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RETHINKING THE WAR POWERS RESOLUTION: A STRENGTHENED CHECK ON UNFETTERED PRESIDENTIAL DECISION MAKING ABROAD

Kelly L. Cowan*

I. INTRODUCTION

The growing threat of terrorism and the rapidly changing landscape of war have renewed constitutional questions regarding the United States president’s and Congress’s role in declaring and conducting war.¹ The War Powers Resolution,² enacted over a presidential veto in 1973, sets forth procedures to address the inconsistencies that have arisen between the Constitution’s text and its application.³ However, due to the War Powers Resolution’s⁴ varied failures in the past,⁵ changes need to be made to the statute for it to become a more effective tool for controlling war powers.⁶

In the absence of a declaration of war, the Resolution establishes a framework intended to guarantee Congress an active role in decisions concerning the deployment of United States Armed Forces.⁷ The statute provides that the president must consult with Congress before committing troops to

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4. The terms “War Powers Resolution” and “Resolution” will be used interchangeably throughout this comment.

5. See discussion infra Part II.

6. See discussion infra Part V.

hostile situations abroad. The statute further provides that United States troops be withdrawn from the dispute within sixty days, unless Congress authorizes longer involvement in the dispute.

The Resolution's existence has been burdened with controversy and deliberation concerning its constitutionality and effectiveness. As influential global changes impact the United States, it is necessary to reconsider whether the Resolution is constitutional, operative, and valuable in the nation's altered political landscape.

In Part II, this comment introduces the general constitutional provisions giving effect to the underlying structural conception of separation of powers and explores the constitutional issues surrounding and giving rise to the statute. Part II further details the history and effects of the War Powers Resolution, including the United States' involvement in Lebanon, the Persian Gulf, Kosovo, and more recently in Iraq, Afghanistan, and through actions against terrorist groups. In Part III, this comment explains the contemporary relevant legal significance of the War Powers Resolution. In Part IV, this comment weighs the War Powers Resolution's constitutionality and effectiveness. This analysis largely centers on the debate among constitutional scholars of the Framers' original intent behind the distribution of war powers.

Finally, this comment concludes with Part V, proposing that the War Powers Resolution is an acceptable measure taken by Congress to interpret the Constitution and ensure the existence of proper checks and balances within the United States federal government. Part V also proposes that a

10. See Note, supra note 3, at 637.
11. See Stephen L. Carter, The Constitutionality of the War Powers Resolution, 70 VA. L. REV. 101, 134 (1984). Carter's final assertion is the Resolution is needed to balance the tension between presidential and Congressional war making power. Id. He also states that the Resolution "still has a considerable distance to grow." Id.
12. See discussion infra Part II.A.
13. See discussion infra Part II.B-C.
14. See discussion infra Part III.
15. See discussion infra Part IV.
16. See id.
17. See discussion infra Part V.
strengthened War Powers Resolution is necessary to meet the growing need for the United States' involvement in multilateral international policy.\(^{18}\) This comment lastly asserts that such changes to the Resolution can be effectuated either through amendments to the statute, stronger congressional action, or judicial interpretation of the Resolution's provisions.\(^{19}\)

II. BACKGROUND

A. General Constitutional Provisions Concerning the Separation of Powers

Underlying every provision of the United States Constitution is the textual argument that each of the three branches of government should check the others' powers.\(^{20}\) More particularly within the federal government, each branch's powers with respect to waging war are explicitly stated in the Constitution, although many questions are still raised from the general war power provisions.\(^ {21}\)

1. The Executive War Power

The executive power is vested in the president, who is designated as the "Commander in Chief of the Army and Navy of the United States."\(^ {22}\) The president holds no legal authority to start or declare war\(^ {23}\) and this constraint is recognized against foreign nations and domestic states.\(^ {24}\) The

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18. See discussion infra Part VI.
19. See id.
20. See, e.g., United States v. Klein, 80 U.S. 128 (1871). "It is the intention of the Constitution that each of the great co-ordinate departments of the government – the Legislative, the Executive, and the Judicial – shall be, in its sphere, independent of the others." Id. at 147.
21. See CHEMERINSKY, supra note 1, at 281. The president's authority in waging war is provided for in Article II, section 2 of the Constitution, and Congress's authority in waging war is provided for in Article I, section 8 of the Constitution.
23. Id. at art. I, § 8, cl. 11. "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Id.
24. See, e.g., Perkins v. Rogers, 35 Ind. 124 (1871). A business transaction was made between merchants from different states during the Civil War. One merchant did not receive compensation and demanded the payment of the money. The question was whether the states were to be considered enemies at the time. The court held that

[we] are clearly of the opinion, from the above decisions, and our
president also lacks powers that are legislative in nature, such as the allocation and appropriation of materials and facilities for the armed forces.  

On the other hand, the president does have the power to recognize the existence of a state of war forced upon the United States, and to determine whether war has been initiated by invasion of a foreign entity into the United States. In these particular cases, the president is permitted to resist by force and respond to the challenge without waiting for special legislative authorization.

Acting in the capacity as commander in chief, the president has the legal authority to conduct war after a declaration is made by Congress. Thus, the president carries into effect all laws passed by Congress to conduct war once it is declared, to regulate the armed forces, and to define and punish all offenses against the rights that exist between nations. Furthermore, as commander in chief, the president is empowered to direct the military forces and deploy them in any appropriate manner.

understanding and construction of the Constitution of the United States, that the late rebellion did not become a civil war until it was made such by the proclamation of the President, on the 16th of August, 1861, made in pursuance of the act of Congress of the 13th of July, 1861, and that prior to that date, commercial intercourse between the citizens of Louisiana and the State of Indiana was lawful and would constitute a legal and valid consideration.

Id. at 139-40.  
25. See Kimpflen, supra note 7.  
26. See, e.g., Matthews v. McStea, 91 U.S. 7 (1875). The issue in this case surrounded the question of “whether a partnership, where one member of the firm resided in New York and the others in Louisiana, was dissolved by the war of the rebellion prior to April 23, 1861.” Id. at 9. The Court held that “it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States . . . .” Id. at 12-13.  
27. The Brig Amy Warwick, 67 U.S. 635 (1862). Three ships sailed in waters during a blockade and claimed they were unaware of the war when they were captured as enemies’ property. The fourth ship claimed it was intending to receive a permit to go to sea and while anchored, it was taken. The Court found that the president had a right to institute a blockade of ports in possession of persons in armed rebellion against the government and that the vessels were bound to regard the blockades. Id. at 698-99.  
28. Id. at 668.  
29. See Kimpflen, supra note 7.  
31. Id.
2. The Legislative War Power

Congress alone holds a significant amount of legal authority in exercising its war and defense powers. Under the United States Constitution, Congress holds the power to declare war. However, this power is only limited to situations in which war is being used to vindicate the rights of the government and its constituents.

Under Article I, section 8 of the Constitution, Congress is also charged with providing the common defense for the nation. The section also vests in Congress the sole power to raise and support armies and provide and maintain a navy. Finally, Congress holds the power to “make Rules concerning Captures on Land and Water.”

3. The Judiciary and the Political Question Doctrine

Throughout the history of the United States, very few cases involving the federal government's war power have come before the Court, due in large part to judicially self-imposed justiciability limits. The justiciability of a case depends on whether a judicial resolution of the controversy "would be consonant with the separation of powers principles embodied in the Constitution, to which all courts must adhere even in the absence of an explicit statutory command." The most relevant limit to the War Powers Resolution is the political question doctrine.

33. U.S. CONST. art. I, § 8, cl. 11 (“[t]he Congress shall have the Power... to declare War”).
34. See Fleming, 50 U.S. at 614.
35. U.S. CONST. art. I, § 8. The “common defense for the nation” refers to what Congress may implement for the nation through its legislative process. A major example is Congress's power to provide for the allocation of materials and facilities for defense. See Kimpflen, supra note 7.
36. U.S. CONST. art. I, § 8, cl. 12-13 (stating “[t]he Congress shall have the Power... to raise and support Armies... [and] to provide and maintain a Navy”).
37. Id. at cl. 11.
38. See CHEMERINSKY, supra note 1, at 83-84.
40. CHEMERINSKY, supra note 1, at 292. The other self-made justiciable limits created by the courts are: prohibition of advisory opinions, standing, ripeness, and mootness. Id. at 28. These limits have also created constraints for courts hearing cases involving the war powers. Id. at 292.
Under the political question doctrine, no case or controversy is heard by a court when the parties solely seek adjudication of a political question. 41 Political questions involve legal claims that are based on public policy decisions that are constitutionally reserved to other branches of the federal government or state governments. 42 Dismissal for non-justiciability under the political question doctrine is appropriate when one of the following circumstances are met: a textual constitutional commitment of an issue to another political department, few judicially discoverable standards for resolving an issue, policy determinations tied in with the decision of an issue, disrespect for another branch of government in light of a decision's holding, questioning of a political decision that has already been made, or the potential for embarrassment resulting from mixed pronouncements by various departments on a single question. 43 If a case presents any one of the above characteristics, it will be deemed non-justiciable under the political question doctrine and a court will not hear it. 44

The political question doctrine demonstrates that courts have declined to hear most cases involving the War Powers Resolution because the Resolution and the war powers in

No justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet justiciability is not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures.

Id. at 95.
42. See Kramer, supra note 39.
44. Id. at 217.
Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

Id.
general belong to the legislative and executive branches of the federal government.\textsuperscript{45} For example, in the relatively recent case of \textit{Lowry v. Reagan},\textsuperscript{46} 110 members of the House of Representatives could not bring an a lawsuit against President Ronald Reagan for his actions in the Persian Gulf because the plaintiffs failed to state a claim for which relief could be granted.\textsuperscript{47} A case of this nature raises questions as to whether the judicial branch can interject under judicially self-imposed justiciable limits by offering an interpretation of certain sections of the War Powers Resolution.\textsuperscript{48}

\section*{B. The Provisions of the War Powers Resolution}

Upon first observation, the relevant constitutional provisions can mislead an observer into assigning more certainty to the application of the constitutional war powers than a more thorough analysis would yield.\textsuperscript{49} In reality, there has been little consensus on the precise division of war powers granted by the Constitution.\textsuperscript{50} Congress consequently felt a compelling need to explicitly codify those powers in the War Powers Resolution.\textsuperscript{51}

There exist two competing arguments for the president and Congress to hold this important power.\textsuperscript{52} Proponents of endowing the president with this power argue that the chief executive is capable of acting with more speed, certainty, and secrecy than the legislature.\textsuperscript{53} Arguably, this may be more beneficial in prosecuting war,\textsuperscript{54} also, the president is often better informed about international situations relevant to decision making.\textsuperscript{55} Opponents of granting this power to the president stress that Congress holds broader political consensus and its structured procedures are more likely to prevent hasty and unnecessary action.\textsuperscript{56} In light of the above reali-

\textsuperscript{46} Id.
\textsuperscript{47} Id. at 337.
\textsuperscript{48} See discussion \textit{infra} Part V.
\textsuperscript{50} Id. at 1410.
\textsuperscript{51} Id. at 1407-08.
\textsuperscript{52} Id. at 1411.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Wald, \textit{supra} note 49, at 1411.
\textsuperscript{56} Id.
ties, a tension exists between the president’s flexibility and efficiency and Congress’s prudence and consensus.  

1. Events Leading to the Passage of the War Powers Resolution

In an environment of distrust resulting from the Vietnam War and the Watergate scandal of the early 1970s, Congress grew increasingly suspect of unfettered presidential power in the foreign policy realm. Bipartisan political support steadily increased in Congress for a measure that would prevent any recurrence of a Vietnam-like conflict in the future. American military involvement in the latter was largely held in disfavor not only because of low public support, but because it was an undeclared war. It was upsetting to liberals on philosophical grounds and to realists on practical grounds as an affront to the national interest. The War Powers Resolution was the result of the Americans’ disapproval with the Nixon administration’s disengagement from Vietnam and the sudden escalation of forces and engagement in Cambodia. Congress created the statute as a restraint on the president and a reassertion of constitutionally granted legislative powers.

2. Problems with Passage of the War Powers Resolution

The principal supporters of the Resolution “contend that it ‘restores’ the original balance of war powers between the president and the Congress.” The Resolution itself states its purpose as “to fulfill the intent of the framers of the Constitution of the United States.” The principal supporters viewed the Resolution as a necessary legislative effort to exercise constitutional control in deciding how the nation should be

57. Id.
58. Note, supra note 3, at 645. “The Vietnam experience persuaded many Americans that something had to be done to discourage Presidents from regarding the war-making power as their private property, to be exercised at presidential will.” Id. at 645 n.51 (internal citation omitted).
59. Id. at 645.
61. Note, supra note 3, at 645.
62. Id.
63. Id.
64. Carter, supra note 11, at 108.
committed to war.\textsuperscript{66}

Opponents of the Resolution condemned the statute as an unjustifiable usurpation by Congress of the authority of the executive branch.\textsuperscript{67} The Resolution's opponents further argued that it was Congress's way of assigning the blame for the Vietnam War to one administration, rather than a disaster managed jointly and collectively by two presidents and five Congresses.\textsuperscript{68} Among the Resolution's adversaries was President Richard Nixon, who vetoed the Act in 1973.\textsuperscript{69} Ultimately, despite Nixon's veto, the War Powers Resolution was enacted in 1973 and has retained its place in the federal code to this day.\textsuperscript{70}

3. The Mandates of the War Powers Resolution: A Summary

The War Powers Resolution is laid out in nine sections, each detailing specific requirements for its adherence.\textsuperscript{71} By limiting the Resolution's scope, the drafters were careful to avoid arguments that it exceeded congressional authority.\textsuperscript{72} In furtherance of this goal, the drafters wrote in the Resolution its basic objective: to preclude the president from unconstitutionally committing troops again without the necessary consent of Congress.\textsuperscript{73}

Section 3 of the Resolution attempts to accomplish this objective by requiring that the president "in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."\textsuperscript{74} After the Resolution was passed, the House committee explained that the word "hostilities" includes combat and any dispute where there is a "clear and

\textsuperscript{66} Carter, \textit{supra} note 11, at 102 (citing L. Henkin, \textit{Foreign Affairs and the Constitution} 100-04 (1972), and Raoul Berger, \textit{War-Making by the President}, 121 U. Pa. L. Rev. 29, 30 (1972)).
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 108.
\textsuperscript{70} Id.
\textsuperscript{72} Carter, \textit{supra} note 11, at 102-03.
\textsuperscript{73} Id. at 103.
\textsuperscript{74} 50 U.S.C. § 1542. The White House has attempted to construe the "hostilities" requirement very narrowly to avoid congressional control. \textit{See} Wald, \textit{supra} note 49, at 1417.
present danger of armed conflict.\textsuperscript{75}

Section 4 of the Resolution requires the president, when acting without a declaration of war, to send a report\textsuperscript{76} to Congress within forty-eight hours of introducing American forces equipped for combat into the territory, airspace, or waters of foreign nations.\textsuperscript{77} This section also requires the president to report on other information that Congress may request with respect to committing the United States to a conflict.\textsuperscript{78} Finally, the section states that when the nation is engaged in hostilities, the president must make periodic reports to Con-

\begin{itemize}
  \item \textsuperscript{75} Wald, \textit{supra} note 49, at 1418 (citing H.R. Rep. No. 287, 93d Cong. 1st Sess. 7 (1973)).
  \item \textsuperscript{76} The reporting requirements are specifically detailed in 50 U.S.C. § 1543: Reporting requirement:
    \begin{enumerate}
      \item Written report; time of submission; circumstances necessitating submission; information reported. In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—
        \begin{enumerate}
          \item into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
          \item into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
          \item in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—
            \begin{enumerate}
              \item the circumstances necessitating the introduction of United States Armed Forces;
              \item the constitutional and legislative authority under which such introduction took place; and
              \item the estimated scope and duration of the hostilities or involvement.
            \end{enumerate}
        \end{enumerate}
    \end{enumerate}
  \item \textsuperscript{77} 50 U.S.C. § 1543(a).
  \item \textsuperscript{78} 50 U.S.C. § 1543(b).
\end{itemize}
gress on the status of the conflict. The periodic reports must be made at least once every six months.

Section 5 further extends the reporting requirement by allowing the president sixty days to engage in military hostilities without congressional authorization. The last four presidents have found this section most troublesome because at any time Congress has full constitutional power to pass a law requiring the removal of United States troops from the conflict. In fact the president must terminate the use of troops unless Congress authorizes otherwise. Section 5 does not apply if Congress declares war or approves such use of the forces, allows for an extension on the sixty-day period, or "is physically unable to meet as a result of an armed attack upon the United States." The sixty-day period will be extended, but only for an additional thirty days, if the "president determines and certifies to Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

The next three sections of the War Powers Resolution detail procedures for consideration of resolutions and bills to declare war, provide authorization for a deployment, and allow for the recall of troops. The penultimate section describes the "[a]uthority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred . . . from any provision of law . . . [or] from any

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79. 50 U.S.C. § 1543(c).
80. Id.
81. See Carter, supra note 11, at 103. This section of the War Powers Resolution has been controversial in the past because presidents have exploited the sixty-day "grace" period to enter into unsupported conflicts. Id.
82. See Wald, supra note 49, at 1419.
83. Kimpflen, supra note 7.
84. 50 U.S.C. § 1544(b).
85. Id. This section has been especially controversial because if Congress wishes to order the president to withdraw troops before the end of the sixty days, the Resolution authorizes it to do so by a concurrent resolution. See id. Concurrent resolutions do not require the president's signature to become effective, which has led some to view the section as unconstitutional. Wald, supra note 49, at 1419-20.
86. 50 U.S.C. § 1545.
87. 50 U.S.C. § 1546a.
treaty. The final section describes the separability of the Resolution, meaning that if one provision of the statute is held invalid this determination will not affect the other provisions.

C. Application of War Powers Resolution: Problems with Presidential Compliance

No president has ever expressly acknowledged the War Powers Resolution’s constitutionality, although a few presidents have complied with its terms. The preeminent portion of the Resolution which raises the most constitutional questions stems from Section 5’s provision that if Congress wishes to order the president to withdraw troops from disputes before the sixty days elapse, it may do so by concurrent resolution. This provision is particularly controversial because concurrent resolutions do not require the president’s signature to become effective. Therefore, the provision could arguably be regarded as an unconstitutional legislative veto. Despite this argument, the federal courts have never held any part of the Resolution unconstitutional, nor has Congress ever repealed any of its provisions.

A historical account and illustration of the Resolution’s application in foreign disputes aids in evaluating the statute’s constitutionality and also highlights areas where the Resolution has failed. The history of the Resolution’s effect on presidential actions makes it clear that Congress, and the courts if necessary, must address the statute’s lack of control

89. 50 U.S.C. § 1547.
90. 50 U.S.C. § 1548.
91. See Carter, supra note 11, at 104.
92. See Wald, supra note 49, at 1419-20. “Concurrent resolutions are passed by both houses of Congress, but are not legislative in nature and are not presented to the president for his signature.” Id. (citing Jefferson’s Manual and Rules of the House of Representatives § 396, H.R. Doc. No. 403, 95th Cong. 2d Sess. (1979)).
93. Id.
94. Id. Legislative vetoes have been held unconstitutional. See, e.g., INS v. Chadha, 462 U.S. 919, 959 (1983).
95. See generally Wald, supra note 49, at 1436-39 (detailing the War Power Resolution’s experience in the courts).
96. 50 U.S.C. §§ 1541-1548 (2000). Historical background of the statute details how the Resolution has never been repealed.
mechanisms and efficacy.\textsuperscript{97}

In order to analyze the Resolution's constitutionality and effectiveness, this comment will consider its application and effect on four international conflicts arising since its passage: Lebanon, Grenada, the Persian Gulf, and Kosovo.\textsuperscript{98}

1. Lebanon

In September 1982, President Ronald Reagan ordered United States Marines into Lebanon as part of a multinational peacekeeping force sent to maintain order after an invasion by Israel.\textsuperscript{99} Reagan notified Congress that there was neither an intention nor an expectation that the marines would engage in hostilities; however, he also stated that the right to self-defense was reserved.\textsuperscript{100} Reagan reported that the troops would remain in Lebanon "only for a limited period to meet the urgent requirements posed by the current situation."\textsuperscript{101} Congress agreed to the deployment and made no attempt to challenge it, even after several violent incidents.\textsuperscript{102} Congress reconsidered its policy after a group of marines were killed during an exchange of fire with Lebanese rebels.\textsuperscript{103} It then demanded that Reagan yield to the Resolution's time limit.\textsuperscript{104} Reagan denied that Lebanon was a "hostile situation" because the attack was an isolated incident and asserted that any congressional limitations would weaken the country's diplomatic position.\textsuperscript{105}

In response, Congress introduced a bill to invoke the sixty-day time limit, but then negotiated an agreement with

\textsuperscript{97} See discussion \textit{infra} pp. 111-16.

\textsuperscript{98} There have been numerous disputes in American history concerning the War Powers Resolution. However, these particular four were picked due to of their historical significance, as well as their ability to highlight problems with the Resolution.

\textsuperscript{99} Wald, \textit{supra} note 49, at 1423.

\textsuperscript{100} \textit{Id.} (quoting Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on United States Participation in the Multinational Force in Lebanon, 2 PUB. PAPERS 1238, 1238 (Sept. 29, 1982)).

\textsuperscript{101} \textit{Id.} (quoting Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on United States Participation in the Multinational Force in Lebanon, 2 PUB. PAPERS 1238, 1238 (Sept. 29, 1982)).

\textsuperscript{102} \textit{Id.} One major incident was a car-bombing of the United States Embassy, which killed more than sixty people, seventeen of which were American citizens.

\textsuperscript{103} \textit{Id.} at 1424.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} Wald, \textit{supra} note 49, at 1424.
the White House that allowed the marines to remain in Lebanon for eighteen months, although their mission would be limited. In signing the legislation, Reagan stated that he intended to consult Congress, but it was not his constitutional duty to follow congressional directives, such as the time limit of the War Powers Resolution.

After Reagan signed the negotiated agreement into law, a suicide bomber drove a truck into a marine barrack and killed more than 240 men. This incident caused a further decline of congressional support for the mission, but the legislature found it difficult to withdraw the troops while under fire. Numerous congressional members regretted authorizing the mission and were upset by Reagan’s action that placed them in a difficult and uncomfortable situation.

In 1984, Congressional Democrats in the House of Representatives began to argue for a prompt withdrawal of the forces in Lebanon. Reagan responded by asserting that he would ignore any such congressional dictate and redeployed troops to United States Navy ships offshore. Reagan reported that this action was to provide support against direct attacks towards United States troops. Eventually, Reagan discreetly reassigned the forces and formally notified Congress of the termination of United States participation in the multinational mission. Many members of Congress considered Reagan’s actions to be a violation of the terms of the eighteen-month authorization and the War Powers Resolution because Reagan did not consult with congressional members. However, Congress did not officially contravene the

106. Id. at 1424-25. A major limitation was the agreement that United States troops would not engage in combat.
109. Id. This is arguably one of the main problems with the Resolution because once military forces are deployed it becomes extremely difficult for Congress to withdraw them after public opinion has been established. Bill Walsh, Congress Reluctant to Use its Power to Withdraw Troops, TIMES-PICAYUNE, Apr. 14, 1999, at A16.
110. Wald, supra note 49, at 1426.
111. Id.
112. Id.
113. Id.
114. Id. at 1427.
115. Id.
President’s actions.\textsuperscript{117}

2. Grenada

In October 1983, troops led by the United States invaded Grenada, supposedly in response to appeals from the Caribbean island nation’s neighbors.\textsuperscript{118} The purpose of the invasion was to restore peace and order after a coup d’etat in which a Marxist faction overthrew the controlling Marxist regime.\textsuperscript{119} According to President Ronald Reagan, the invasion’s purpose was to prevent Grenada from becoming a “Soviet-Cuban colony... to export terror and undermine democracy.”\textsuperscript{120}

Reagan presented his plans to Congress the night before the invasion, and congressional leaders perceived this “as more of a notification than a consultation.”\textsuperscript{121} Reagan technically observed the consultation requirement of the Resolution by formally notifying Congress of the invasion, although he failed to meet the sixty-day time limit of the statute.\textsuperscript{122}

The House of Representatives passed a resolution stating that “section 4(a)(1) [time-limit provision] of the War Powers Resolution became operative on October 25, 1983, when the United States Armed Forces were introduced into Grenada.”\textsuperscript{123} The Senate also included this sentiment in an amendment to a bill designed to raise the national debt ceiling.\textsuperscript{124} The Grenada amendment was eventually removed from the national debt ceiling bill and the House bill never came to the Senate floor for a vote.\textsuperscript{125} Congress did not take any further action on the time limit problem, possibly because administrative officials, never admitting an obligation under the Resolution, anticipated that the troops would be

\begin{thebibliography}{99}
\bibitem{117}Id. Congress was reluctant to act because it did not want to denounce a military operation regarding which it was unable to reach a clear consensus. \textit{Id.}
\bibitem{118}Id.
\bibitem{119}Id.
\bibitem{120}Address to the Nation on Events in Lebanon and Grenada, 2 Pub. Papers 1517, 1521 (Oct. 27, 1983).
\bibitem{121}Wald, \textit{supra} note 49, at 1428.
\bibitem{122}Id.
\bibitem{123}Id.
\bibitem{124}Id. (quoting 129 CONG. REC. H8884 (Oct. 31, 1983) (debate on amendment to H.R.J. Res. 402, 98th Cong., 1st Sess.); \textit{id.} at H8933 (daily ed. Nov. 1, 1983) (vote adopting amendment by 403-23)).
\bibitem{125}Id.
\end{thebibliography}
pulled in fewer than sixty days. Additionally, the invasion of Grenada proved to be politically popular. While Congress did not use the War Powers Resolution to prevent the unauthorized invasion, this was the first time Congress formally invoked any portion of the Resolution.

3. The Persian Gulf War

On August 2, 1990 after Iraq invaded Kuwait, President George H.W. Bush deployed United States Armed Forces and instituted economic sanctions against Iraq. Pursuant to the Resolution, Bush reported to Congress one week later that the deployment was defensive in nature. In particular, the deployment was to deter further Iraqi aggression. By the end of October, some members of Congress began to question whether President Bush was acting without legislative approval or consultation; however, Congress did pass a bill providing extra funds for the troops in the Persian Gulf.

Near the end of 1990, President Bush changed his representation of the dispute with Iraq as offensive with approximately 230,000 troops stationed in the Persian Gulf. The unilateral decision making of the Bush administration produced two unsuccessful lawsuits against the President.

The first, Dellums v. Bush, was a suit brought by fifty-four members of Congress who opposed the President's perceived encroachment upon powers constitutionally reserved for Congress. The court dismissed the action for want of ripeness because only fifty-four members, as opposed to a majority, of Congress sought relief for an infringement of Congress's war-declaration power. Additionally, the court dis-

126. Id. at 1428-29.
127. Wald, supra note 49, at 1428.
128. Id. at 1429.
129. LeMar, supra note 60, at 1051.
130. Id.
131. Id.
132. Id.
133. Id. at 1051-52.
134. Id. at 1052.
136. Id. at 1143 n.1.
137. Id. at 1152. A ripe case is one that is ready for consideration by a court, meaning that all other avenues for determining the case have been exhausted, there is a real controversy, and the law needs to be settled on one or more issues raised by the case. Id. at 1149.
missed the action because the President had not yet shown a commitment to a definitive course of action.\textsuperscript{138}

An American soldier initiated the second suit, \textit{Ange v. Bush},\textsuperscript{139} alleging that Bush's deployment order exceeded his authority.\textsuperscript{140} The court determined that the challenges to the President's deployment of troops presented non-justiciable political questions.\textsuperscript{141} Even if the case could have been considered justiciable, the cause of action was not ripe for judicial review because it was not certain whether the President would take further action in excess of his authority.\textsuperscript{142} The court held that the determination sought by the soldier regarding Bush's actions was one that the judicial branch could not make pursuant to the separation of powers embodied in the court's equitable discretion and in the political question doctrine.\textsuperscript{143}

When Bush eventually ordered the commencement of offensive action in Kuwait and Iraq, Congress, for various reasons including avoiding a political stalemate between the legislative and executive branches, statutorily authorized war in the Persian Gulf.\textsuperscript{144} This was the first military authorization for offensive force since World War II.\textsuperscript{145}

4. Kosovo

In the mid-1990s, President William J. Clinton and the United Nations began to take a serious interest in the political changes occurring in Yugoslavia.\textsuperscript{146} Following the final dissolution of the country, a massive civil war began among the varied ethnic groups in the region.\textsuperscript{147} In March 1990, President Clinton, lacking congressional authorization, ordered air and missile strikes "against the Federal Republic of

\textsuperscript{138} Id. This case demonstrates how the court used justiciability limits to avoid making a decision regarding Congress's and the president's war-making authority.


\textsuperscript{140} Id. at 510.

\textsuperscript{141} Id.

\textsuperscript{142} Id. at 515.

\textsuperscript{143} Id. at 514. See discussion \textit{infra} Part II.A.3 on the political question doctrine.


\textsuperscript{145} Id. at 836.

\textsuperscript{146} See id. at 841-42.

\textsuperscript{147} Id. at 840.
Yugoslavia to protect the province of Kosovo.\textsuperscript{148} President Clinton claimed that the strikes were not defensive in nature and that he took "these actions pursuant to my constitutional authority to conduct United States foreign relations and as Commander in Chief."\textsuperscript{149}

Members of Congress were aggravated by the President's unilateral use of force, and Congressman Tom Campbell brought suit against Clinton.\textsuperscript{150} In \textit{Campbell v. Clinton},\textsuperscript{151} Campbell, along with thirty other members of Congress, sought declaratory judgment against Clinton for his use of force in Yugoslavia.\textsuperscript{152} Campbell claimed that the President's actions were unlawful under both the War Powers Clause of the Constitution\textsuperscript{153} and the War Powers Resolution.\textsuperscript{154} The district court dismissed Campbell's case on non-justiciability grounds due to lack of standing.\textsuperscript{155} The court reasoned that Campbell had sufficient opportunity to use the legislative process to stop the President's war activity, and he therefore lacked the power to challenge such executive action in court.\textsuperscript{156} The Court of Appeals for the District of Columbia affirmed the district court's dismissal of the case.\textsuperscript{157}

\textbf{D. The War Powers Resolution Today}

The tragic events of September 11, 2001 have been followed by many political changes. One change is the unprecedented centralization of power into the executive branch when dealing with terrorism at home and abroad.\textsuperscript{158} Presi-

\textsuperscript{148} LeMar, \textit{supra} note 60, at 1052 (citing Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 \textit{WEEKLY. COMP. PRES. DOC.} 527, 527-28 (Mar. 26, 1999)).

\textsuperscript{149} Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 \textit{WEEKLY. COMP. PRES. DOC.} 527, 528 (Mar. 26, 1999). \textit{See also} U.S. \textit{CONST.} art II \S\ 2, cl. 1 ("[t]he President shall be Commander in Chief of the Army and Navy of the United States").

\textsuperscript{150} \textit{See} Campbell v. Clinton, 203 F.3d 19 (1st Cir. 2000).

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.} at 20.

\textsuperscript{153} U.S. \textit{CONST.} art. I, \S\ 8, cl. 11 (giving Congress the sole authority to declare war).

\textsuperscript{154} \textit{See} Campbell, 203 F.3d at 20.

\textsuperscript{155} \textit{Id.} at 19.

\textsuperscript{156} \textit{Id.} at 32.

\textsuperscript{157} \textit{Id.} at 19.

\textsuperscript{158} \textit{See} Nancy Kassop, \textit{The War Power and Its Limits}, 33 \textit{PRESIDENTIAL
dent George W. Bush defined the terrorist attacks on September 11, 2001, as "acts of war," and his response was to implement domestic and foreign policies aimed at protecting America from any future aggression. Congress, with the Bush administration's influence, expedited passage of legislation that granted the executive branch vast new powers. For example, U.S.A. Patriot Act, use-of-force resolutions, an executive order authorizing military tribunals, and a new National Security Strategy have given the executive branch expansive authority in the war powers area.

The emergence of these new laws and the executive branch's characterization of Bush as a wartime president have led to strong executive dictate with regard to foreign policy. Although congressional authorization allowed Bush to send United States troops into Iraq for a second time, it is unclear how he would respond in the event Congress refused...
to authorize his actions. President Bush’s actions are open to questioning in light of mounting inquiries concerning the original justification for invading Iraq, specifically the supposed possession of illegal weapons of mass destruction. The state of war against covert enemies and the resulting measures aimed at national security have once again called America to consider the War Powers Resolution for its effectiveness and constitutionality.

III. IDENTIFICATION OF THE LEGAL PROBLEM

The War Powers Resolution’s existence has been fraught with deliberation over the statute’s constitutionality, use, and effectiveness. Both opponents and supporters of the Resolution agree that a significant part of the debate surrounds the Framers’ original intent. The Resolution’s opponents have argued that it upsets the original balance of the constitutionally defined war powers between the president and Congress, while supporters of the Resolution contend that it restores the original balance that has been transformed over time. This comment will analyze the two sides’ arguments and recommend changes that need to be made in order for the Resolution to be a more operative and effective legislative mandate.

IV. ANALYSIS

A. Presenting the Arguments on the War Powers Resolution’s Constitutionality

The War Powers Resolution’s opponents claim that it is an unconstitutional restraint on the president’s power. Proponents, on the other hand, argue that the War Powers Resolution is not only constitutional, but necessary to ensure the separation of powers doctrine conceptualized by the

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168. LeMar, supra note 60, at 1046.
170. See Carter, supra note 11, at 108.
171. Id.
172. Id. at 108-09.
173. Id. at 108.
174. Id.
Framers of the Constitution.¹⁷⁵ Both arguments have merit, although for the reasons described below, the arguments supporting the Resolution are more persuasive.

1. The Framers' Intent

Generally, opponents and proponents of the War Powers Resolution agree that both the Articles of Confederation and the original draft of the Constitution granted Congress broad discretion in the conduct of war, but in the course of the Constitutional Convention, the Framers retooled the balance in favor of a system with shared war powers.¹⁷⁶

Opponents of the Resolution, who defend an independent presidential war-making power, claim that the rejection of the Articles of Confederation and the Constitution's original draft, which favored Congress, is evidence that the Framers intended for Congress to have less power.¹⁷⁷ Further they contend, the Framers must have understood that there had been and would continue to be many instances in which the president can react to hostilities without a declaration of war.¹⁷⁸ Acting in such times, the president should have the greatest power to control the American forces, thus alleviating the "need to develop a national consensus on every tactical issue that might arise."¹⁷⁹

In contrast, proponents of the War Powers Resolution more convincingly argue that the Framers would have been strongly opposed to the president taking unilateral military action without congressional authorization.¹⁸⁰ However, the Framers would have supported instances "when the United States or its troops abroad were suddenly attacked and the president needed to repel such attacks."¹⁸¹ The proponents' argument is better founded because action taken in self-defense allows for a preservation of international policy and enables congressional consideration on whether to conduct war.¹⁸² The proponents' argument meets the important sepa-

¹⁷⁵. Id.
¹⁷⁶. See Carter, supra note 11, at 110.
¹⁷⁷. Id. at 109.
¹⁷⁸. Carter, supra note 11, at 110 (internal citation omitted).
¹⁷⁹. Id. at 111.
¹⁸⁰. Id. at 110.
¹⁸¹. LeMar, supra note 60, at 1054.
ration of powers requirement that the Framers incorporated throughout the Constitution.\textsuperscript{183} In addition, the Resolution's proponents persuasively stress the Framers' concern following their experience with British colonialism over the abuses inherent in vesting absolute power in any one individual.\textsuperscript{184} Proponents contend that where war powers are concerned, the Framers preferred a more balanced system of decision making, one that fostered deliberation instead of autocracy.\textsuperscript{185} The strength of the proponent's theory lies in language expressly written in the Constitution that grants the president the authority to command the military once in conflicts, but not to direct its involvement into conflicts.\textsuperscript{186}

2. Congressional Checks on Presidential War-Making Powers

Opponents also look to other arguments beyond the Framers' original intent and have contended that Congress has several other options available to enforce its constitutional authority over the president.\textsuperscript{187} Congress could employ the power of the purse and cut off funds the president is using to support military operations.\textsuperscript{188} Congress could also take more extreme measures and attempt to impeach the president.\textsuperscript{189} Opponents argue that if the president is truly acting outside of his given constitutional authority, the system of checks and balances will prevail and he or she will be removed from office.\textsuperscript{190}

The Resolution's proponents on the other hand, contend that these additional methods of congressional control over the president are too insubstantial to counterbalance execu-
tive abuses. These contentions assert the reality that once a military action is initiated abroad, it is very difficult for Congress to recall the troops. It would be extremely counterproductive and embarrassing internationally and domestically for Congress to withhold funds or attempt to impeach the president after troops have been committed. This line of action could bring the United States global ridicule and cause significant strife among the American public. Furthermore, the strength in this argument lies in the simple fact that the text of the Constitution explicitly gives Congress the right to declare war and to “raise and support Armies . . . [and] to provide and maintain a Navy.” The president, on the other hand, is explicitly named the “Commander in Chief of the Army and Navy.” Therefore, it is only after Congress declares war, or statutorily authorizes a military operation, that the president may assume command of the armed forces.

B. Overall Resolution of Argument

The strengths and weaknesses of the two constitutional arguments establish that the Resolution is constitutional. The Resolution, at the time of inception, was an acceptable measure taken by Congress to interpret the Constitution and ensure checks and balances within the federal government. It continues to be so today.

To imagine that the Framers of the Constitution would have allowed a president to take unilateral military action without congressional assent seems almost absurd, especially in light of the overall strength of the separation of pow-

191. See Carter, supra note 11, at 112. Carter discusses the need for the Resolution to enable Congress to act when the “President’s actions slide down the scale from use of troops in time of peace to use of troops in time of war.” Id.
192. See Walsh, supra note 109, at A16.
193. Id.
194. Id.
197. Id.
198. See generally Carter, supra note 11. Carter’s major assertion is that the Resolution is constitutional.
199. Id. at 134. The Resolution “guarantees that unless the Congress of the United States gives its approval, all of that awesome power will not be concentrated in the hands of a single individual.” Id.
200. LeMar, supra note 60, at 1054.
ers doctrine. This contention is particularly evident in the amount of constitutional control over the initiation and support of military operations that the Framers conferred to Congress, compared to the relatively limited control the Constitution bestows the president. These facts suggest that the Framers would support a law requiring the president to consult with Congress before committing United States Armed Forces to military actions abroad. The facts further suggest that the consultation provision of the Resolution should be strengthened or at least asserted by Congress.

Furthermore, although it is important for the United States to respond quickly to adverse situations abroad and at home, this alone should not give the president unfettered power to direct the armed forces in any manner he or she sees fit. Congress, and the nation, should have a say in what actions the president takes in the name of the United States. As evidenced by past conflicts, what starts as a simple "defensive" military operation abroad may turn into a full-blown "war-like" dispute. When the president decides to interject United States troops in such situations abroad, Congress and the American public are virtually excluded from the decision-making process, yet are left to handle the consequences of the unilaterally induced engagement. The War Powers Resolution attempts to alleviate these very issues, and with appropriate changes it has potential to become a much stronger political balancing force.

V. PROPOSAL

The history of the War Powers Resolution's implementation offers sufficient evidence of its ineffectiveness and the legislature's overall inability to manage the problems that result from the statute's weaknesses. These past problems

201. Carter, supra note 11, at 110 (discussing Abraham Sofaer's argument that the Framers planned to limit the president's war power authority).
203. Id.
204. See discussion supra Part II.C.
205. See, e.g., LeMar, supra note 60, at 1051-52 (discussing President George H.W. Bush's entry into the Persian Gulf War as a defensive mission, which later became a full-blown military campaign).
206. The United States' most recent engagement in Iraq is an excellent example of this situation.
207. Note, supra note 3, at 637.
and current presidential indiscretions clearly show that the statute must be modified. The Resolution should be strengthened by a congressional amendment, stronger congressional action, or more specific judicial interpretations of the statute as it currently stands. If Congress wishes to reassert its constitutionally defined role in determining when the United States should become involved in military activities, the Resolution must be revised.

A congressional amendment of the War Powers Resolution would be one way to alleviate difficulties concerning the statute. In doing so, Congress must address two main issues. First, it must make the consultation and reporting requirement stricter, and second, it must provide a more detailed definition of "hostilities" within the Resolution.

In order to achieve these goals, Congress should first amend section 4 of the War Powers Resolution to make it more exacting. Currently, this provision calls for the president to consult with Congress prior to engaging United States troops into hostilities. The historical account of this statute detailed above suggests that some presidents have regarded the consultation requirement as a mere notification requirement. To avoid this, the wording of the Resolution must be changed, requiring the president to present to Congress the justifications for entering into hostilities abroad before he or she takes action. These modifications would require the president to assemble military experts and thoroughly evaluate the ramifications of military involvement. Congress should then vote on whether this is a dispute that United States Armed Forces should enter. The wording should also propose specific actions Congress could take if the president fails to meet this section of the Resolution. Congress would then have a clear guideline of the procedures to follow when the president violates the Resolution.

This amendment would also be beneficial because it would allow Congress to have a bearing on the United States'
actions abroad before troops are committed overseas. Although this extra time spent by Congress determining whether there should be troop involvement would take more time than is currently used by the president alone; the additional deliberations and investigations are justified when lives are at risk, foreign policy is upset, and a significant amount of taxpayer money is spent on foreign disputes.

Congress should also add a section to the War Powers Resolution, or perhaps create another statute altogether, that more clearly defines "hostilities" within the Resolution. After the Resolution was passed the House committee explained that the word "hostilities" includes combat and also any dispute where there is a "clear and present danger of armed conflict." With technological advancements and the transformation in war tactics, it is vital that the legislature better define "war" and "hostilities" to reflect the changes that have taken place with the emergence of influential terrorists groups. If Congress expands the scope of the meaning of "hostilities" to include the United States perspective of "smaller" operations that in reality have large influences throughout the world, it will have more control on what actions the president takes. Furthermore, the American public will be better informed with regard to the United States' involvement abroad. Finally, the word "hostilities" should also include situations when the United States enters into a dispute as a peaceful or self-defensive action, because in many of these cases the dispute turns offensive.

Congress must also begin to take a more active role in the enforcement of the War Powers Resolution to make it a stronger piece of legislation.

214. See Walsh, supra note 109, at A16.
215. See Note, supra note 3, at 648-51 (discussing the need for a better definition of hostilities).
216. Wald, supra note 49, at 1418 (citing H.R. Rep. No. 287, 93d Cong. 1st Sess. 7 (1973)).
217. See generally Kassop, supra note 158 (discussing the war on terror and the drastic changes September 11th has made to the definition of war).
218. These "smaller" operations should include any solitary military action the United States takes abroad, which would allow for more public influence in the course of action taken.
220. See LeMar, supra note 60, at 1067.
necessary that Congress become more proactive in deciding when United States troops should engage in military actions abroad. Often, the general public verbalizes concerns with presidential actions in the area of foreign policy, but its concerns are not fully recognized by the executive branch.\textsuperscript{221} Congress needs to better consider its constituents' wishes and address presidential actions in foreign policy by enforcing the War Powers Resolution.

More particularly, Section 5 of the War Powers Resolution\textsuperscript{222} should be strictly enforced by Congress to remove United States Armed Forces at any time during troop involvement.\textsuperscript{223} The legislature could take more control over the president's actions if it is diligent about using this provision of the Resolution.\textsuperscript{224} If a significant number of congressional members disagree with the president's actions, they should pass a concurrent resolution to remove the troops at any time during their involvement in the dispute.\textsuperscript{225} This action would be especially useful in instances where the American public largely disapproves of United States involvement in hostilities; it would also allow Congress to meet its constituents' needs by removing the troops before it becomes logistically difficult to do so.\textsuperscript{226}

Finally, the War Powers Resolution can become more effective if the judiciary is able to better interpret specific provisions of the statute.\textsuperscript{227} Future cases must be brought by plaintiffs in such a way as to avoid dismissal on justiciable grounds, such as constituting a political question, lack of standing, or lack of ripeness.\textsuperscript{228} In order to escape such dismissal, cases need to center on the meaning of the words within the statute, rather than on alleged presidential ac-

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\textsuperscript{221} This again has been seen in the most recent United States involvement in Iraq. Many citizens do not agree with President George W. Bush's further involvement with the nation. A May 24, 2004 ABCNEWS/Washington Post Poll indicated that fifty-eight percent of Americans disapprove of President Bush's handling of the Iraq War. \textit{See} http://www.abcnews.go.com/images/pdf/955a1BushIraqElection.pdf (last visited 01/02/2005) (on file with the Santa Clara Law Review).


\textsuperscript{223} LeMar, \textit{supra} note 60, at 1057.

\textsuperscript{224} \textit{Id}.

\textsuperscript{225} 50 U.S.C. § 1544.

\textsuperscript{226} \textit{See} Walsh, \textit{supra} note 109, at A16.

\textsuperscript{227} \textit{Id}.

\textsuperscript{228} \textit{See}, e.g., Lowry v. Reagan, 676 F. Supp 333 (D.D.C. 1987).
tions. If courts could better interpret the meaning of words within the Resolution, such as "consult" or "hostilities," the expectations of the president's actions would be more clearly defined. Thus, Congress would know when the president fails to meet the Resolution's requirements and could legitimately act in response to indiscretions.

VI. CONCLUSION

The world today is a different place as compared to 1973, when the War Powers Resolution was passed. As drastic changes have taken place in the United States and the world at large, it is now even more imperative that both the executive and the legislative branches of the government determine the federal government's foreign policy decisions.

In order to safeguard the United States from unilateral and hasty decision making, certain provisions of the War Powers Resolution should be amended. The Resolution should also be better enforced and interpreted, in order to be a more effective statute. These changes to the Resolution would help reinforce the United States' position as a world leader, while at the same time respecting the global trend of multilateral foreign policy and decision making.

230. See, e.g., Wald, supra note 49, at 1428 (discussing President Reagan's lack of consultation with Congress before invading Granada).
231. See Note, supra note 3, at 648-51.
232. See Carter, supra note 11, at 115-16. Carter discusses the importance of a fluid system of separation of powers that places "limits on what each branch can do to control the others." Id. at 115.