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Inadvertent Implications of the War Powers Resolution

Michael A. Newton

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INADVERTENT IMPLICATIONS OF THE WAR POWERS RESOLUTION

*Michael A. Newton**

The constitutional infirmity of the War Powers Resolution has been uniformly demonstrated by more than four decades of bipartisan experience. The Resolution manifestly fails to eliminate the healthy inter-branch tensions that are in our constitutional DNA with respect to military deployments. In its context, the override of President Nixon's veto represented little more than a stark act of congressional opportunism. The President's veto message was prescient in warning that the Resolution is "dangerous to the best interests of our Nation." This article suggests that the act represents an attempted abdication of the enumerated obligation of Congress to oversee military operations via the appropriations power. It describes reasons why our republic would be well served by clear-eyed reassessment of the War Powers Resolution. It spawned three serious defects: 1) it displaced good faith dialogue between the co-equal branches with after the fact litigation, 2) it highlights American political will as the weakest strand of otherwise formidable military capacity, and 3) it creates a perverse incentive to reverse engineer military operations based on statutory language in ways that undermine strategic objectives. American lives and interests are ill-served by these inadvertent implications.

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I. INTRODUCTION

The constitutional infirmity of the War Powers Resolution¹ (the Resolution) as a statutory straitjacket on executive authority has been uniformly demonstrated by more than forty years of practice. The Resolution has nonetheless exacerbated three profoundly dangerous trends in the context of modern military operations. Since its adoption on November 7, 1973, there are few people who have criticized that legislation with more insight or persistence than my distinguished co-panelist Bob Turner, who has reiterated today his verdict that the legislation was a fraud.² I prefer to view the legislative effort to circumscribe the Commander-in-Chief's constitutionally mandated authority as a feckless effort at modern constitutional revisionism. Indeed, the inadequacy of the Resolution for the purpose sought by its proponents was evident almost from the outset. Congressional arguments that the executive power operates under the bonds of legislative handcuffs are accordingly misplaced. Successive executive branch declarations, most recently President Obama's defense of the use of American power over Libya to aid those rebel forces seeking to overcome the tyranny of Muammar Qaddafi, make the Resolution itself something of an archaic expression of an earlier era of American politics. Implicitly conceding their own inability to overthrow the constitutional order, a series of bipartisan congressional actions have implicitly reinforced the impotence of the Resolution with startling clarity.

II. JUDICIAL AVOIDANCE OF WAR POWERS ISSUES

The Article III courts have uniformly elected to remain aloof from the legislative-executive struggle. Though this is a subject rich with irony and legal nuance, the interests of time permit me to describe only three such instances, the legal issues surrounding 1) the NATO

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1. H.R.J. Res. 542, Pub. L. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548).
 2. Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud That Contributed Directly to the 9/11 Attacks*, 45 CASE W. RES. J. INT'L L. 109 (2012); see also ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* (1991).

campaign in Kosovo; 2) US military engagement in Kuwait; and 3) the policy of targeted bombing under President Clinton.

The NATO air campaign against the forces of Slobodan Milošević began on March 24, 1999 without any formalized expression of congressional support and prior to the subsequent action of the UN Security Council. As a matter of international law, the Kosovo campaign was hotly contested given that it proceeded without either Security Council authority or a basis derived from a clear and imminent need for national self-defense.³ Following the campaign, the Security Council rejected a Russian effort to condemn the campaign as a violation of Article 2(4) of the UN Charter.⁴ Furthermore, the Council implicitly endorsed the intervention by passing Resolution 1244 under its Chapter VII powers without expressly commending or condemning NATO's actions.⁵ On the domestic front, there were several votes in Congress during the air campaign and the coordinated ground actions of the Kosovo Liberation Army⁶ that fell short of either authorizing an actual deployment of forces or a making a

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3. See Bruno Simma, *NATO: the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 11 (1999) (finding even the mere threat of armed intervention to violate the prohibition on the threat or use of force); Antonio Cassese, *Ex Iniuria ius Oritur: Are we Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 29 (1999) (agreeing with Professor Simma's view that the NATO action was contrary to the core principles of the UN Charter).
 4. See U.N. SCOR, 54th Sess., 3989th mtg. at 5–6, U.N. Doc. S/PV.3989 (Mar. 26, 1999) (recording the vote to reject Russia's draft resolution to condemn NATO's actions by a vote of twelve to three).
 5. See S.C. Res. 1244, U.N. Doc. S/RES/1244, (June 10, 1999). Professor Thomas Franck analogized this to the refusal to condemn India's violation of Article 2(4) during the intervention in Bangladesh. See Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857, 859 (1999).
 6. In the interests of full disclosure, the author acknowledges that he was in the service of the US government working under the authority of Ambassador David Scheffer in the Office of War Crimes Issues, Department of State at the time of the Kosovo campaign. In that capacity, he helped to prepare the early estimates of missing Kosovar Albanian men and document the ongoing atrocities committed by Serbian military and paramilitary forces in Kosovo; he coordinated and deployed with the FBI into Kosovo to collect the evidence that supported the crimes against humanity charges against Milosevic in the International Criminal Tribunal for the Former Yugoslavia. See DAVID SCHEFFER, *ALL THE MISSING SOULS* 251–95 (2012) (discussing the Kosovo conflict in 1998 and 1999 and the International Criminal Tribunal for the Former Yugoslavia's role in prosecuting those responsible for war crimes during the conflict).

formal declaration of war.⁷ The House of Representatives rejected such a declaration of war as between United States and Yugoslavia by a vote of 2-427.⁸ During the bombing, Representative Tom Campbell (R-CA) along with twenty-five members sought a judicial declaration that the actions of the executive violated the Constitution and the War Powers Act.⁹ The District Court for the District of Columbia decided that the legislative branch plaintiffs lacked standing due to the absence of an actual “constitutional impasse” or attendant “actual confrontation” for the bench to resolve.¹⁰

Similarly, in the widely cited case *Dellums v. Bush*, fifty-four members of Congress challenged the authority of President George H.W. Bush to order offensive operations to repel the Iraqi aggression into Kuwait based on the authority of the Chapter VII Resolution alone.¹¹ The case was dismissed as not ripe for judicial determination, though Judge Harold H. Greene wrote in dicta that some of the most sweeping Justice Department arguments would effectively neuter the constitutional authority to “declare war” by turning it into a “merely semantic decision” dependent upon the discretion and drafting skill of the commander-in-chief and his advisors.¹² In language that seems strikingly prescient of the Obama Administration’s justifications for the use of American air power over Libya during 2011, Judge Greene opined that “such an ‘interpretation’ would evade the plain language of the Constitution, and it cannot stand.”¹³ The War Powers Resolution and the broader array of congressional-executive interactions related to armed hostilities thus remain authoritative only as a matter of domestic decision making. The political dynamic over the resort to American military power operates irrespective of the larger scope of articulable authority derived from international legal principles.

Apart from the series of standing and ripeness determinations, courts have commonly avoided constitutional collisions between the co-equal branches of the federal power by invoking the political

7. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 12 (2005).

8. See MICHAEL JOHN GARCIA, *CONG. RESEARCH SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION 8* (2012).

9. See *id.*

10. *Campbell v. Clinton*, 52 F.Supp.2d 34, 45 (D.D.C. 1999), *aff’d*, 203 F.2d 19 (D.C. Cir. 2000).

11. LOUIS FISHER, *PRESIDENTIAL WAR POWERS* 171 (2d ed. 2004); *Dellums v. Bush*, 752 F.Supp. 1141, 1143, 1143 n.1 (D.D.C. 1990).

12. 752 F.Supp. at 1145.

13. *Id.*

question doctrine. In one of the most pointed invocations of the Commander-in-Chief power, President Clinton authorized the bombing of targets in Sudan, Iraq, and Afghanistan in response to terrorist actions against U.S. interests.¹⁴ The Court of Appeals in the DC Circuit reiterated in an en banc decision rendered in June 2010, that “[u]nder the political question doctrine, the foreign target of a military strike cannot challenge in court the wisdom of retaliatory military action taken by the United States.”¹⁵

III. HISTORY THE WAR POWERS RESOLUTION AND THE DEBATE OVER EXECUTIVE AUTHORITY

The history of heated political and legal debates between congressional and executive officials has been well summarized in the literature, and time does not permit undue regurgitation today. The tenor of the political debates and the constitutional passion with which they were framed should not in itself be surprising. This extensive history itself leads to judicial abstention, despite the repeated efforts of congressional leaders to force the federal courts to align themselves with legislative branch equities. In the words of the *El-Shifa* majority:

By asserting the authority to decide questions the Constitution reserves to Congress and the Executive, some would expand judicial power at the expense of the democratically elected branches. And by stretching beyond all precedent the limited category of claims so frivolous as not to involve a federal question, all would permit courts to decide the merits of disputes under the guise of a jurisdictional holding while sidestepping obstacles that are truly jurisdictional.¹⁶

The War Powers Resolution fails in the first instance on that level alone, as it seeks to eliminate the healthy inter-branch tensions and debates that should guide the use of American power. The “Purpose and Policy” section states that:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is

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14. Michele L. Malvesti, *Bombing bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, FLETCHER F. WORLD AFF., Winter-Spring 2002, at 18–19.
 15. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 851 (D.C. Cir. 2010) (en banc).
 16. *Id.* at 850–51.

clearly indicated by the circumstances, are exercised *only* pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.¹⁷

Section 4(a) further requires the president to submit a report, within forty-eight hours of introducing U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, to the Speaker of the House of Representatives and to the president pro tempore of the Senate.¹⁸ The report must provide the circumstances necessitating the introduction of such forces, the constitutional and legislative authority under which such introduction took place, and the estimated scope and duration of the hostilities or involvement.¹⁹ Section 5(b) requires the president, within sixty calendar days of submitting such report, to terminate any use of the U.S. Armed Forces unless Congress takes certain enumerated actions to authorize continuing combat or “is physically unable to meet as a result of an armed attack upon the United States.”²⁰ The sixty-day period, however, may be extended to ninety days if the president certifies to Congress that “unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in bringing about a prompt removal of such forces.”²¹ “Thus, when a report under section 4(a)(1) is filed . . . section 5(b)’s 60 day (or, when appropriate, 90 day) ‘clock’ begins to run.”²²

Perhaps the gravest obligation of the chief executive is that of keeping the nation safe from its enemies. The burden of watching American families sacrifice themselves pursuant to the orders of the Commander-in-Chief means that decisions to employ American military power can never be lightly undertaken. There must in turn be a tight nexus between the force employed and the principles that guide that use of force and the larger strategic imperatives. The essence of America is embodied in her sons and daughters, and the profound decisions to use force affect the life of the nation as well as

17. Pub. L. No. 93-148, §2(a), 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541(c)) (emphasis added).

18. *Id.* § 4(a)(1)–(3) (codified at 50 U.S.C. § 1543(a)(3)).

19. *Id.* § 4(a)(3).

20. *Id.* § 5(b) (codified at 50 U.S.C. § 1544(b)).

21. *Id.*

22. Memorandum from Randolph D. Moss, Ass’t Att’y Gen., Office of Legal Counsel, to the Att’y Gen., Authorization for Continuing Hostilities in Kosovo (Dec. 19, 2000), available at <http://www.justice.gov/olc/final.htm>.

the lives and safety of those young Americans. This is the essence of what it means to have created a constitutional republic in which the authority of the executive derives from the consent of the governed. Conflicting cross-currents of debate between the president and Congress over the use of force national identity are in our very national DNA. All American wars have had an inevitable political linkage. Heated disagreements over the proper scope and use of American military accordingly date to our earliest national experiences.²³

The original impulse of the War Powers Resolution might have been admirable, though there is ample evidence that it actually represented an act of stark congressional opportunism. Prior to the override of President Nixon's veto on November 7, 1973, the 93rd Congress had failed in eight previous veto override attempts.²⁴ Quite apart from the ultimately mortal wound to the Nixon presidency occasioned by Watergate, the War Powers Resolution came in the context of a tumultuous period of American political life. The massed armies of Arab states, led by Syria, attacked Israel on October 6th, and the Yom Kippur War ended on October 25th, the day after President Nixon's veto of the War Powers Resolution.²⁵ Vice President Spiro T. Agnew had resigned on October 10th, after being charged with having accepted more than \$100,000 in bribes while serving in a succession of public offices.²⁶ The Arab oil embargo began on October 19th, and the economic attrition was just beginning to bite the nation.²⁷ The incident we now remember as the "Saturday Night Massacre" took place on October 20th, as President Nixon fired Archibald Cox, the Justice Department special prosecutor for Watergate, and abolished the Office of the Special Prosecutor, which

23. See generally Alexander Hamilton & James Madison, *The Pacificus-Helvidius Debate*, GAZETTE OF THE U.S., June 29, 1793, available at <http://teachingamericanhistory.org/library/index.asp?documentprint=429>.

24. See Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 4 (1998).

25. See *Veto of the War Powers Resolution*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=4021> (last visited Feb. 16, 2013).

26. See *Letter from House Minority Leader Gerald R. Ford to President Richard M. Nixon*, NAT'L ARCHIVES, <http://www.archives.gov/education/lessons/ford-nixon-letter/> (last visited Feb. 16, 2013).

27. See James C. McMillin, *Principled Fairness in the Regulation of Petroleum Prices*, 57 TEX. L. REV. 573, 577 (1979) (discussing the 1973 Arab oil embargo).

in turn prompted the resignation of the Attorney General, Elliott Richardson and Deputy Attorney General William Ruckelshaus.²⁸

The pressure for presidential impeachment was palpably building. The veto of the War Powers Resolution just four days after the Saturday Night Massacre presented a tempting target against a weakened president. At the same time, the papers were full of accounts that President Nixon had total income of nearly \$800,000 for tax years 1970, 1971, and 1972 but had paid only some \$5,000 in combined federal taxes.²⁹ The tax revelations would ultimately prompt perhaps the most memorable public statement of Nixon's long career as he held a press conference on November 17, 1973 to proclaim: "Well, I'm not a crook. I've earned everything I've got."³⁰ Public opinion polls of the time showed that 76% of those asked had a negative impression of President Nixon's ability to "inspire confidence personally in the White House."³¹ Some 83% of the American people rated the President negatively for his "handling of the Watergate case" according to the Harris Survey.³² Is it any wonder that a number of legislators reversed their votes on the War Powers Resolution to override President Nixon's veto? What other issue in American political life has since managed to unite more than 80% of the vox populi? Would anyone have expected the 93rd Congress to align itself with the executive interests of an increasingly unpopular administration, in the midst of the oil shock and an increasingly fearful public?

Setting aside the unique political confluence that produced the congressional override of President Nixon's veto, the focus of this essay is my firm conviction that the larger interests of our republic would be well served by a clear-eyed reassessment of the actual implementation and effects of the War Powers Resolution. The phrase "repeal and replace" is a commonly voiced sentiment in our political discourse, albeit in a wholly distinct context from the war powers debate. President Nixon's veto message from October 24, 1973

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28. See Rex VanMiddlesworth, *Archibald Cox: Conscience of a Nation*, 61 TEX. B.J. 84, 84 (1998); Carroll Kilpatrick, *Nixon Faces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.
 29. See *A Portrait of a Country Awash in 'Red Ink'*, NPR (July 30, 2012), <http://m.npr.org/story/157449392>.
 30. See Richard Nixon, "I'm Not a Crook," YOUTUBE (July 15, 2009), <http://www.youtube.com/watch?v=sh163n1lJ4M>.
 31. *Nixon Tumbles to New Low in Confidence Poll*, NASHUA TELEGRAPH, Mar. 17, 1971, at 18.
 32. See *The Watergate Files*, GERALD R. FORD LIBR. & MUSEUM, http://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=3&page=d (last visited Feb. 16, 2013).

categorically declared that the act infringed executive authority in ways that would be “both unconstitutional and dangerous to the best interests of our Nation.”³³ Experience bears out his prediction in ways that were unforeseen at the time. After nearly forty years, real reevaluation would be appropriate given the context of modern conflicts and in light of technological innovation. On a perhaps more poignant level, the War Powers Resolution has had profoundly dangerous effects on the conduct of American military operations. American lives and interests are ill-served by its inadvertent implications.

Before focusing on three distinct dimensions of these dangerous trends, we should frame our reassessment of the War Powers Resolution against a couple of bedrock truths. In the first place, no one should cavalierly disregard the context of the American constitutional ferment at the time of the framers and the subsequent ratification debates. We’ve grown so accustomed to the trappings of our federal republic that we forget that there was vigorous debate in the Constitutional Convention whether the executive power should be vested in either a singular or plural executive. These lengthy debates originated from a visceral rejection of a monarchical power, which was the defining imperative that shaped American perceptions at the time. The shift towards rejection of the person and power of the King of

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33. *Veto of the War Powers Resolution*, *supra* note 25. Nixon’s veto message began:

While I am in accord with the desire of the Congress to assert its proper role in the conduct of our foreign affairs, the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation.

The proper roles of the Congress and the Executive in the conduct of foreign affairs have been debated since the founding of our country. Only recently, however, has there been a serious challenge to the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches.

The Founding Fathers understood the impossibility of foreseeing every contingency that might arise in this complex area. They acknowledged the need for flexibility in responding to changing circumstances. They recognized that foreign policy decisions must be made through close cooperation between the two branches and not through rigidly codified procedures.

These principles remain as valid today as they were when our Constitution was written. Yet House Joint Resolution 542 would violate those principles by defining the President’s powers in ways which would strictly limit his constitutional authority.

Id.

England marked the decisive turning point of the American struggle for independence.³⁴ George Washington recognized that focusing the energy of the army on the king as the enemy who must be overcome in order to achieve the cause of American independence was profoundly cathartic to the military effort. In order to sustain morale and a sense of mission, he ordered that the pamphlet *Common Sense* by Thomas Paine be distributed to the troops.³⁵

Against the backdrop of continental rejection of the monarchy as a governing institution, Benjamin Franklin, among others, voiced concerns that a singular executive could readily arrogate power as against the legislative branch and become overambitious or, in his words, “fond of war.”³⁶ The disagreement over the identity of the chief executive was amplified by the reality that any federal standing army would be under the authority of the Commander-in-Chief. Delegates rejected efforts to give Congress a role in the conduct of hostilities. Article I accordingly gives Congress the authority only to “declare war” as delegates unanimously rejected a role for congressional authority to “make war.”³⁷ This must have relieved General Washington greatly as he knew better than anyone the grievous effects of congressional management of the Revolution.³⁸ The debate over a singular Commander-in-Chief would have been particularly uncomfortable to General Washington who reportedly sat with composure and stoic character throughout the discussion.³⁹ In the draft of Washington’s first inaugural address, there is some evidence that he remained troubled by the presumed aspersions upon the character of the chief executive. In his draft text (which was amended prior to the actual public speech), he wrote that:

34. See SCOTT LIELL, 46 PAGES THOMAS PAINE, COMMON SENSE, AND THE TURNING POINT TO AMERICAN INDEPENDENCE 16–21 (2003).

35. *Id.* at 125.

36. CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 60 (1986).

37. See U.S. CONST. art I, § 8.

38. See CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER 1775–1783, at 64–65 (1979) (stating that Congress repeatedly refused Washington’s and other generals’ requests to increase enlistment service for militia men or to provide bounty incentive to increase the length of service, and to move from a militia to a Continental army).

39. See Richard J. Behn, *The Dignity of Leadership from Washington to Lincoln*, THE LEHRMAN INSTIT., <http://lehrmaninstitute.org/history/the-dignity-of-leadership-from-washington-to-lincoln.asp> (last visited Feb. 16, 2013) (“Washington’s stoic and modest dignity was essential to the trust that the Second Continental Congress placed in him in 1775 when they selected him to command the Continental Army.”).

[I]f there should be a single citizen of the United States, to whom the tenour of my life is so little known, that he could imagine me capable of being so smitten with the allurements of sensual gratification, the frivolities of ceremony or the baubles of ambition, as to be induced from such motives to accept a public appointment: I shall only lament his imperfect acquaintance with my heart, and leave him until another retirement (should Heaven spare my life for a little space) shall work a conviction.⁴⁰

The second conceptual underpinning of the War Powers Resolution was the deep-seated colonial reluctance to envision a sweeping executive branch authority paired with a permanent standing army. Writing as "Centinel" in the *Philadelphia Freeman's Journal* of October 24, 1787, Samuel Bryan opined that:

A standing army with regular provision of pay and contingencies, would afford a strong temptation to some ambitious man to step up into the throne, and to seize absolute power. The keeping on foot a hired military force in time of peace ought not to be gone into unless two thirds of the members of the legislature agree.⁴¹

In a similar cautionary vein, other anti-federalists wrote in the *New York Journal* that "keeping up a standing army, would be the highest degree dangerous to the liberty and happiness of the community . . . no government should be empowered to do that which if done, would tend to destroy public liberty."⁴² The framers addressed these vehement objections by giving an express and delimited power to the legislative branch. Article 1, section 8 of the Constitution expressly provides congressional authority to "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."⁴³ No less an authority than Alexander Hamilton later argued that this limitation provided "a precaution which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident

40. George Washington, *Fragments of a Draft of the First Inaugural Address*, in WRITINGS 705 (John Rhodehamel ed., 1997).

41. "Centinel" II, *To Avoid the Usual Fate of Nations: Reply to Wilson's Speech*, FREEMAN'S J., Oct. 24, 1787, reprinted in THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE FOR RATIFICATION, PART ONE 85 (1993) (emphasis omitted) [hereinafter DEBATE ON THE CONSTITUTION].

42. "Brutus" VIII, *On the Calamity of a National Debt that Cannot Be Repaid, and On Standing Armies*, N.Y. J., Jan. 10, 1788, reprinted in DEBATE ON THE CONSTITUTION, *supra* note 41, at 736.

43. U.S. CONST. art. I, § 8, cl. 12.

necessity.”⁴⁴ In Hamilton’s opinion, seemingly ubiquitous among the Federalist camp, vesting the exclusive power of raising and supporting military forces in the popularly elected legislative branch would be the surest check upon the power of an otherwise overweening chief executive bent on committing the republic to military adventures. Thus, in the words of a leading Federalist writer during the debates over ratification the “representatives of the people have it in their power to disband th[e] army every two years, by refusing supplies.”⁴⁵

The Department of Justice Office of Legal Counsel (OLC) has argued that the War Powers Resolution was enacted against a background that was “replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.”⁴⁶ It further distinguished the types of conflicts the act was intended for, reasoning that Congress’ overriding interest was to prevent the United States from being engaged, without express congressional authorization, in “major, prolonged conflicts such as the wars in Vietnam and Korea, rather than to prohibit the President from using or threatening to use troops to achieve important diplomatic objectives where the risk of sustained military conflict was negligible.”⁴⁷ In *Crockett v. Reagan*, Judge Joyce Hens Green concluded “the automatic cutoff after 60 days was intended to place the burden on the President to seek positive approval from the Congress, rather than to require the Congress positively to disapprove the action, which had proven so politically difficult during the Vietnam war.”⁴⁸ These arguments are misplaced in the sense that the very *raison d’être* of the congressional appropriations power, with respect to the armed forces, was to “frustrate presidential warmaking that was not in the nation’s interests.”⁴⁹

The very constitutional infirmity of the War Powers Resolution is thus embedded into its structure because it purported to shift the burden from congressional exercise of express constitutional powers to achieve the very purpose envisioned when the framers crafted the appropriations power. Such an abdication of wholly appropriate

44. “Publius,” *The Danger of a Standing Army: “An Intention to Mislead the People,”* INDEP. J., Dec. 19, 1787, reprinted in DEBATE ON THE CONSTITUTION, *supra* note 41, at 576.

45. *Rebuttal to “An Officer of the Late Continental Army”: “Plain Truth,”* INDEP. GAZETTEER, Nov. 10, 1787, reprinted in DEBATE ON THE CONSTITUTION, *supra* note 41, at 109.

46. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980).

47. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 175 (1994).

48. *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982)).

49. YOO, *supra* note 7, at 160.

legislative oversight of operations cannot be remedied by the statutory device designed to shift responsibility onto the Commander-in-Chief absent an affirmative act by Congress. The inconsistency between the design of Article 8 and the text of the War Powers Resolution is perhaps the primary driver for the uniform disregard of its mandates by both the executive and legislative branches. In other words, the War Powers Resolution, since the very day of its enactment, has demonstrated the invalidity of congressional arguments that the executive power operates under the bonds of statutory handcuffs.

IV. RAMIFICATIONS OF THE WAR POWERS RESOLUTION

There are, nevertheless, at least three inadvertent ramifications of the War Powers Resolution that have become apparent after forty years of practice. The irony is that while the framers clearly envisioned a legislative role in the employment of American military power, the very effectiveness of American power has been undermined by the War Powers Resolution through which the 93rd Congress purportedly attempted to enshrine just such congressional oversight and inter-branch consultation. The three most consequential inadvertent implications of the Resolution are discussed below.

A. President as Litigator-in-Chief

First, debates over the applicability of the War Powers Resolution have shifted the attention from the proper role of the president as the national leader to that of the national litigator-in-chief. The interpretation guidance to the War Powers Resolution states that the Resolution should not be “construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances.”⁵⁰ But this assumes that the president already has such authority, and that the Resolution is not “intended to alter the constitutional authority of the . . . President.”⁵¹ Additionally, although the text makes plain that, even in the absence of specific authorization from Congress, the President may introduce armed forces into hostilities only in “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces,” every lucid observer concedes that this declaration, found in the Purpose and Policy section, either is incomplete or is not meant to be binding.⁵² The War

50. 50 U.S.C. § 1547(d)(2) (2012).

51. *Id.* § 1547(d)(1); Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. at 176.

52. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C., at 176 (quoting Cyrus R. Vance, *Striking the Balance: Congress and the*

Powers Resolution effectively marginalized the congressional role to carping from the sidelines as various presidents have launched an increasingly diverse range of military operations.

After forty-years practice, there is a long line of precedent that has stretched the bounds of executive power in ways that could scarcely have been imagined by the framers. For example, the OLC opinion for the use of force in Somalia in 1992 reasoned that, "Attorneys General and this Office have concluded that the President has the power to commit United States troops abroad as well as to take military action, for the purpose of protecting important national interests," even without specific prior authorization from Congress.⁵³ Just two years later, the OLC echoed its' reasoning in the deployment of armed forces into Haiti.⁵⁴ The "pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, 'evidences the existence of broad constitutional power.'"⁵⁵ The independent authority of the executive derives from the president's unique responsibility, as Commander-in-Chief and chief executive for foreign and military affairs as well as national security.⁵⁶ The OLC used similar reasoning once again in 1995 in relation to the proposed deployment into Bosnia.⁵⁷ It explained that the scope and limits of the congressional power to declare war is not well defined by constitutional text, case law, or statute, but rather, the relationship of Congress' power to declare war and the president's authority as Commander-in-Chief and chief executive has been clarified by two-hundred years of practice.⁵⁸

President Under the War Powers Resolution, 133 U. PA. L. REV. 79, 81 (1984)).

53. Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 6 (1992).
54. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. at 178.
55. *Id.* (quoting Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. at 187).
56. See Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C., at 176 n.4 (citing *Santiago v. Nogueras*, 214 U.S. 260, 266 (1909) and *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427-28 (1814)); see also *id.* at 178 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950)).
57. Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 333 (1995).
58. See *id.* at 330-31; see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 70-71* (1990) (noting how historical precedent serves as "quasi-constitutional custom" in foreign affairs).

This frame of reasoning is uniformly supported by the judiciary, including the Supreme Court. Chief Justice Rehnquist explained in *Dames & Moore v. Regan*:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on “Executive Power” vested in the President by §1 of Article II. Past practice does not, by itself, create power, but long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent[.]⁵⁹

In *Haig v. Agee*, Chief Justice Burger further reasoned that the historical practice reflects the two political branches’ practical understanding, developed since the founding of the republic, of their respective roles and responsibilities with respect to national defense.⁶⁰ Jack Goldsmith, who admirably delivered the keynote address earlier this morning, described this reasoning as simply a principle of constitutional law—“that a constitutional meaning may be liquidated by constitutional practice.”⁶¹ Professor Goldsmith argued that Congress had known about the pattern of presidential unilateralism for decades and done little in response. Congress has never seriously questioned the use of overseas military power without its authorization, much less impeached a president for authorizing such force. Instead, a succession of bipartisan legislatures has financed an enormous military force in the face of this continuing practice and has consistently refused to withhold funding for a wide array of deployments. The net effect of this practice has been to immunize the president from oversight. Hence, presidents of both parties are in an almost unassailably strong litigation posture *vis-à-vis* Congress, and they know it.

The War Powers Resolution has therefore had the paradoxical effect of displacing good faith debate and dialogue between the branches with after-the-fact litigation. Presidents of both parties have felt confident that courts would support their executive prerogatives, and the War Powers Resolution has had the unfortunate effect of creating the perception that the constitutional authority is subject to distributive bargaining between the executive and legislative branches. Thus, presidents have relied upon their inherent

59. *Dames v. Moore*, 453 U.S. 654, 686 (1981) (*quoting* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952)) (internal quotation marks omitted).

60. *Haig v. Agee*, 453 U.S. 280, 291–92 (1981).

61. Jack Goldsmith, *War Power*, SLATE (Mar. 21, 2011, 6:48 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/03/war_power.html.

constitutional authority, secure in the belief that the war-making function is not a zero sum game. In the process, there has been a tendency to rely upon successful litigation strategies rather than a clearly presented framing of the national objectives at stake in a given deployment or a clear-eyed national discussion of the merits of such overseas action.

B. US Enemies' Ability to Manipulate American Political Will

The corollary to this modern reality, and the second of three inadvertent implications of the Resolution, is that our enemies now focus on American political will as the Achilles heel of our vast capabilities. Prior to the War Powers Resolution, President Eisenhower understood that it was necessary to “seek the cooperation of the Congress. Only with that can we give the reassurance needed to deter aggression.”⁶² President Clinton understood the importance of clear communication with the Congress and the American people in order to sustain the political legitimacy that is a vital element of modern military operations. Justifying his bombing of targets in Sudan, he argued that the “risks from inaction, to America and the world, would be far greater than action, for that would embolden our enemies, leaving their ability and their willingness to strike us intact.”⁶³ In his letter to Congress “consistent with the War Powers Resolution,” the president reported that the strikes “were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities” and “were intended to prevent and deter additional attacks by a clearly identified terrorist threat.”⁶⁴ The following day, in a radio address to the nation, the president explained his decision to take military action, stating, “Our goals were to disrupt bin Laden’s terrorist network and destroy elements of its infrastructure in Afghanistan and Sudan. And our goal was to destroy, in Sudan, the factory with which bin Laden’s network is associated, which was producing an ingredient essential for nerve

62. See Louis Fisher, *Presidential Power in National Security: A Guide to the President-Elect*, in WHITE HOUSE TRANSITION PROJECT REPORTS 11 (2007). See also FISHER, *supra* note 11, at 124–25 (noting that Eisenhower understood the independence of executive and the interdependence as a pragmatic matter for funding and political expediency, yet still sent troops to Lebanon and began US involvement in Vietnam).

63. President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, in II PUB. PAPERS 1460, 1461 (1998).

64. President William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, in II PUB. PAPERS 1464, 1464 (1998).

gas.”⁶⁵ Citing “compelling evidence that the bin Laden network was poised to strike at us again” and was seeking to acquire chemical weapons, the president declared that we simply could not ignore the threat posed, and hence ordered the strikes.⁶⁶ Similarly, President Clinton understood that intervention in Bosnia could not be successful absent some national consensus, which had been slow to form during the long Bosnian civil war.⁶⁷

Secretary of State George Schultz provided perhaps the most poignant and pointed example of this truism in his testimony to Congress regarding the deployment of US Marines into Lebanon to separate the warring factions in 1982. On September 21, 1983, he testified before the Senate Foreign Relations Committee and provided a chilling premonition of the bombing that would come only one month later and kill 241 Americans, which was the bloodiest day in the Marine Corps since the battle of Iwo Jima.⁶⁸ Seeking to bolster legislative support and to better explain the strategic objectives, he explained that:

It is not the mission of our marines or of the [Multinational Force in Lebanon] as a whole to maintain the military balance in Lebanon by themselves. Nevertheless, their presence remains one crucial pillar of the structure of stability. They are an important deterrent, a symbol of the international backing behind the legitimate Government of Lebanon, and an important weight in the scales.

To remove the marines would put both the Government and what we are trying to achieve in jeopardy. This is why our domestic controversy over the war powers has been so disturbing. Uncertainty about the American commitment can only weaken our effectiveness. Doubts about our staying power can only cause political aggressors to discount our presence or to intensify their attacks in hopes of hastening our departure.

65. President William J. Clinton, The President’s Radio Address, *in* II PUB. PAPERS 1464, 1465 (1998).

66. *Id.*

67. See Bob Dole, *Balkans Require Bipartisanship*, WALL ST. J., Apr. 13, 2001, at A10 (noting that although “a strong bipartisan consensus on Bosnia policy existed in Congress for most of the first half and much of the second half of the Clinton administration,” the inaction of the first half of Clinton’s administration cost the Bosnian population dearly).

68. See Pres. Ronald Reagan, *Proclamation 5396—A Time of Remembrance, 1985*, *in* II Pub. Papers 1283, 1283 (1985).

An accommodation between the President and Congress to resolve this dispute will help dispel those doubts about our staying power and strengthen our political hand.⁶⁹

Following the spectacularly successful terrorist attack on the Marine barracks in Beirut, President Reagan withdrew the Marines. Osama bin Laden later cited this as an example of American weakness that could not withstand the jihadist fury he sought.⁷⁰

The legal battles over the scope and effect of the War Powers Resolution have highlighted the focus on national political will as the fulcrum of successful military operations by requiring assurances that military operations are limited in nature, duration, and scope, and therefore well within the president's constitutional authority as Commander-in-Chief and chief executive. President Obama's report to Congress in the context of the Libya operations in 2011 cited precedent from air strikes in Bosnia that took just over two weeks and involved more than 2,300 US sorties and the deployment of US forces in Somalia in 1992 and Haiti in 1993.⁷¹ The White House released a memorandum from the OLC, similar to previous interventions, explaining how the authorization to use such force was constitutional on the basis that "'war' within the meaning of the [Constitution's] Declaration of War Clause" does not encompass all military engagements, but only those that are "prolonged and substantial . . . typically involving exposure of U.S. military personnel to significant risk over a substantial period."⁷² President Obama consistently maintained that the US role in Libya was limited, unlikely to expose any US persons to attack (especially given the role of missiles and drones and the utter inability of Qaddafi's forces to strike back with conventional means), and likely to end expeditiously.⁷³ By that logic, it did not require authorization from

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69. *War Powers Resolution: Hearing Before the Comm. on Foreign Rel., 98th Cong. 1 (1983)* (statement of Hon. George P. Shultz, Sec'y of State).
70. See Osama Bin Laden, *Bin Laden's Fatwa*, PBS NEWSHOUR (Aug. 23, 1996), http://www.pbs.org/newshour/updates/military/july-dec96/fatwa_1996.html?print (explaining Bin Laden's comments about the Beirut massacre).
71. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 8–9 (2011).
72. *Id.* at 8.
73. See *id.* In the Pentagon, the legal opinion of whether we were at war with Libya for purposes of the War Powers Resolution, and more specifically, for purposes of the termination clause, certainly did not seem to be an opinion one was open to give, perhaps knowing it did not coincide with others in the administration. Then Secretary of Defense Robert Gates was asked in an ABC News interview on March 27, whether Libya posed an actual or imminent threat to the United States. Gates responded quite simply, "no." He explained that although Libya

Congress. The administration ultimately adopted a legal analysis that the US military's activities fell short of "hostilities," and thus, the president needed no permission from Congress to continue the mission after the expiration of the sixty-day reporting window specified in the War Powers Resolution.⁷⁴ The president's reasoning rested on previous OLC opinions that what counts as war depends on "a fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations."⁷⁵

Present justifications for bypassing the War Powers Resolution hinge on interpretations that it requires "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."⁷⁶ The OLC engaged in similar reasoning in the Bosnia intervention in 1995, explaining that in deciding whether the proposed deployment into Bosnia amounted to a "war" in the constitutional sense, considerable weight was given to the consensual nature and protective purposes of the operation.⁷⁷ That deployment was similarly intended to be a limited mission but that mission, in contrast to the present one, was in support of an agreement that the warring parties had reached and it was at the invitation of the parties that led to the belief that little or no resistance to the deployment would occur. Though some scholars argued that the Libya OLC Memorandum defended its reasoning for why the operation did not amount to "war," it did not address whether the administration believed that it will have to stop

was a national interest to the United States, it was not a vital one. Interview by Jake Tapper, ABC News, with Defense Sec'y Robert Gates and Sec'y of State Hillary Clinton (Mar. 27, 2011), *available at* <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4800>. Similarly, a few months later, as the sixty-day clock neared expiration, the question of whether we were at war with Libya was increasingly more important and controversial. Jeh Johnson, the Pentagon General Counsel similarly told the White House he believed that the United States military's activities in the NATO-led air war amounted to "hostilities." Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES, Jun. 18, 2011, at A1.

74. See Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16.
75. Authority to Use Military Force in Libya, 35 Op. O.L.C. at 8 (*quoting* Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 179 (1994)).
76. Authority to Use Military Force in Libya, 35 Op. O.L.C. at 8.
77. Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 333 (1995).

operations upon expiration of the sixty-ninety-day clock under the War Powers Resolution.⁷⁸ The deadline passed with little fanfare.

The memorandum also relied upon quite distinguishable precedent to serve as a guiding point in this intervention. Professor Goldsmith argued the opinion broke “new ground . . . in its extension of the ‘no war’ precedents beyond the Bosnia and Haiti situations—which involved consensual peacekeeping-like introductions of ground troops but no significant uses of force—to cover two weeks of non-consensual aerial bombardments.”⁷⁹ Thus, even as it incentivizes short term, limited deployments, the War Powers Resolution embeds an inevitable constitutional collision between the coordinate branches. Our enemies can rely upon constitutional carping from Congress, and in fact can adapt tactics and statements that seek to undermine political will in the US Congress and among the American people from the first days of an operation. The Resolution helps to ensure that such debates over the national political will take center stage sooner rather than later, and an asymmetric enemy can in theory erode our political will even before it solidifies.

C. Restrictive Rules of Engagement at the Expense of Achieving Strategic Objective

Finally, the War Powers Resolution has the pernicious effect of incentivizing commanders to adopt a form of reverse engineering in the planning and conduct of operations. The effort to limit casualties and designed to create minimal risk relies on previous OLC reasoning that such operations would comply with the statutory mandate.⁸⁰ As noted above, commanders-in-chief must ensure that there is a tight nexus between the strategic reason for ordering deployments of US forces and the optimal conduct of hostilities to secure those objectives quickly and with the least possible expenditure in terms of blood and treasure.

As Private Eddie DiFranco stood guard in front of the Marine Barracks that October morning in Beirut in 1983, he was under strict Rules of Engagement that prohibited him from chambering a live round in his weapon.⁸¹ The Sergeant of the Guard, Stephen Russell,

78. See Robert Chesney, *A Point-by-Point of Libya's OLC Memo*, LAWFARE (Apr. 7, 2011, 4:15 PM), <http://www.lawfareblog.com/2011/04/a-point-by-point-summary-of-olcs-libya-memo/>.

79. Jack Goldsmith, *Office of Legal Counsel Opinion on Libya Intervention*, LAWFARE (Apr. 7, 2011, 1:32 PM), <http://www.lawfareblog.com/2011/04/office-of-legal-counsel-opinion-on-libya-intervention>.

80. Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. at 332.

81. JOHN C. O'BRIEN, *FORCE PROTECTION: FROM BEIRUT TO KHOBAR TOWERS, WHAT HAVE WE LEARNED* (1998).

remembers the yellow Mercedes truck that sped by on its way to kill 241 Americans.⁸² He recalls that the driver smiled at him as he drove past the guard who was too slow to react.⁸³ Even as crews cleared the rubble from the bombing, marines posted a chilling cartoon on a bulletin board. The cartoon undoubtedly captures the view some soldiers have of ROE in the era of the War Powers Resolution—it showed a Marine rifleman in a prone firing position behind a barricade in Lebanon.⁸⁴ The president of the United States is shown whispering in his ear, “Before you fire, I want you to consider the nuances of the War Powers Act.”⁸⁵

To be sure, the War Powers Resolution coincided with a set of revolutionary changes in the nature of warfare, the abolition of the national draft, and the transition to an all-volunteer force, and epochal changes in the nature of conflict as new non-state actors became the norm. It is also historically clear that the micro-management of conflict did predate the War Powers Resolution in some circumstances. One need only remember President Johnson helping to select targets in Vietnam for instance.⁸⁶ It is difficult to pinpoint a causal linkage between the Resolution and the dramatically more restrictive conduct of modern operations. However, the passage of the War Powers Resolution most definitely injected an entirely unhealthy degree of politicization into the war-making function. Though it was intended to reinforce the parallel authorities of the co-equal branches of the federal government, it actually embedded great incentives for commanders to issue restrictive rules of engagement in an overall effort to limit casualties, as well as the scope of the conflict.

This domestic political restriction created controversy for example during the Kosovo air campaign between the United States and its NATO allies. Of more fundamental concern to the war-fighters and the lawyers that advise them, artificial rules that go well beyond the normal bounds of the laws and customs of warfare logically lead to increased American casualties as they erode the morale of the force. To the extent that the War Powers Resolution helped to inject political sensitivity into the conduct of operations, it has led to constrained rules that may not be the optimal pathway for achieving US strategic objectives. Constrained rules in turn actually make

82. Rick Hampson, *Haunting Memories of the Blast that Shook the World*, USA TODAY, Oct. 18, 2008, http://usatoday30.usatoday.com/news/military/2008-10-15-beirut-barracks_N.htm.

83. *Id.*

84. See Mark S. Martins, *Rule of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 20 (1994).

85. *Id.*

86. See Tom Wicker, *In the Nation: Ghosts of Vietnam*, N.Y. TIMES, Jan. 26, 1991, § 1.

missions longer and more costly. This is not at all of course to imply that there are inherent limits on the commander-in-chief's war-making authority, but to the extent that the Resolution embeds artificial barriers to the accomplishment of US military objectives, it artificially impedes US success in ways that its drafters would certainly not have foreseen or sought.

V. CONCLUSION

The War Powers Resolution is an outdated and demonstrably irrelevant relic of a bygone era of American political life. Its vestigial remains nevertheless result in heated debates between the coordinate branches of the federal government. This is especially true in the modern era of uncertainty regarding the precise scope of international authority for the use of force. At the time of this writing, debate continues over the adoption of the crime of aggression in the Rome Statute of the International Criminal Court. Current texts require that trans-state aggression must be "manifest" in order to warrant criminal sanction.⁸⁷ The function of the threshold is twofold. First, it implies a magnitude test by referring to the gravity and scale of the act of aggression. Second, by referring to the character, the threshold poses a qualitative requirement: the state use of force must be unambiguously illegal. This qualitative aspect is very important because there has been extensive debate on whether Article 2(4) of the UN Charter is dead or useless because of its complete indeterminacy.⁸⁸ The prohibition arising from international law on the use of force is surrounded by a legal grey area of some significance. The scope of anticipatory self-defense and forcible rescue operations at this juncture as well as some forms of humanitarian intervention remain defensible but unclear under international law.⁸⁹

In all those cases, reasonable international lawyers may disagree about the current state of the law. It would be thoroughly unwise to

87. Rome Statute of the International Criminal Court, art. 8(1), July 17, 1998, 2187 U.N.T.S. 90.

88. For two of the most important voices, see Thomas M. Franck, *Who Killed Art. 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970) and Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 540 (2002). See also Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005). For Glennon's unsurprisingly skeptical conclusions concerning the crime of aggression, see Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71 (2009).

89. For a more comprehensive (and at the same time masterfully succinct) exposition of this grey area, see Elizabeth Wilmshurst, *Aggression*, in ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 322-25 (2d ed. 2010).

try to clarify this grey area through the back door of the international *criminal* justice system, and it is my opinion that the International Criminal Court should avoid these murky waters. However, unresolved domestic debates over the War Powers Resolution run the risk of undermining the US posture in these diplomatic debates even as they weaken national resolve and undermine the efficiency of our deployed forces. The War Powers Resolution should be repealed and replaced with a more modern and flexible formulation that balances these important needs and helps to ensure a synergy between the coordinate branches of government and the forces in the field.

