>

While Clinton welcomed the support of Congress, the message from the Legislative Branch was, at best, mixed. A month after the bombing commenced, the House of Representatives rejected—by a vote of 427 to two—a joint resolution declaring war on Serbia.<sup>110</sup> The House then rejected—by a vote of 213 to 213—a Senate resolution authorizing the use of force against Serbia.<sup>111</sup> At the same time, the House also rejected measures to end the U.S. offensive against Serbia.<sup>112</sup>

Congress rejected votes to declare, or even authorize, war against Serbia. But Congress also rejected a vote to end the bombing campaign against Serbia. And the mixed messages only continued. In May 1999, Congress doubled President Clinton’s request for emergency funding for Kosovo War operations—but again voted against authorizing it.<sup>113</sup>

On June 3, 1999, Milosevic pulled his forces out Kosovo and accepted the alliance’s demands.<sup>114</sup> NATO prevailed: a humanitarian crisis was averted; a million refugees could return

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1681

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Javier Solana, *NATO’s Success in Kosovo*, Council on Foreign Relations, Vol. 78, No. 6, 117 (Nov. – Dec. 1999)

to their homes; and the so-called “ethnic cleansing” of Kosovar Albanians ended.<sup>115</sup> Kosovo regained its autonomy and elected a new, provisional government in November 2001.<sup>116</sup> Then, in February 2008, Kosovo broke from Serbia altogether and declared its independence.<sup>117</sup>

All told, the U.S. joined NATO in bombing Serbia for seventy-seven days. The alliance successfully repelled the Serbian offensive—more than that, they ended a potential genocide and laid the groundwork for a free and independent Kosovo that persists to this day. And for his part, Slobodan Milosevic never lived to see it. Milosevic died at the Hague, where he was being held for genocide and other war crimes perpetrated at his behest in Kosovo.<sup>118</sup>

### C. The Constitutionality of President Clinton’s Actions in Kosovo

The U.S. military intervention in Kosovo stands in stark contrast to the instability and “forever wars” created by U.S. intervention in other instances.<sup>119</sup> And yet, despite the success in Kosovo, the campaign exceeded the WPR’s sixty-day termination window without any declaration of war, or other authorization, from Congress. Taken at face value, Section 5(b) of the WPR required President Clinton to pull out of Kosovo once those sixty days elapsed. But he did not, and Congress took no action to enforce the WPR against him.

This was not lost on some members of Congress. Once the sixty-day window closed, thirty-one Congressmen, who were opposed to the U.S. involvement in Kosovo, filed suit in *Campbell v. Clinton*. The Congressmen sought declaratory judgment that President Clinton’s use

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<sup>115</sup> *Id.*

<sup>116</sup> Dan Bilefsky, *Kosovo Declares Its Independence from Serbia*, N.Y. Times, Feb. 18, 2008

<sup>117</sup> *Id.*

<sup>118</sup> BBC News, *Milosevic Found Dead in His Cell*, Mar. 11, 2006

<sup>119</sup> The U.S. military has been on the Korean peninsula since 1950. USFK Combined Forces Command, *Mission of the ROK/US Combined Forces Command*, accessible at: <https://www.usfk.mil/About/Combined-Forces-Command/> (last accessed Nov. 26, 2021). Similarly, the U.S. military has been in Iraq since 2003. Dave Philipps, *U.S. Troops Still Deploying to Iraq*, N.Y. times, Sep. 20, 2021. The campaign against Serbia was only seventy-seven days. See *supra* note 114.

of military force against Serbia was unlawful under both the War Powers Clause of the Constitution and WPR.<sup>120</sup>

The Congressmen’s gambit failed. The D.C. Circuit declined to address the constitutionality of the WPR. Instead, the suit was dismissed for lack of standing.<sup>121</sup> The court noted that the “dispute [was] ... fully susceptible to political resolution” and dismissed to avoid “meddling in the internal affairs of the legislative branch.”<sup>122</sup>

The court explained that Congress had multiple political tools available to resolve the alleged dispute. For one, Congress could have passed a law forbidding the use of U.S. forces in the Kosovo War.<sup>123</sup> And in fact, there was a measure introduced to withdraw U.S. troops from the conflict—but it was defeated by a 290 to 139 vote.<sup>124</sup>

The court further noted that “Congress always retains appropriations authority and could have cut off funds for the American role in the conflict”—and there was a measure to that effect, but it also failed.<sup>125</sup> Instead, Congress *doubled* President Clinton’s request for additional funding for Kosovo War operations.<sup>126</sup>

Finally, the court reasoned that “logic dictates [the Congressmen] do not have standing to bring [the] challenge” because “Congress has a broad range of legislative authority it can use to stop a President’s war-making.”<sup>127</sup> Again, this was consistent with historic practice: the Judiciary has never reached the merits of any challenge of presidential war-making.<sup>128</sup>

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<sup>120</sup> *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000)

<sup>121</sup> *Id.* at 24

<sup>122</sup> *Id.* at 21 (quoting *Raines v. Byrd*, 523 U.S. 811, 138 (1997))

<sup>123</sup> *Id.* at 22

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Yoo at 1682

Congress never explicitly authorized President Clinton’s actions in the Kosovo War. But they also never used the tools at their disposal to stop him. Indeed, when some members of Congress tried to use those tools, they were defeated by their peers. And when President Clinton went to Congress for funding, Congress generously doubled his request. Congress could have stopped the U.S. intervention in Kosovo by simply doing *nothing*. No affirmative act was required.

Opponents of President Clinton and/or the efforts to liberate Kosovo may continue to argue that Clinton acted unconstitutionally. These opponents include what may appear to be strange bedfellows, like the American Civil Liberties Union (ACLU)<sup>129</sup> and the Cato Institute<sup>130</sup>, a noted conservative think tank. But there is nothing in the Constitution that operates to prohibit the President from deploying troops to protect national interests—here, upholding our commitment to NATO and also preventing a humanitarian crisis in a region that already sparked a World War prior.

That is not to say that President Clinton could have unilaterally taken the nation into a total, general war with Serbia. But a limited, seventy-seven-day campaign, justified by national interests—this the Constitution allows. And if Congress disagreed, they had the tools available to stop the President. Rather than do that, though, they chose to give him the money he needed to continue. The fact that Congress lacked the political will to stop the President does not mean that they lacked the means to do so, or that the President acted unconstitutionally. It means that the system is flawed and the WPR needs to be revisited.

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<sup>129</sup> ACLU, *ACLU Says Military Action in Kosovo Violates the Constitution and War Powers Act*, Apr. 28, 1999, accessible at: <https://www.aclu.org/press-releases/aclu-says-military-action-kosovo-violates-constitution-and-war-powers-act> (last accessed Nov. 26, 2021) (arguing that the President cannot launch “sustained military action” without Congress and further supporting Campbell in *Campbell v. Clinton*)

<sup>130</sup> Doug Bandow, *Clinton Stepped Beyond Constitutional Limits*, Cato Institute, Apr. 30, 1999, accessible at: <https://www.cato.org/commentary/clinton-stepped-beyond-constitutional-limits> (last accessed Nov. 26, 2021) (arguing that Clinton started a war illegally and that Congress was effectively powerless to stop him because of his veto power)

#### **IV. A New War Powers Resolution to Rebalance War Powers between the Political Branches**

The danger of the consolidation of war powers in a single person is self-evident. It would belabor the point to quote any given Founding Father or constitutional scholar on the matter. The Constitution and WPR intend to limit the president’s independent war-making ability. In reality, and increasingly over the last century, they have failed to do so. There are a number of reasons why, further illustrated in Section A. Regardless, a new WPR is necessary to rebalance war powers between the political branches—and Section B proposes exactly that.

##### **A. Congress Lacks the Political Will to Check Presidential War-Making, Even with Public Support to Do So**

The pro-Congress argument asserts that “[t]he burden is on the President to come through the front door and seek authorization from Congress ... [when] taking the nation from a state of peace to a state of war.”<sup>131</sup> But this is a strawman. The pro-Execute argument concedes that to take the *nation* to war, some act of Congress is needed. On that much, the Constitution is clear.

But it gets gray. War and peace are not binary conditions; the United States may find itself in military hostilities that do not rise to the level of “taking the *nation* to war.”<sup>132</sup> From 1789 to 1950, presidents used military force unilaterally numerous times, but pro-Congress advocates qualify those ventures were “relatively modest in scope and limited in duration.”<sup>133</sup>

That qualification is reasonable. Few would question the President’s power to initiate defensive military action. And many seem to accept the President’s power to initiate some

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<sup>131</sup> Fisher at 1666

<sup>132</sup> *Id.* (emphasis added)

<sup>133</sup> *Id.* at 1655

“modest” and “limited” offensive military action. But neither the Constitution nor the WPR illuminate the contours of that limited scope and duration.

Ultimately, the only guardrail on presidential war-making is the political will of Congress. Pro-Congress advocates lament this reality; they argue that we cannot expect that kind of check to function effectively. To that end, if Congress takes a legislative act against the President, it needs to be veto-proof—so the President only needs “one-third plus one” of either chamber of Congress to ward off any such legislative check.<sup>134</sup> Alternatively, Congress can wait for the President to run out of funding, and then simply do nothing when the President seeks additional appropriations.<sup>135</sup>

Before Congress even gets to that point, it needs the political will to act. Few politicians are willing to take that stand—to appear to undercut U.S. troops in active combat. This holds true even when the war is unpopular, and this is illustrated by the ongoing involvement in Iraq.

In October 2002, Congress authorized President George W. Bush to initiate military action against Iraq (the 2002 Authorization for Use of Military Force Against Iraq, or “AUMF”).<sup>136</sup> The vote passed the House by a margin of 296 to 133 and the Senate by a margin of seventy-seven to twenty-three.<sup>137</sup> These margins paralleled public support—at the initiation of the Iraq War, over 70% of Americans believed it was the right decision.<sup>138</sup>

But public opinion shifted. By February 2005, a plurality of Americans believed going into Iraq was the wrong decision.<sup>139</sup> And by the end of the Bush presidency, a majority of

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<sup>134</sup> *Id.* at 1666

<sup>135</sup> *Id.* at 1667

<sup>136</sup> H.J. Res. 114, 107<sup>th</sup> Cong. (as passed by House and Senate, Oct. 16, 2002)

<sup>137</sup> *Id.*

<sup>138</sup> Pew Research Center, *Public Attitudes Toward the Iraq War: 2003 – 2008*, Mar. 19, 2008, accessible at <https://www.pewresearch.org/2008/03/19/public-attitudes-toward-the-war-in-iraq-20032008/> (last accessed Oct. 15, 2021)

<sup>139</sup> *Id.*

Americans were against the war.<sup>140</sup> Still, the 2002 AUMF survived the end of the Bush presidency, and in fact survived the next two presidents as well.

Perhaps unbelievably, the 2002 AUMF persists to this day. It was not until June 2021—after three different presidents and fifteen years of public opposition—that the House voted to repeal the 2002 AUMF.<sup>141</sup> But the repeal is stalling before the Senate.<sup>142</sup>

Recent polling shows that 63% of Americans believe the Iraq War was “not worth fighting”.<sup>143</sup> Despite that, Congress is still unable to gather the political capital necessary to repeal the 2002 AUMF—a legislative act that now pre-dates the birth of many American troops that may be sent to war pursuant to its terms.

Kosovo was, in comparison, a good story. We were in and out in about ten weeks. We spent “only” \$12 billion.<sup>144</sup> And American fatalities were limited to two soldiers in a single instance.<sup>145</sup> On top of all that, over 60% of Americans supported the airstrikes.<sup>146</sup>

That stands in staunch juxtaposition to the Iraq War, which has cost the United States nearly \$2 trillion.<sup>147</sup> That does not even factor in the loss of life—over 4,000 Americans have died in

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<sup>140</sup> *Id.*

<sup>141</sup> H.R. 256, 117<sup>th</sup> Cong. (June 17, 2021)

<sup>142</sup> S.J. Res. 10, 117<sup>th</sup> Cong. (Aug. 4, 2021)

<sup>143</sup> Associated Press, *Most Americans Say the Wars in Afghanistan and Iraq Were Not Worth Fighting*, Aug. 19, 2021, accessible at <https://apnorc.org/projects/most-americans-say-the-wars-in-afghanistan-and-iraq-were-not-worth-fighting/> (last accessed Oct. 15, 2021)

<sup>144</sup> CNN, *Clinton Signs \$15 Billion Spending bill for Kosovo*, Storm Victims, Farmers, May 21, 1999, accessible at <https://www.cnn.com/ALLPOLITICS/stories/1999/05/21/kosovo.costs/> (last accessed Oct. 15, 2021)

<sup>145</sup> BBC News, *Two Die in Apache Crash*, May 5, 1999, accessible at <http://news.bbc.co.uk/1/hi/335709.stm> (last accessed Oct. 15, 2021)

<sup>146</sup> Pew Research, *Continued Public Support for Kosovo*, Apr. 21, 1999, accessible at <https://www.pewresearch.org/politics/1999/04/21/continued-public-support-for-kosovo-but-worries-grow/> (last accessed Oct. 15, 2021)

<sup>147</sup> Neta C. Crawford, *The Iraq War Has Cost the US Nearly \$2 Trillion*, Military times, Feb. 6, 2020, accessible at <https://www.militarytimes.com/opinion/commentary/2020/02/06/the-iraq-war-has-cost-the-us-nearly-2-trillion/> (last accessed Oct. 15, 2021)

Operation Iraqi Freedom.<sup>148</sup> Nonetheless, Congress apparently still lacks the political capital, or political will, to fully repeal the 2002 AUMF.

### **B. A New WPR Is Necessary to Check Presidential War-Making**

The problem is clear. The Constitution permits some degree of presidential war-making, and unless the President is bringing the nation into a total, general war, the only check against the President is the will of Congress. But the will of Congress is fickle, and even with public support, Congress may not be able to overcome the supermajority threshold.

Turning back to the scholars on point, John Hart Ely called the WPR “unworkable”.<sup>149</sup> He noted that, since its inception, Presidents have refused to obey the WPR, and Congress has lacked the fortitude to “call [the President] on it.”<sup>150</sup> The flaw was evident to Ely too: “the [WPR] is designed to force a decision regarding matters that Congress has in the past shown itself unwilling to face up to.”<sup>151</sup> So even though the WPR puts the ball back in Congress’s court, an irresolute Congress is powerless to stop an Executive already in motion.<sup>152</sup>

The result is an Executive with vastly greater war power than the Framers envisioned. In Federalist No. 4, John Jay warned that “absolute monarchs will make war when their nations are to get nothing by it, but for ... purposes ... merely personal, such as thirst for ... glory, revenge ... [and,] ambition.”<sup>153</sup> But, in Federalist No. 69, Alexander Hamilton assured that the President

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<sup>148</sup> U.S. Department of Defense, *Casualty Status*, Oct. 13, 2021, accessible at <https://www.defense.gov/casualty.pdf> (last accessed Oct. 15, 2021)

<sup>149</sup> John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 Colum. L. Rev. 1379 at 1385 (Nov. 1988)

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1381

<sup>152</sup> *Id.* at 1382 (“thanks to a combination of presidential defiance [and] congressional irresolution ... the [WPR] has not worked.”)

<sup>153</sup> *The Federalist Papers*, No. 4

would be unlike the British King—while the British King could declare war and raise or regulate armies and fleets, those powers “would appertain to the legislature.”<sup>154</sup>

In reality, the legislature must take action to exercise the powers that “appertain” to it. In the absence of a Congress willing to expend the political capital to check presidential war-making, the Executive consumes greater and greater war power. The distinction between the British King and American President in Federalist No. 69 continues to blur.

The answer is a new WPR. And this paper is not the first to propose a new WPR. In fact, there is a bipartisan bill to rein in presidential war-making that is currently making its way through Congress—and, perhaps surprisingly, the bill has Executive support from President Biden.<sup>155</sup> The current proposal seeks to define the “hostilities” that trigger the WPR, and to further define the type of “specific statutory authorization” required if/when the sixty-day clock closes.<sup>156</sup>

These terms are currently undefined in the WPR, and that is a problem for two reasons. First, without an established definition for “hostilities”, the President may argue that certain military actions do not rise to that level and therefore do not trigger any requirement to notify Congress, nor any corresponding sixty-day clock.<sup>157</sup> Second, it is unclear what type of legislative act is required to meet the “specific statutory authorization” required if “hostilities” reach sixty days—i.e., does Congress need to explicitly authorize military force, or is funding sufficient to infer that authorization?<sup>158</sup>

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<sup>154</sup> *The Federalist Papers*, No. 69

<sup>155</sup> Katherine Ebricht, *A Bipartisan Bill to Rein in Presidential War-Making*, Brennan Center for Justice, Sep. 30, 2021, accessible at: <https://www.brennancenter.org/our-work/analysis-opinion/bipartisan-bill-rein-presidential-war-making> (last accessed Nov. 26, 2021)

<sup>156</sup> *Id.*

<sup>157</sup> Ely at 1398 (further noting that Congress, too, may neglect to acknowledge “hostilities” to avoid its own responsibilities under the WPR)

<sup>158</sup> Ely at 1431 (arguing that mere funding should not imply authorization unless Congress explicitly states that such funding should be taken as specific statutory authorization)

To be sure, this is a good start. But it is just a half-measure. It still leaves open the possibility of a defiant Executive and irresolute Congress. A new WPR should require Congress to vote, for or against, any military action exceeding sixty days.

Absent the affirmative authorization of Congress, the military action should immediately cease. This forces the political branches to cooperate in any war-making; it forces the President to get buy-in from Congress for any extended military action; and, most importantly, it forces Congress to conclusively vote for or against the military action

This hopefully avoids situations like Kosovo and Iraq, or even Vietnam before that. In any of those examples, the President would have the power to initiate military action, but after sixty days, Congress would be forced to take a straight up-or-down vote on the matter. No question of whether funding implies authorization; no mixed messages where Congress votes against the authorization of military force while simultaneously voting against the withdrawal of military force.

Undoubtedly, members of Congress may not want to take that vote. Politicians perpetually running for their next election may be wary to get pinned down on the record. They may want some room to argue for or against in the future. But the lack of accountability is one of the reasons why the U.S. finds itself so often ensnared in endless military conflict. Forcing Congress onto the record creates accountability.

Finally, this proposal would also force the judiciary to get into the fray. In *Campbell*, the court held that the Congressmen challenging President Clinton lacked standing because Congress failed to take action to stop him. Under this new WPR, Congress could not hide; it would need to exercise its war powers affirmatively and explicitly, in one way or another. And if the President ignored Congress at that point, there should be a justiciable claim to be heard.