PRO-AT: REFORM WAR POWERS

By Vance Trefethen and Chris Jeub

***Resolved: On balance, the current Authorization for Use of Military Force gives too much power to the president.***

This PRO-AT brief is repurposed evidence from the Season 14 briefs from Stoa resolution on military reform. The evidence will be helpful to PF teams running affirmative arguments on reforming presidential war powers. This brief is divided into the following sections: Inherency, Constitutional Issues, “Founding Fathers” Arguments, and Solvency, Justifications and Disadvantages.

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INHERENCY

The War Powers Resolution, sometimes referred to as the War Powers Act, WPR or WPA: Title 50 United States Code Chapter 33 Sections 1541-1548. The Library of Congress explains some of the key provisions in their article last updated in 2011, saying QUOTE:

Library of Congress, last updated 2011. last updated 4 Apr 2011 “War Powers,” <http://loc.gov/law/help/war-powers.php>

“The second part requires the President to consult with Congress before introducing U.S. armed forces into hostilities or situations where hostilities are imminent, and to continue such consultations as long as U.S. armed forces remain in such situations (50 USC Sec. 1542).The third part sets forth reporting requirements that the President must comply with any time he introduces U.S. armed forces into existing or imminent hostilities (50 USC Sec. 1543); section 1543(a)(1) is particularly significant because it can trigger a 60 day time limit on the use of U.S. forces under section 1544(b). The fourth part of the law concerns Congressional actions and procedures. Of particular interest is Section 1544(b), which requires that U.S. forces be withdrawn from hostilities within 60 days of the time a report is submitted or is required to be submitted under Section 1543(a)(1), unless Congress acts to approve continued military action, or is physically unable to meet as a result of an armed attack upon the United States.” UNQUOTE

Now is the critical time, if we don’t act we may lose the ability to rebalance war powers in the future

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

As the wars in Iraq and Afghanistan wind down, there is no better time for Congress to recognize that it is at a constitutional crossroads. The next few years will provide an opportunity for collective reflection on the conduct of these wars: instead of engaging in recriminations over past mistakes, it is far more profitable to take institutional measures that will prevent their recurrence. A window of opportunity is opening. If Congress does not take advantage of this moment to reclaim the power of the purse, its chances of rebalancing the separation of powers may well diminish over time.

War Powers Resolution is flawed

Center for Constitutional Rights 2009. (non-profit legal and educational organization, includes attorneys who litigate for civil rights issues. The material in this quote was written by: Annette Warren Dickerson, Qa’id Jacobs, C. Lynne Kates, Jules Lobel, Sara Miles, Nicholas Modino, Jen Nessel, Alison Roh Park, Michael Ratner, Vincent Warren and Peter Weiss) “Restore. Protect. Expand. Amend the War Powers Resolution” <http://ccrjustice.org/files/CCR_White_WarPowers.pdf>

The War Powers Resolution, as written, was flawed in several key respects. The first flaw was that the Resolution imposed no operative, substantive limitations on the executive’s power to initiate warfare, but rather created a time limit of 60 days on the president’s use of troops in hostile situations without explicit congressional authorization. This approach was a mistake, because as a practical matter it recognized that the President could engage in unilateral war-making for up to 60 days, or 90 days with an extension. But the Constitution requires that Congress provide authorization prior to initiating non-defensive war, not within a period of months after warfare is initiated. As history has demonstrated time and again, it is difficult to terminate warfare once hostilities have begun. The key time for Congress to weigh in is before hostilities are commenced, not 60 or 90 days afterward. Secondly, the War Powers Resolution correctly recognized that even congressional silence, inaction or even implicit approval does not allow the president to engage in warfare – but it failed to provide an adequate enforcement mechanism if the president did so. Under the resolution, wars launched by the executive were supposed to be automatically terminated after 60 or 90 days if not affirmatively authorized by Congress – but this provision proved unenforceable. Presidents simply ignored it, Congress had an insufficient interest in enforcing it and the courts responded by effectually saying: if Congress did nothing, why should we?

WPR can’t solve for unauthorized Presidential expansion of an existing war

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

Nonetheless, the War Powers Resolution, passed in the wake of Vietnam, continues to suppose that wars come in only two sizes. It distinguishes between very short-term interventions and the rest. The resolution authorizes the president to make brief interventions unilaterally—giving him sixty days to use military force without legislative approval. But the president has to go to Congress for explicit authorization during this period if he wants to sustain his offensive for a longer period. The idea behind this compromise was simple: the president should have the power to fend off momentary threats, but he must work with Congress to carry out any significant military conflict. This allowed the country to maintain its deep commitment to interbranch cooperation while permitting it to respond to short-term emergencies. But the compromise failed to acknowledge that modern war is limited war. And the challenge of limited war is not merely to induce the president to seek Congress’s approval at the start. The real problem is in enforcing the limits once the war is already underway.

President can start a war with already-appropriated funds, then hit Congress with “emergency” requests

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

We have come a long way from the Founding Era, when the president was obliged to gain fine-grained funding from Congress before he could engage in significant military action. Nowadays, Congress is playing catchup. The president can generally start a war with already appropriated funds, and then start bludgeoning Congress with an endless series of “emergency” appropriations.

Elsewhere in the same article, Ackerman and Hathaway explain the conclusion:

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

Our aim, in short, has been to place the ongoing normalization of “emergency” budgeting into larger constitutional perspective. While it only required the majority vote of a single house to deny the president the money he needed to start a war during the Founding period, it now takes two-thirds of both houses to cut off a war even after it has begun.

Full context: Why Congress can’t easily cut off war funding under Status Quo - not as the Constitution originally designed it

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

Perhaps some future act of resistance will involve the outright rejection of an emergency funding request. But congressional resistance will likely take a more cautious form. Under this scenario, Congress would reluctantly pass the president’s emergency request, and then pass another bill cutting off funds at some future date—say a year or so—to allow the troops to get out of harm’s way. While this maneuver would effectively insulate Congress from charges that it is “endangering the troops in the field,” it comes at a heavy institutional price: the funding cut-off would require two-thirds support in both houses to overcome a presidential veto. Our aim, in short, has been to place the ongoing normalization of “emergency” budgeting into larger constitutional perspective. While it only required the majority vote of a single house to deny the president the money he needed to start a war during the Founding period, it now takes two-thirds of both houses to cut off a war even after it has begun.

Presidents commit armed forces into hostilities without authorization from Congress

Richard F. Grimmett 2010. (Specialist in International Security, Congressional Research Service) 22 Apr 2010 “The War Powers Resolution: After Thirty-Six Years” <http://www.fas.org/sgp/crs/natsec/R41199.pdf>

In the post-Cold War world, Presidents have continued to commit U.S. Armed Forces into potential hostilities, sometimes without a specific authorization from Congress. Thus the War Powers Resolution and its purposes continue to be a potential subject of controversy. On June 7, 1995, the House defeated, by a vote of 217-201, an amendment to repeal the central features of the War Powers Resolution that have been deemed unconstitutional by every President since the law’s enactment in 1973.

G.W. Bush and Obama both violated Congressional war mandates in Iraq

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

The recent Iraq War exemplifies this challenge. When Congress authorized the invasion of Iraq in 2003, it did not give President Bush the carte blanche he sought. It self-consciously restricted the war’s aims to narrow purposes, expressly authorizing a limited war. Yet the president transformed a well-defined and limited mission into an open-ended conflict with changing aims. The critical moment came during the final months of the Bush Administration. Despite Obama’s victory at the polls, President Bush broke statutory limits on the war without requesting congressional approval. He asserted his authority to transform a limited war into an unlimited one by concluding an executive agreement with the Iraqi government. Despite the protests of congressional leaders, including then-Senators Joseph Biden, Hillary Clinton, and Barack Obama, the Bush Administration simply cut Congress out of the international lawmaking process, leaving the executive agreement as its legal legacy. This represented a breathtaking assertion of presidential authority to redefine war aims without the consent of Congress. Once the Democratic leaders in the Senate took over the executive branch, however, they failed to challenge Bush’s assertion of presidential prerogative. They silently accepted his unilateral actions, allowing them to serve as the foundation of their own Iraq policy.

Obama violated War Powers Act in Libya in 2011, just like other Presidents of both parties

Rep. Chris Gibson 2011. (congressman from New York, former professor of American government) 25 May 2011 “War Powers, United States Operations in Libya, and Related Legislation” Testimony of Rep. Chris Gibson (NY20) House Committee on Foreign Affairs, <http://foreignaffairs.house.gov/112/gib052511.pdf>

Last Friday marked 60 days since the administration began operations in Libya and we are now not in compliance with the War Powers Act. While it is somewhat encouraging that in recent days the President has taken the steps to obtain Congressional approval, it is unclear why he waited until the 60-day period had passed, and why he sought approval from several international organizations prior to the mission, but failed to consult or seek statutory authorization from Congress. In view of the War Powers Act, I believe the President’s actions are on dubious constitutional grounds but I want to be clear, this is not a new phenomenon. Presidents from both parties have been on dubious grounds with regard to the War Powers Act, perhaps not surprising given that no President since its enactment has acknowledged its constitutionality. It’s time to bring clarity to the situation and to resolve the matter of Presidential War Powers.

Status Quo policy on war powers violates the Constitution

Herbert L. Fenster 2012. (expert in Government Contract Law; extensive experience in the negotiation, interpretation, and litigation of contracts for major weapons systems; holds degrees in architecture/civil engineering, history, and economics from the University of Pennsylvania, and is a graduate of the University of Virginia Law School; served as litigation counsel for the Reagan-Bush Campaign Committee and for the Grace Commission; director of the U.S. Chamber of Commerce National Chamber Litigation Center and a corporate and foundation director and trustee; General Counsel of the National Defense University Foundation) 24 Jan 2012 “The Great War Powers Misconstruction” JOURNAL OF NATIONAL SECURITY LAW & POICY <http://www.jnslp.com/2012/01/24/the-great-war-powers-misconstruction/>

Congress owns all of the powers to create and field a military (no matter how the powers are defined), and the President has the executive authority. The involvement of the United States in multiple military conflicts, ultimately at the behest of the President and not the Congress, is evidence that currently both the executive and legislative branches operate contrary to the mandates of the Constitution. Thus, the notion of war powers must be reconsidered.

Without reform, the War Powers Resolution of 1973 will leave the debate over war powers paralyzed

Center for Constitutional Rights 2009. (non-profit legal and educational organization, includes attorneys who litigate for civil rights issues. The material in this quote was written by: Annette Warren Dickerson, Qa’id Jacobs, C. Lynne Kates, Jules Lobel, Sara Miles, Nicholas Modino, Jen Nessel, Alison Roh Park, Michael Ratner, Vincent Warren and Peter Weiss) “Restore. Protect. Expand. Amend the War Powers Resolution” <http://ccrjustice.org/files/CCR_White_WarPowers.pdf>

In a great many instances, neither the President nor Congress, nor even the courts have been willing to trigger the War Powers Resolution mechanism. This is in part because the courts will not enforce the Resolution where Congress is either silent or acts ambiguously, even though the law clearly requires the troops to be withdrawn in such circumstances. In 1999, in the case of Yugoslavia, Congress voted not to authorize war, yet failed to pass legislation ordering the troops home and in fact funded the military action. Clearly, without reform of the legislation to address its weaknesses and without a concerted effort by a new executive in concert with Congress, the debate over war powers and responsibilities will remain paralyzed.

Drone attacks violate Constitutional safeguards requiring Congress to authorize war

Dr. Peter W. Singer 2012. (PhD in government, Harvard; Senior Fellow and Director of the 21st Century Defense Initiative at the Brookings Institution; served as coordinator of the Obama 2008 campaign’s defense policy task force) 22 Jan 2012 “Do Drones Undermine Democracy?” <http://www.brookings.edu/opinions/2012/0122_drones_singer.aspx>

A deep deliberation on war was something the framers of the Constitution sought to build into our system. Yet on Tuesday, when President Obama talks about his wartime accomplishments during the State of the Union address, Congress will have to admit that its role has been reduced to the same part it plays during the president’s big speech. These days, when it comes to authorizing war, Congress generally sits there silently, except for the occasional clapping. And we do the same at home. Last year, I met with senior Pentagon officials to discuss the many tough issues emerging from our growing use of robots in war. One of them asked, “So, who then is thinking about all this stuff?” America’s founding fathers may not have been able to imagine robotic drones, but they did provide an answer. The Constitution did not leave war, no matter how it is waged, to the executive branch alone.

War Powers Resolution is flawed, disrespected and not enforced

War Powers Initiative Committee of The Constitution Project, Co-Chaired by former Representative Mickey Edwards and former Representative David Skaggs, 2005. (Mickey Edwards - Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton Univ.; former Member of Congress (R-OK); David Skaggs - former Member of Congress (D-CO): Member of the Appropriations Committee and Permanent Select Committee on Intelligence; Peter Raven-Hansen - professor of law, George Washington Univ.; Louis Fisher - Senior Specialist in Separation of Powers, Congressional Research Service, Library of Congress; Thomas Franck - Professor of Law Emeritus at N.Y. Univ School of Law; Michael J. Glennon - Prof. of International Law, Fletcher School of Law & Diplomacy at Tufts Univ.; Dr. Morton Halperin, former high-level official in the National Security Council, State Department, and Defense Department; Harold Hongju Koh, former Assistant Sec. of State for Democracy, Human Rights & Labor; Dr. Susan E. Rice, former Assistant Secretary of State for African Affairs; James R. Sasser - Former senator from Tenn.; Jane Stromseth - Prof. of law at Georgetown Univ.; Patricia M. Wald - former Chief Judge, US Court of Appeals for the D.C. Circuit; Don Wallace Jr. - Prof of law, Georgetown Univ.; R. James Woolsey - former director of the CIA; Michael K. Young - former Dean of the George Washington Univ. Law School), FORCE ABROAD: WAR POWERS in a System of CHECKS AND BALANCES, <http://www.constitutionproject.org/pdf/28.pdf>

In sum, the WPR combines several elements of a sensible process for making war powers decisions (including reporting, consultation, and a clear statement rule) with a constitutionally under-inclusive definition of the President’s defensive war powers and a constitutionally problematical sixty-day clock. Consequently, presidents have given only lip service to even the beneficial parts of the process and ignored or rejected the rest. Congress, in turn, has sometimes taken the sixty-day clock as an excuse to do nothing, instead of reaching a collective judgment about uses of force. The courts, mindful that Congress often looks the other way when the President has abused the WPR process, have looked away themselves. The WPR is sometimes said to have “pricked the conscience”of the political branches in use-of-force situations by prompting some information flow and dialogue, at least about compliance with WPR procedures, if not about the merits of a use of force. Even if this is true, the benefit is substantially outweighed by the WPR’s underinclusive view of the President’s defensive war powers and the interpretation of the sixty-day clock to give a free pass to the political branches, as well as by the continuing disrespect for the rule of law bred by the general desuetude of this law.

War Powers Resolution not upheld by Congress nor Presidents because of its 60-day time limit

Richard F. Grimmett 2010. (Specialist in International Security, Congressional Research Service) 22 Apr 2010 “The War Powers Resolution: After Thirty-Six Years” <http://www.fas.org/sgp/crs/natsec/R41199.pdf>

The automatic withdrawal provision has become perhaps the most controversial provision of the War Powers Resolution. Section 5(b) requires the President to withdraw U.S. forces from hostilities within 60-90 days after a report is submitted or required to be submitted under section 4(a)(1). The triggering of the time limit has been a major factor in the reluctance of Presidents to report, or Congress to insist upon a report, under section 4(a)(1).

Congressional oversight through “power of the purse” has failed: We need a new mechanism to restore the constitutional balance

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

Congress has lost the oversight capacity that made the power of the purse such a potent means of military control at the time of the Founding. Nevertheless, it has not given up trying to use its budgetary powers to keep limited wars from escalating. Despite the obstacles created by a transformed appropriations system, these efforts have been occasionally successful. But these successes have been so erratic and unpredictable that they will have little deterrent effect on future assertions of presidential unilateralism. If Congress hopes to police the boundaries of limited war, it must confront the transformations in the larger appropriations system, and create new Rules for Limited War that recalibrate the constitutional balance.

“Libya was NATO, not US” - Response: US Admiral was running it

Prof. Bruce Ackerman and Prof. Oona Hathaway 2011. (professors of law and political science at Yale Univ.) 18 May 2011, “Opinions Death of the War Powers Act?” WASHINGTON POST <http://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G_story.html>

Why, then, hasn’t the president been pressing Congress to approve the war before the looming deadline? Because it’s easier to paper over the problem with new legal fictions pretending that the time limit doesn’t apply to this instance. By Friday, the administration’s legal team is likely to announce that the clock stopped ticking on April 1 — the date when NATO “took the lead” in the bombing campaign. Since NATO is running the show, the argument will go, the War Powers Act no longer applies, and the president doesn’t have to go back to Congress after all. But American planes and drones continued their bombing long after the April turnover — and the drones are still flying over Libya. Since the cost of the mission is at three-quarters of a billion dollars and climbing, it is sheer fiction to suggest that we are no longer a vital player in NATO’s “Operation Unified Protector.” This is especially so when an active-duty American officer remains at the top of NATO’s chain of command. As supreme allied commander, Adm. James Stavridis “leads all NATO military operations.”

“Consulting” or “Notifying” Congress isn’t enough: We need specific legislation authorizing use of force

War Powers Initiative Committee of The Constitution Project, Co-Chaired by former Representative Mickey Edwards and former Representative David Skaggs, 2005. (Mickey Edwards - Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton Univ.; former Member of Congress (R-OK); David Skaggs - former Member of Congress (D-CO): Member of the Appropriations Committee and Permanent Select Committee on Intelligence; Peter Raven-Hansen - professor of law, George Washington Univ.; Louis Fisher - Senior Specialist in Separation of Powers, Congressional Research Service, Library of Congress; Thomas Franck - Professor of Law Emeritus at N.Y. Univ School of Law; Michael J. Glennon - Prof. of International Law, Fletcher School of Law & Diplomacy at Tufts Univ.; Dr. Morton Halperin, former high-level official in the National Security Council, State Department, and Defense Department; Harold Hongju Koh, former Assistant Sec. of State for Democracy, Human Rights & Labor; Dr. Susan E. Rice, former Assistant Secretary of State for African Affairs; James R. Sasser - Former senator from Tenn.; Jane Stromseth - Prof. of law at Georgetown Univ.; Patricia M. Wald - former Chief Judge, US Court of Appeals for the D.C. Circuit; Don Wallace Jr. - Prof of law, Georgetown Univ.; R. James Woolsey - former director of the CIA; Michael K. Young - former Dean of the George Washington Univ. Law School), FORCE ABROAD: WAR POWERS in a System of CHECKS AND BALANCES, <http://www.constitutionproject.org/pdf/28.pdf>

Neither consulting nor notifying Congress is a substitute for its collective judgment expressed in authorizing legislation. In any case, all members of the War Powers Initiative agree that it is in the President’s institutional interests and in the national interest for the use of force abroad to be supported by the collective judgment of Congress and the President, because such a judgment reflects a political consensus that makes them jointly responsible for the resulting costs. To persuade a majority of both houses of Congress to make the collective judgment that the use of force is in the national interest, a President must, in effect, persuade the people. If he cannot persuade the people’s representatives, he is unlikely to persuade the people who elected them.

Example of failure of budget process: Iraq and Afghanistan. President can start the initial invasion out of general funds

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

As we have seen, Congress now grants the Defense Department vast sums under very broad categories, giving the president immense discretion to reallocate funds from one activity to another. This permitted President Bush to seize fiscal control at the very outset of the wars in Afghanistan and Iraq. He could finance the initial invasions out of general funds, without seeking any special appropriations for the use of military force.

Current budget process leads to inadequate Congressional consideration of war-related issues

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

In further normalizing the “emergency” approach, the new president did indulge in a bit of public hand-wringing. Recalling his campaign promise, he pledged to submit future funding requests through the regular appropriations system. But these brave words were soon forgotten when money began to run out again in 2010: with political opposition to the Afghan war on the rise, the political advantages of another emergency appropriation were too tempting to ignore. Once again, Obama acquiesced in a deeply problematic innovation by his predecessor, and thereby enhanced its standing as a bipartisan precedent for future presidents. This recent history stacks the deck further against the responsible use of the power of the purse. Worse yet, these “emergency” bills often include lots of other items that have nothing to do with the war. Since they are destined for expedited treatment, they provide a tempting vehicle for funding pork barrel projects of interest to particular members of Congress. This will allow future administrations to pacify potential war critics by supporting their special-interest amendments to the emergency package. The normalization of emergency funding, then, not only misleads the public and eliminates the participation of key committees; it can even deflect the attention of Congress entirely from the question of war and peace to the pork-barrel priorities of individual members. A positive vote for continuing the next war may merely signify the successful conclusion of a feeding frenzy, supported by the executive branch.

“Minor Repair - Congress just cuts off funding for unpopular war” - Response: Budget process blocks Congress from effective use of “power of the purse” to control war spending

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

According to the conventional wisdom, Congress lacks the political will to use the power of the purse to stop presidential war-making in its tracks. While this may have been true in particular cases, Congress has in fact demonstrated political forcefulness on many occasions. The key modern problem is Congress’s lack of institutional capacity to exercise its political will. It has allowed the budgetary process to evolve in ways that make it extraordinarily difficult to act decisively.As our Iraq case study shows, the Bush Administration was in a position to pay for the initial invasion with money appropriated for other purposes. It then funded the war through a series of well-timed requests for “emergency” supplemental appropriations. By deferring these requests to the last minute, President Bush put Congress in an untenable position. If it refused funding to enforce its statutory limitations on the war, it would be accused of abandoning the troops in the field. This was too high a political price to pay to force the president to retreat from Iraq, as the initial congressional authorization required. The strategic use of emergency appropriations allowed the president to engage in “bait-and-switch” tactics that undermined effective democratic control over the use of military force. Following the Iraq precedent, future presidents will be able to “bait” Congress and the American people into approving a limited war, and then “switch” to a much longer war with more ambitious objectives. Serious congressional consideration of these escalating war aims will be short-circuited by the repeated use of the “emergency” appropriations device. This diagnosis suggests the need for an institutional remedy. The Iraq case shows that it is not enough for the initial authorization of force to specify the limited purposes of the war. It must also specify the limited time period for the conflict, requiring the president to return for an explicit reauthorization if he wishes to extend the war beyond the preset period.

Budget is so complicated that Congress has lost control over defense policy

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, (brackets added) Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

By the early 1960s, Congress had essentially lost control over the process: “the totals involved in the defense budget have become so great, the lump-sums and carry-overs so large, the discretion to shift funds from one category to another so extensive, that budgetary controls have actually provided Congress with little leverage over policy.” [quoting Raymond H. Dawson, Congressional Innovation and Intervention in Defense Policy: Legislative Authorization of Weapons Systems, 56 Am. Pol. Sci. Rev. 42, 44 (1962)]

“Congress can always stop the President by cutting off funding” - Response: President has the constitutional burden to obtain authorization from Congress before conducting war

War Powers Initiative Committee of The Constitution Project, Co-Chaired by former Representative Mickey Edwards and former Representative David Skaggs, 2005. (Mickey Edwards - Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton Univ.; former Member of Congress (R-OK); David Skaggs - former Member of Congress (D-CO): Member of the Appropriations Committee and Permanent Select Committee on Intelligence; Peter Raven-Hansen - professor of law, George Washington Univ.; Louis Fisher - Senior Specialist in Separation of Powers, Congressional Research Service, Library of Congress; Thomas Franck - Professor of Law Emeritus at N.Y. Univ School of Law; Michael J. Glennon - Prof. of International Law, Fletcher School of Law & Diplomacy at Tufts Univ.; Dr. Morton Halperin, former high-level official in the National Security Council, State Department, and Defense Department; Harold Hongju Koh, former Assistant Sec. of State for Democracy, Human Rights & Labor; Dr. Susan E. Rice, former Assistant Secretary of State for African Affairs; James R. Sasser - Former senator from Tenn.; Jane Stromseth - Prof. of law at Georgetown Univ.; Patricia M. Wald - former Chief Judge, US Court of Appeals for the D.C. Circuit; Don Wallace Jr. - Prof of law, Georgetown Univ.; R. James Woolsey - former director of the CIA; Michael K. Young - former Dean of the George Washington Univ. Law School), FORCE ABROAD: WAR POWERS in a System of CHECKS AND BALANCES, <http://www.constitutionproject.org/pdf/28.pdf>

The President may constitutionally use force abroad for a range of defensive purposes, including some counter-terrorist operations, depending on their scope and duration and other factors listed above. But the President otherwise cannot constitutionally conduct war, or preventive war, without obtaining prior congressional authorization. Beyond this range of defensive war powers, the burden lies on the President to obtain the authorization. The constitutional rule is that the President can lawfully fight wars for other than a range of defensive purposes only if Congress has authorized it, not that the President may fight it until Congress has stopped it.

“Congress can just stop the funding” - Response: Budget process reverses it. Now Congress must vote to stop a war, and the President can veto

John Yoo’s claim about “Congress can just do nothing” are misleading

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 (brackets and ellipses in original) <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

As Reid Skibell put it, “There is a general academic consensus that Congress can countermand an executive decision to commit troops abroad through spending restrictions. . . . [T]he spending power has become Congress’s primary tool in influencing military . . . decisions.” Even super-strong presidentialists like John Yoo agree: “[A]ll Congress need do is nothing . . .” and the war effort will be starved by lack of funds. But Yoo’s claim is deeply misleading. Congress has to act affirmatively if it wants to stop a war in its tracks. For starters, modern day appropriations give the president enormous discretion in military spending. As a Congressional Research Service memo explained at the dawn of the Iraq war: “In regular defense appropriations bills, money for operation and maintenance . . . is typically appropriated in very broad categories, which has allowed Administrations to deploy forces into regions of potential conflict without advance funding approval from Congress.” Once the president starts a war with already appropriated funds, he can make repeated use of last-minute emergency supplemental appropriations to bludgeon Congress into appropriating additional funds. Congressional opposition will predictably crumble if the only alternative is to deprive the troops of “bullets and body armor.” To act effectively, Congress must pass separate legislation cutting off further funding at some future date. But these cut-offs are subject to a presidential veto, requiring an override by a two-thirds majority in both houses.

Status Quo Congressional “Power of the Purse” is no longer an effective means of controlling war powers

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

The radical transformation of limited into unlimited war was made possible by the erosion of Congress’s most powerful tool for controlling military force—the power of the purse. Congress has failed to adapt this power to meet modern challenges. What was once a highly effective mechanism for forcing the president to operate within congressional limits has eroded over the course of two centuries.

General funding of Defense Dept means President can start a war without specific Congressional authorization

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

As we have seen, Congress now grants the Defense Department vast sums under very broad categories, giving the president immense discretion to reallocate funds from one activity to another. This permitted President Bush to seize fiscal control at the very outset of the wars in Afghanistan and Iraq. He could finance the initial invasions out of general funds, without seeking any special appropriations for the use of military force.

Status Quo Congressional budget process bypasses deliberation about war funding - result is political blackmail and unconstitutional Presidential powers

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

For starters, the “emergency” label enables the president to evade the longer-term, and more disciplined, reviews characteristic of the standard budgetary process. Under congressional rules, “emergency” requests bypass the authorizing committees, like the Senate Armed Services Committee, and go directly to the House and Senate Appropriations Committees. As the Iraq Study Group pointed out, these committees are then “pressured by the need to act quickly so that troops in the field do not run out of funds.” The result is a spending bill that “passes Congress with perfunctory review.” This end-run not only undermines thoughtful and disciplined congressional deliberation; it is an invitation to blatant forms of political blackmail. These emotional appeals were on display when President Bush began his sustained political campaign to transform the Iraqi war into an unlimited conflict. A critical moment came three days after President Bush and Prime Minister Maliki signed the Declaration of Principles that would ultimately allow the president to break free of congressional war limitations. The administration suddenly announced that the immediate injection of funds was necessary to provide soldiers in the field with such basics as “bullets and body armor.” Against this background, members of Congress had little choice but to vote “yes” within three weeks. With funds running out again in June 2008, Congress again approved another “emergency” appropriation — allowing Bush to continue negotiating his unconstitutional agreements with Maliki with confidence that his critics could not cut off military funding until after he had left the White House.

CONSTITUTIONAL ISSUES

Congress alone was given the constitutional authority to initiate war

Louis Fisher 2012. (Scholar in Residence at the Constitution Project; worked for four decades at the Library of Congress as Senior Specialist in Separation of Powers) 24 Jan 2012 Basic Principles of the War Power, JOURNAL OF NATIONAL SECURITY LAW & POLICY <http://www.jnslp.com/2012/01/24/basic-principles-of-the-war-power/>

The Framers of the U.S. Constitution assigned to Congress many of the powers of external affairs previously vested in the English king. That allocation of authority is central to America’s democratic and constitutional system. When decisions about armed conflict, whether overt or covert, slip from the elected members of Congress, the principles of self-government and popular sovereignty are undermined. Political power shifts to an executive branch with two elected officials and a long history of costly, poorly conceived military commitments. The Framers anticipated and warned against the hazards of Executive wars. In a republican form of government, the sovereign power rests with the citizens and the individuals they elect to public office. Congress alone was given the constitutional authority to initiate war.

“Commander in Chief” power is not unlimited - it’s subject to Congress

Louis Fisher 2012. (Scholar in Residence at the Constitution Project; worked for four decades at the Library of Congress as Senior Specialist in Separation of Powers) 24 Jan 2012 Basic Principles of the War Power, JOURNAL OF NATIONAL SECURITY LAW & POLICY <http://www.jnslp.com/2012/01/24/basic-principles-of-the-war-power/>

The Commander in Chief Clause is sometimes interpreted as an exclusive, plenary power of the President, free of statutory checks. It is not. Instead, it offers several protections for republican, constitutional government. Importantly, it preserves civilian supremacy over the military. The individual leading the armed forces is an elected civilian, not a general or admiral. Attorney General Edward Bates in 1861 concluded that the President is Commander in Chief not because he is “skilled in the art of war and qualified to marshal a host in the field of battle.” He possesses that title for a different reason. Whatever military officer leads U.S. forces against an enemy, “he is subject to the orders of the civil magistrate, and he and his army are always ‘subordinate to the civil power.’” Congress is an essential part of that civil power.

“Declare War clause is just a formality” - Response: Not in context of the Founders; they intended it to be a binding limit against any initiation of military action

Dr. Thomas E. Woods 2011. (PhD history, Columbia Univ.) March 2011 “The Phony Arguments for Presidential War Powers” <http://www.tomwoods.com/warpowers/> (brackets added)

Consider also that as the Constitution was being debated, Federalists sought to reassure skeptical anti-Federalists that the president’s powers were not so expansive after all. For one thing, the Federalists said, the president lacked the power to declare war. In order for their argument to carry any weight, “declare war” must have been taken to mean the power to initiate hostilities – for no anti-Federalist would have been appeased by “Sure, the president can take the country to war on his own initiative, but the power to draft declaratory statements will rest with Congress!” If [Professor John] Yoo’s argument were correct, we should expect to see presidents in the years immediately following ratification of the Constitution taking bold military action without concerning themselves much about the will of Congress, which according to Yoo had only the power to issue declaratory statements. But as we have seen in the examples of Washington, Adams, and Jefferson, the opposite was in fact the case; these early presidents were careful to defer to Congress.

Even for action against terrorism and WMDs, Congress should be asked for authorization

War Powers Initiative Committee of The Constitution Project, Co-Chaired by former Representative Mickey Edwards and former Representative David Skaggs, 2005. (Mickey Edwards - Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton Univ.; former Member of Congress (R-OK); David Skaggs - former Member of Congress (D-CO): Member of the Appropriations Committee and Permanent Select Committee on Intelligence; Peter Raven-Hansen - professor of law, George Washington Univ.; Louis Fisher - Senior Specialist in Separation of Powers, Congressional Research Service, Library of Congress; Thomas Franck - Professor of Law Emeritus at N.Y. Univ School of Law; Michael J. Glennon - Prof. of International Law, Fletcher School of Law & Diplomacy at Tufts Univ.; Dr. Morton Halperin, former high-level official in the National Security Council, State Department, and Defense Department; Harold Hongju Koh, former Assistant Sec. of State for Democracy, Human Rights & Labor; Dr. Susan E. Rice, former Assistant Secretary of State for African Affairs; James R. Sasser - Former senator from Tenn.; Jane Stromseth - Prof. of law at Georgetown Univ.; Patricia M. Wald - former Chief Judge, US Court of Appeals for the D.C. Circuit; Don Wallace Jr. - Prof of law, Georgetown Univ.; R. James Woolsey - former director of the CIA; Michael K. Young - former Dean of the George Washington Univ. Law School), FORCE ABROAD: WAR POWERS in a System of CHECKS AND BALANCES, <http://www.constitutionproject.org/pdf/28.pdf>(brackets added)

The Declare War Clause gives Congress the choice between authorizing the use of force abroad by declaration of war or by legislation. Public accountability for the decision to use force requires that Congress speak as clearly in legislation as it does in a declaration. Under this constitutionally-derived clear statement rule, which is restated in the WPR [the War Powers Resolution of 1973], authorization for the use of force abroad should not usually be inferred from a general defense appropriation, let alone from other legislation regarding military procurement, conscription or other collateral subjects. However, the nature and source of terrorist attacks and threats posed by WMD [weapons of mass destruction], and the need for secrecy and speed in clandestine operations against them, may justify more general authorization of some counter-terrorist operations that are not already authorized by the President’s defensive war power. Even in such cases, Congress must always state the purposes and scope of its authorization as clearly as the circumstances permit in order to satisfy the constitutional objectives of legislative deliberation and political accountability.

Now is key time for reform: Obama is solidifying the abuses of Bush

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

We are likely to see this scenario repeated in the future. President Bush’s successful bait-and-switch in Iraq has created a deeply troubling precedent that threatens the democratic check by Congress required by the Constitution. Instead of challenging this precedent, the Obama Administration is on the verge of consolidating it through acquiescence. There is a pressing need for institutional reform that allows Congress to restore our endangered balance of powers.

Constitution requires shared responsibility for war powers

Robert McMahon, last updated 2011. (master's degree in international relations from Tufts University's Fletcher School of Law and Diplomacy) last updated 20 June 2011 “Balance of War Powers: The U.S. President and Congress,” <http://www.cfr.org/united-states/balance-war-powers-us-president-congress/p13092>

Susan Low Bloch, a constitutional law expert at the Georgetown University Law Center, says the framers of the Constitution deliberately divided the war powers between the two branches to induce them to work together on such a vital issue. "I don't know if they expected conflict, but they wanted coordination and cooperation and shared responsibility," Bloch says.

Unauthorized Presidential expansion of “limited war” is a real threat to the constitutional allocation of power

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

The constitutional limits on the use of force have been violated in two classes of cases. In the first, the president uses military force without congressional approval. A frequently mentioned example is President Clinton’s intervention in Kosovo in 1999 under the auspices of NATO. In the second, the president seeks and receives a limited authorization for the use of force from Congress but then ignores the limits. The first type of constitutional violation is troubling but infrequent—Kosovo notwithstanding. Since the adoption of the War Powers Resolution in 1973, modern presidents have repeatedly asserted the constitutional authority to commit troops without seeking congressional approval, but have nonetheless sought and received the congressional authorization that the War Powers Resolution requires (putting aside cases authorized by U.N. Security Council resolution). The second type of violation is almost never discussed, but it poses a serious and very real threat to the constitutional allocation of power.

“FOUNDING FATHERS” ARGUMENTS - They didn’t support Presidential war powers without Congressional approval

“Congress controls major wars, but lesser uses of force are reserved to the president” - Response: Supreme Court in 1800 said Congress had power to regulate even limited war and not the President

Dr. Thomas E. Woods 2011. (PhD history, Columbia Univ.) March 2011 “The Phony Arguments for Presidential War Powers”<http://www.tomwoods.com/warpowers/>

“Congress may have some power over major wars, but lesser uses of force are reserved to the president alone.” The evidence from the early republic contradicts this claim. Supreme Court justice Samuel Chase summed up the reigning doctrine in 1800: “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time.”

“Congress controls major wars, but lesser uses of force are reserved to the president” - Response: Supreme Court in 1804 said Congress regulates even limited war

Dr. Thomas E. Woods 2011. (PhD history, Columbia Univ.) March 2011 “The Phony Arguments for Presidential War Powers”<http://www.tomwoods.com/warpowers/>

The 1804 case of *Little v. Barreme* involved a ship commander who, during the Quasi War with France in the late 1790s, had seized a ship that he thought was illegally trading with France. The commander was following a directive from President John Adams in seizing this ship, which had been coming from France. But Congress had authorized President Adams only to seize ships going *to* France; in short, the president’s directive ventured beyond what congress had called for in this limited war. In a unanimous decision, the Court declared that the commander was liable for damages even though he had acted in accordance with a presidential directive. No such presidential directive could override the authority of Congress, said the Court.

The President can only act alone to repel sudden attacks. Alexander Hamilton said the President directs the war after Congress authorizes it

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“The president has the power to initiate hostilities without consulting Congress.”

Ever since the Korean War, Article II, Section 2 of the Constitution – which refers to the president as the “Commander in Chief of the Army and Navy of the United States” – has been interpreted this way. But what the framers actually meant by that clause was that once war has been declared, it was the President’s responsibility as commander-in-chief to direct the war. Alexander Hamilton spoke in such terms when he said that the president, although lacking the power to declare war, would have “the direction of war when authorized or begun.” The president acting alone was authorized only to repel sudden attacks (hence the decision to withhold from him only the power to “declare” war, not to “make” war, which was thought to be a necessary emergency power in case of foreign attack).

Constitutional Convention delegates said war and peace should be managed by the legislature

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At the Constitutional Convention, the delegates expressly disclaimed any intention to model the American executive exactly after the British monarchy. James Wilson, for example, remarked that the powers of the British king did not constitute “a proper guide in defining the executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace.” Edmund Randolph likewise contended that the delegates had “no motive to be governed by the British Government as our prototype.”

Founding Father James Wilson said a single man would not have the power to involve us in war

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James Wilson assured the Pennsylvania Ratifying Convention, “This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our interest can draw us into war.”

George Washington only used the military for defensive measures, and waited for Congress to approve anything further

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In conformity with this understanding, George Washington’s operations on his own authority against the Indians were confined to defensive measures, conscious as he was that the approval of Congress would be necessary for anything further. “The Constitution vests the power of declaring war with Congress,” he said, “therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure.”

Pres. John Adams waited for Congressional approval for military action against France

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Supporters of a broad executive war power have sometimes appealed to the Quasi War with France, in the closing years of the eighteenth century, as an example of unilateral warmaking on the part of the president. Francis Wormuth, an authority on war powers and the Constitution, describes that contention as “altogether false.” John Adams “took absolutely no independent action. Congress passed a series of acts that amounted, so the Supreme Court said, to a declaration of imperfect war; and Adams complied with these statutes.”

Jefferson’s war with the Barbary pirates was authorized by Congress

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Jefferson consistently deferred to Congress in his dealings with the Barbary pirates. “Recent studies by the Justice Department and statements made during congressional debate,” Louis Fisher writes, “imply that Jefferson took military measures against the Barbary powers without seeking the approval or authority of Congress. In fact, in at least ten statutes, Congress explicitly authorized military action by Presidents Jefferson and Madison. Congress passed legislation in 1802 to authorize the President to equip armed vessels to protect commerce and seamen in the Atlantic, the Mediterranean, and adjoining seas.

“Hundreds of historical examples justify Presidential military intervention without Congress” - Response: Those examples aren’t parallel with what modern Presidents are doing

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In 1966, in defense of the Vietnam War, the State Department adopted a similar line: “Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the ‘undeclared war’ with France (1798-1800).” We have already seen that the war with France in no way lends support to those who favor broad presidential war powers. As for the rest, the great presidential scholar Edward S. Corwin pointed out that this lengthy list of alleged precedents consisted mainly of “fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like.” To support their position, therefore, the neoconservatives and their left-liberal clones *are counting chases of cattle rustlers as examples of presidential warmaking*, and as precedents for sending millions of Americans into war with foreign governments on the other side of the globe.

“UN Charter authorizes the President to act” - Response: UN Charter says action must be approved by Constitutional process, and that means Congress

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“If the United Nations authorizes military action, the president does not need to consult Congress.” The UN Charter itself notes that the Security Council’s commitment of member nations’ troops must be authorized by these nations’ “respective constitutional processes.” The Congressional Research Service’s Louis Fisher explains further: “Assured by Truman that he understood and respected the war prerogatives of Congress, the Senate ratified the UN Charter. Article 43 provided that all UN members shall make available to the Security Council, in accordance with special agreements, armed forces and other assistance. Each nation would ratify those agreements ‘in accordance with their respective constitutional processes.’ It then became the obligation of Congress to pass legislation to define the constitutional processes of the United States. Section 6 of the UN Participation Act of 1945 states with singular clarity that the special agreements ‘shall be subject to the approval of the Congress by appropriate Act or joint resolution.’ The procedure was specific and clear. Both branches knew what the Constitution required. The President would first have to obtain the approval of Congress.”

SOLVENCY / ADVOCACY / ADVANTAGES

The Plan is constitutional and enforceable

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

The Constitution gives either chamber the authority to change its rules governing future authorizations for the use of force. Under our proposed “Rules for Limited War,” all future authorizations will be valid for only two years unless the House or Senate sets a different time-limit—or declares that the war should continue, without limit, until victory is achieved. But unless Congress makes this decision explicit in its initial authorizing resolution, the two-year term will serve as a default rule. The new rules will be enforced through a prohibition on all war appropriations after the congressional deadline, except for money needed to wind down the mission over the course of one year.

Advocacy: House & Senate need rules to block war appropriations until President gets Congressional approval

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To back up these time limits, the House and Senate will require another set of rules. These enforcement provisions prohibit all further war appropriations, except for a one-year fund for winding down the mission. The ban would include all appropriations that extend the engagement beyond the withdrawal period—whether in a regular or “emergency” appropriations bill. If the president wants to continue the war, he can do so only by obtaining a new authorization—in which Congress can consider the merits of further fighting without the emotional blackmail involved in an endless series of “emergency” funding measures.

Clear time limit is the only way to stop presidential “bait-and-switch” tactics

[B & S = President gets Congress to vote for a limited military engagement and then expands it without authorization]

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There is every reason to expect the president’s lawyers to adopt similarly creative interpretive approaches to future qualitative limitations. The more legal fog they generate, the easier it will be to engage in bait-and-switch, with the president relying on their legal analysis to deny that he is escalating the war far beyond the express terms of the initial war authorization. This is the reason why the new rules rely on a quantitative approach to limited war. Our proposed two-year default rule authorizes the president to make war for 730 days. Even the most creative lawyers will have a hard time wriggling their way out of the default time limit, or any other time period that Congress selects to replace it. Although qualitative restrictions on war aims can play a useful supplementary role, only quantitative restrictions have the hard-edged clarity essential for effectively constraining presidential bait-and-switch—a central design objective for the system as a whole.

Congress must be able to limit the President’s use of military force

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

All these cases add up to a clear principle: the president must respect congressional limits on the use of military force. Congress’s power is not unbounded. It cannot, for example, interfere with the commander in chief’s ability to control military strategy. But it can, as Justice Chase said in Bas v. Tingy, authorize “a limited war; limited in place, in objects, and in time.”These restrictions do not interfere with the president’s authority to execute the war within these limits. If Congress authorizes war in Iraq, the president may not use the authorization to wage war in Iran. If Congress authorizes war to carry out a Security Council resolution, the president may not continue the war after the resolution has expired. And if Congress authorizes war for a period of two years, the president cannot wage war for a decade. Time and again, the Court has reaffirmed Congress’s power to limit the president’s use of military force. This principle is now well-settled. The challenge, as the next Part shows, is for Congress to develop the institutional capacity to back up this principle with effective action when the president tries to violate it.

Ackerman & Hathaway plan provides flexibility and forces open debate on war authorization

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

The default rule provides the needed flexibility without abandoning the more fundamental point: most wars are fought for limited objectives that require reappraisal from time to time. Given this fact, the new rules force Congress to frame the terms of its initial war commitment self-consciously after an open and focused public debate. This initial termination point can, of course, be extended if Congress passes a new reauthorization before the period has expired—and as before, this new bill will be subject to a two-year default unless it specifies some other term explicitly.

Funds should be prohibited for unauthorized use of military force

Courts should oversee war powers challenges

Congress should impeach the President for violations

Center for Constitutional Rights 2009. (non-profit legal and educational organization, includes attorneys who litigate for civil rights issues. The material in this quote was written by: Annette Warren Dickerson, Qa’id Jacobs, C. Lynne Kates, Jules Lobel, Sara Miles, Nicholas Modino, Jen Nessel, Alison Roh Park, Michael Ratner, Vincent Warren and Peter Weiss) “Restore. Protect. Expand. Amend the War Powers Resolution” <http://ccrjustice.org/files/CCR_White_WarPowers.pdf>

To ensure that this principle is enforced, new legislation should prohibit the use of appropriated funds for any executive use of force that is unauthorized under the statute. Furthermore, the reformed War Powers Resolution must allow room for judicial oversight in the case of conflicts. A president who initiates hostilities in disregard of the statute would undoubtedly use appropriated funds to do so, forcing Congress to make the difficult decision of whether to authorize funds for troops engaged in combat. The statute should therefore state that a presidential violation of the act would create an impasse with Congress, and that separation of powers principles require the Court to decide the merits of any challenge brought against an alleged violation. And, a presidential violation of this principle should be explicitly made an impeachable offense.

Plan creates incentives for President to negotiate with Congress over war funding

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

The endgame will loom large as early as Period One. Since the president has reason to believe that a bait-and-switch will be very costly later on, he will have strong incentives to be more realistic about the war’s potential costs at Period One—as we have seen, greater candor at this stage may allow him to persuade Congress to extend the term of initial authorization beyond the two-year default rule and thereby buy more political insurance at the outset of the venture. Similarly, the high costs of later defiance will encourage him to cooperate with Congress during Period Two, soliciting its advice in negotiations with countries in the battle zone and seeking its approval for any important agreements he reaches with the affected governments. In short, the costs of defiance play a central role in generating the deliberation-forcing and power-enhancing dynamics that provide the great constitutional advantages of the reform.

Plan has significant impact on Congressional-Presidential relations

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

Our proposal is designed to be both politically feasible and instrumentally effective in controlling the democratic pathologies of a presidential bait-and-switch. It builds on precedents developed by Congress to control the use of the appropriations power. Even if only a single chamber adopts the new rules, this action will catalyze a recalibration of our real-world system of checks and balances.The rules will have a significant impact on congressional–presidential relations long before matters reach the moment of final confrontation—when the president, after failing to convince Congress to authorize a further extension of the war effort, confronts a one-year “wind up” appropriation for the orderly withdrawal of troops from the battle zone.

Plan enhances Congress’ power over war by making the President negotiate with them

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

At the same time, our proposal will provide a much-needed boost to Congress in its ongoing dealings with the president. The proposal is therefore power-enhancing. To illustrate, consider a brief hypothetical variation on our Iraq case study. Begin by recalling some basic facts: as popular support for the war waned during 2008, President Bush and Prime Minister Maliki finally agreed to extend the war for three more years. During their lengthy negotiations, President Bush completely cut Congress out of the loop, even refusing to provide leading members with copies of the negotiating draft documents. Worse yet, he utterly ignored the demands of then-Senators Obama and Clinton to submit the agreement to Congress for its approval. Under the new rules, no president could afford to treat Congress with such contempt. After all, he will be obliged to gain reauthorization within the foreseeable future, and it would be foolish to antagonize the congressional leadership by locking them out of key negotiations. It makes much more strategic sense to co-opt key senators and representatives by keeping them abreast of the negotiations, and then to submit the president’s agreement for congressional approval.

Constitution says Congress can put limitations on use of force, and those limits are binding on the President

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

The Constitution and two centuries of practice have established a clear principle: Congress may impose limitations on the use of force and these limits are binding on the president. We begin with the text. Congress not only has the power to “declare War” and to “raise and support Armies.” It also has the power to grant “Letters of Marque and Reprisal.” Although this latter power has fallen into disuse (as have formal declarations of war), it does suggest the pervasive character of the congressional role at the time of the Founding. In the eighteenth century, letters of marquee and reprisal enabled Congress to authorize small-scale military actions by privateers—actions which could provoke retaliations that might lead to larger-scale war. There can be no mistaking, then, the Constitution’s broad textual commitment toCongress’s key role in the war-making system.

Multiple examples of Congress authorizing “limited wars”

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 (ellipses and brackets in original) <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

Other examples of limited war include the First Barbary War, the Spanish-American War, and the First Gulf War. In the First Barbary War, Congress provided authorization “to equip, officer, man, and employ such of the armed vessels of the United States as may be judged requisite by the President . . . for protecting effectually the commerce and seamen thereof on the Atlantic ocean, the Mediterranean and adjoining seas.” An Act for the protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers, ch. 4, 2 Stat. 129, 130 (1802). Congress also provided the authority “to subdue, seize and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, or to his subjects . . . .” Id. The congressional declaration of war in the Spanish-American War “directed and empowered [the president] to use the entire land and naval forces of the United States” for the specific purpose of ensuring that Spain “relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.”

JUSTIFICATIONS

If Presidents can start wars without Congress: Lives and money wasted on reckless military adventures

War Powers Initiative Committee of The Constitution Project, Co-Chaired by former Representative Mickey Edwards and former Representative David Skaggs, 2005. (Mickey Edwards - Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton Univ.; former Member of Congress (R-OK); David Skaggs - former Member of Congress (D-CO): Member of the Appropriations Committee and Permanent Select Committee on Intelligence; Peter Raven-Hansen - professor of law, George Washington Univ.; Louis Fisher - Senior Specialist in Separation of Powers, Congressional Research Service, Library of Congress; Thomas Franck - Professor of Law Emeritus at N.Y. Univ School of Law; Michael J. Glennon - Prof. of International Law, Fletcher School of Law & Diplomacy at Tufts Univ.; Dr. Morton Halperin, former high-level official in the National Security Council, State Department, and Defense Department; Harold Hongju Koh, former Assistant Sec. of State for Democracy, Human Rights & Labor; Dr. Susan E. Rice, former Assistant Secretary of State for African Affairs; James R. Sasser - Former senator from Tenn.; Jane Stromseth - Prof. of law at Georgetown Univ.; Patricia M. Wald - former Chief Judge, US Court of Appeals for the D.C. Circuit; Don Wallace Jr. - Prof of law, Georgetown Univ.; R. James Woolsey - former director of the CIA; Michael K. Young - former Dean of the George Washington Univ. Law School), FORCE ABROAD: WAR POWERS in a System of CHECKS AND BALANCES, <http://www.constitutionproject.org/pdf/28.pdf>

The framers shared the view that an absolute monarch would be prone to squandering his subjects’ lives and money on reckless military adventures. “Absolute monarchs,” John Jay wrote in The Federalist Papers, “will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” The best precaution against unilateral war-making by the executive was to require a collective decision to go to war. “It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large,” James Wilson later explained to the Pennsylvania ratifying convention. Moreover, vesting this power in the whole Congress meant that the popularly-elected House, the body most directly responsive to the voters, had to act and so helped to assure the widest possible political consensus for war. The Senate — originally chosen by state legislatures — could not alone provide this assurance. Since the people could not be asked directly whether the nation should go to war, requiring the assent of the House as well as the Senate was the next best thing. If presidents bent on war could not persuade the Congress, they presumably could not persuade the people either and would therefore lack the consensus required to assume the costs and risks of war.

Plan produces better decision-making about war

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

But the new rules will not only encourage the president to go to Congress for the initial authorization. Once he gets there, he will engage Congress and the nation in a more candid conversation over the likely dimensions of theanticipated military commitment. As our Iraq case study suggests, the present setup makes it all-too-easy for the president to conduct a bait-and-switch operation. In contrast, the new rules encourage a different dialogue. It will no longer be in the president’s interest to minimize risks. He will avoid too dark an account, since this might lead Congress to vote down the authorization. But he will also avoid an overly rosy view—for this will lead Congress to authorize a short time period and increase the risk that he will be forced to return for a reauthorization of the limited war at an unpropitious moment. If he wants to buy more political insurance, he must ask Congress and the country to prepare themselves for a three- or four- year engagement and explain why this lengthy commitment is worth its likely cost in blood and treasure. The prospect of a more realistic dialogue with Congress will also have positive effects on executive deliberations over whether to go to war in the first place. Top policymakers will be more open to expert assessments of risks if they believe that they will have to return to Congress when its initial authorization proves too short to finish the job. And if bottom-up reports are very pessimistic, this might prompt the president to ask himself whether the limited war is worth fighting in the first place. This pressure toward more candid exchange—within the executive branch, and between the president and Congress and the American people— is one of the most promising features of the new constitutional regime. Call it “deliberation-forcing.”

DISADVANTAGE RESPONSES

“Time limit enables our enemies” - Responses: Not unique, we already have the election cycle every 2 years - the plan gives no additional advantage to our enemies

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

In contrast to the new rules, the U.S. election schedule does provide a target date for enemy strategists—if they can demoralize voters just before the November polling date, this may well have a serious impact. And yet the rigid electoral calendar has not seriously impaired past war efforts—provided that the American people remained convinced of their necessity. All things considered, then, the new rules will not provide enemies with a significant strategic advantage beyond those already afforded by our fixed election calendar.

Funding cutoff date does not enable our enemies: President can and will ask Congress to reauthorize an ongoing war in advance of the cutoff date

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf> (typographical error “many” for “may” was in the original; brackets added)

Even if this point is conceded, our not-so-hypothetical critic may come up with another, more nuanced, complaint: she many [may] insist that Congress’s selection of a particular expiration date—say, January 1, 2016—will serve as a reference point for enemy strategists, encouraging them to plan a spectacular series of attacks aimed to demoralize public opinion on New Year’s Day. Why hand this strategic opportunity to the enemy on a silver platter? Once again, this critique mistakes the nature of our proposal: the president is perfectly free to submit his request for reauthorization long before the expiration date, and thereby destabilize the enemy’s military plans. The new rules establish a deadline, not a target. And there is every reason to expect the president to act well before the deadline. He is perfectly aware that a last-minute request can be undermined by an unanticipated enemy offensive. This gives him a strong incentive to choose an earlier moment when the war is going relatively well, since this will make it much easier to gain a substantial war-extension from Congress.

“Emergencies justify Presidential war power” - Response: Even in “grave emergency,” the President should respect Congressional limits on war power

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Little v. Barreme’s insistence on Congress’s power to limit the scope of war was echoed in Youngstown Sheet & Tube Co. v. Sawyer. Justice Jackson’s concurring opinion has since become the classic statement of presidential power. Even in a time of “grave emergency,” he explained, the president’s power is circumscribed by express and implied limits imposed by Congress.

Works Cited

1. Library of Congress, last updated 2011. last updated 4 Apr 2011 “War Powers,” http://loc.gov/law/help/war-powers.php
2. Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf
3. Center for Constitutional Rights 2009. (non-profit legal and educational organization, includes attorneys who litigate for civil rights issues. The material in this quote was written by: Annette Warren Dickerson, Qa’id Jacobs, C. Lynne Kates, Jules Lobel, Sara Miles, Nicholas Modino, Jen Nessel, Alison Roh Park, Michael Ratner, Vincent Warren and Peter Weiss) “Restore. Protect. Expand. Amend the War Powers Resolution” http://ccrjustice.org/files/CCR\_White\_WarPowers.pdf
4. Richard F. Grimmett 2010. (Specialist in International Security, Congressional Research Service) 22 Apr 2010 “The War Powers Resolution: After Thirty-Six Years” http://www.fas.org/sgp/crs/natsec/R41199.pdf
5. Rep. Chris Gibson 2011. (congressman from New York, former professor of American government) 25 May 2011 “War Powers, United States Operations in Libya, and Related Legislation” Testimony of Rep. Chris Gibson (NY20) House Committee on Foreign Affairs, http://foreignaffairs.house.gov/112/gib052511.pdf
6. Herbert L. Fenster 2012. (expert in Government Contract Law; extensive experience in the negotiation, interpretation, and litigation of contracts for major weapons systems; holds degrees in architecture/civil engineering, history, and economics from the University of Pennsylvania, and is a graduate of the University of Virginia Law School; served as litigation counsel for the Reagan-Bush Campaign Committee and for the Grace Commission; director of the U.S. Chamber of Commerce National Chamber Litigation Center and a corporate and foundation director and trustee; General Counsel of the National Defense University Foundation) 24 Jan 2012 “The Great War Powers Misconstruction” JOURNAL OF NATIONAL SECURITY LAW & POICY http://www.jnslp.com/2012/01/24/the-great-war-powers-misconstruction/
7. Dr. Peter W. Singer 2012. (PhD in government, Harvard; Senior Fellow and Director of the 21st Century Defense Initiative at the Brookings Institution; served as coordinator of the Obama 2008 campaign’s defense policy task force) 22 Jan 2012 “Do Drones Undermine Democracy?” http://www.brookings.edu/opinions/2012/0122\_drones\_singer.aspx
8. War Powers Initiative Committee of The Constitution Project, Co-Chaired by former Representative Mickey Edwards and former Representative David Skaggs, 2005. (Mickey Edwards - Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton Univ.; former Member of Congress (R-OK); David Skaggs - former Member of Congress (D-CO): Member of the Appropriations Committee and Permanent Select Committee on Intelligence; Peter Raven-Hansen - professor of law, George Washington Univ.; Louis Fisher - Senior Specialist in Separation of Powers, Congressional Research Service, Library of Congress; Thomas Franck - Professor of Law Emeritus at N.Y. Univ School of Law; Michael J. Glennon - Prof. of International Law, Fletcher School of Law & Diplomacy at Tufts Univ.; Dr. Morton Halperin, former high-level official in the National Security Council, State Department, and Defense Department; Harold Hongju Koh, former Assistant Sec. of State for Democracy, Human Rights & Labor; Dr. Susan E. Rice, former Assistant Secretary of State for African Affairs; James R. Sasser - Former senator from Tenn.; Jane Stromseth - Prof. of law at Georgetown Univ.; Patricia M. Wald - former Chief Judge, US Court of Appeals for the D.C. Circuit; Don Wallace Jr. - Prof of law, Georgetown Univ.; R. James Woolsey - former director of the CIA; Michael K. Young - former Dean of the George Washington Univ. Law School), FORCE ABROAD: WAR POWERS in a System of CHECKS AND BALANCES, http://www.constitutionproject.org/pdf/28.pdf
9. Richard F. Grimmett 2010. (Specialist in International Security, Congressional Research Service) 22 Apr 2010 “The War Powers Resolution: After Thirty-Six Years” http://www.fas.org/sgp/crs/natsec/R41199.pdf
10. Louis Fisher 2012. (Scholar in Residence at the Constitution Project; worked for four decades at the Library of Congress as Senior Specialist in Separation of Powers) 24 Jan 2012 Basic Principles of the War Power, JOURNAL OF NATIONAL SECURITY LAW & POLICY http://www.jnslp.com/2012/01/24/basic-principles-of-the-war-power/
11. Dr. Thomas E. Woods 2011. (PhD history, Columbia Univ.) March 2011 “The Phony Arguments for Presidential War Powers” http://www.tomwoods.com/warpowers/ (brackets added)
12. Robert McMahon, last updated 2011. (master's degree in international relations from Tufts University's Fletcher School of Law and Diplomacy) last updated 20 June 2011 “Balance of War Powers: The U.S. President and Congress,” http://www.cfr.org/united-states/balance-war-powers-us-president-congress/p13092
13. Dr. Thomas E. Woods 2011. (PhD history, Columbia Univ.) March 2011 “The Phony Arguments for Presidential War Powers”http://www.tomwoods.com/warpowers/
14. Center for Constitutional Rights 2009. (non-profit legal and educational organization, includes attorneys who litigate for civil rights issues. The material in this quote was written by: Annette Warren Dickerson, Qa’id Jacobs, C. Lynne Kates, Jules Lobel, Sara Miles, Nicholas Modino, Jen Nessel, Alison Roh Park, Michael Ratner, Vincent Warren and Peter Weiss) “Restore. Protect. Expand. Amend the War Powers Resolution” http://ccrjustice.org/files/CCR\_White\_WarPowers.pdf