WHO HAS THE POWER TO WAGE WAR:

THE PRESIDENT WITH TREATIES OR CONGRESS WITH THE CONSTITUTION?

THESIS

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TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

Congress, of course, has the power to declare war under the Constitution, but the president has often taken action in the past fifty years arguably equivalent to declaring war. The president often cites treaties to justify the use of armed forces abroad. The executive branch usually also argues the interventions are consistent with American interests, but even if Congress agrees, the use of the U.S. military in hostilities is not constitutional short of a congressional declaration of war or a congressional resolution authorizing hostilities. Any test with lower standards leaves a loophole open for abuse by the president. For instance, some argue if Congress really opposed the executive use of armed forces it would withhold appropriations, object, or even impeach the president. If Congress does none of these, they argue the president can proceed without a declaration of war. These standards are too difficult for Congress to meet practically and politically, and have caused a shift of important constitutional power to the executive branch.

Congress responded after Vietnam with the War Powers Resolution, a law its sponsors argued was in compliance with constitutional war powers. It does not limit the power of the president as Commander-in-Chief, because the president does not have the power to declare war. The problem is that Congress

has not prevented the president from exercising war-making power in spite of the Constitution and the War Powers Resolution. Congress has been too willing to approve the actions of the executive when their actions are successful and complain only when there are failures. The Supreme Court will not decide the issue at all, as it falls under their doctrine of a political question. The future is likely to yield more instances of presidential actions equivalent to waging war without congressional authorization.

The President of the United States enjoys tremendous power to wage limited wars around the globe. This thesis traces the history of the power to wage war from pre-Constitutional times through President Clinton's war activities in Kosovo. The Framers of the Constitution clearly intended for Congress alone to have the authority to declare war and to authorize hostilities. The president was merely to command the troops after Congress authorized hostilities including war. The executive branch has, by acting without legislative authorizations, usurped this power from Congress, which has acquiesced.

Presidents often rely on vague resolutions, short of Congressional declaration of war, or treaty language to engage in war. The use of treaties has increasingly become the source of presidential power to involve the United States armed forces in foreign disputes. The U.S. is a party to multiple collective-security agreements, all of which the United States politically influences to the point of unilateral control. The constitutionality of this development is explored in detail, using the Persian Gulf War and Kosovo as case studies.

Congress has struggled to keep or regain some of its constitutionally mandated authority. Congress members shy from meaningful votes, and courts shy from judicial interference. Congress attempted one time to regain control via legislation, the War Powers Resolution. This thesis also addresses the constitutionality of the War Powers Resolution, the motivation for its passage, and the effect it has had on both the legislative and executive branches.

The Constitution was designed to make it more difficult to declare war than it is to make peace, or at least ensure that the people's body makes a truly national decision through deliberation. When one person holds the power of war and peace, it becomes easier to wage war—lessons the early colonists learned from English history. During ratification of the Constitution, George Mason stated that he was "against giving the power of war to the Executive, because [he is] not safely to be trusted with it;. . . He was for clogging rather than facilitating war" (Gaillard Hunt 1910, 312). The Framers wanted to ensure that making war would not be initiated easily, impulsively, or often. The goals of the Framers have gone unrealized. Congress must take responsibility if it hopes to reverse executive usurpation of the war powers and return to the original intent of our Founding Fathers.

CHAPTER II

EVOLUTION OF THE WAR POWERS

The distribution of war powers outlined in the United States Constitution is the product of earlier experiences, dating back to Anglo-Saxon England in the sixth and seventh centuries. It was during this early period that the foundations of common law and parliamentary democracy were formed. Even during this early development, the debate over war powers existed. In its most fundamental form, the concept and the practice of legislative control of war began.

The Angles and the Saxons developed a governing council to advise the king in ruling his kingdom. One of their primary roles was to advise the king on matters of war and peace and approve the military levies for local militia (Barnhart 1987, 14). But, even then, other influences made the decisions about war and peace to be a matter of royal prerogative that allowed the king to claim the right to wage war without the advice of his council. Actions by the king without the consent of his council, led the council, in June 1215, to convince the king (through military occupation of London) to sign the Magna Carta. This is of great significance because it is the Magna Carta that developed parliamentary control of war. It outlined the "principle that the king should rule with justice, and that major decisions affecting the welfare of the king's subjects should be made with the assent of the barons of the realm" (Barnhart 1987, 16).

Over the next century, war and taxes were the primary motives for bringing about change. In 1297, the barons forced the king to accede to the Confirmation of Charter, which "expressed parliament's conception of the common law rights of subjects to be protected against onerous war taxes and special levies which had been initiated to support war making" (Barnhart 1987, 18). Then, in 1311, the king consented to the New Ordinances, which made Parliament alone responsible for making the decisions to go to war or for the king to leave the country.

The fight for legislative control of the war power gained momentum during the English Civil War. This issue, as well as the raising of money and forces for war and the conditions of military service, were basic goals. The British Parliament enacted, in 1689, the English Bill of Rights. Based on the basic principles of common law, one of the basic tenets of the Bill of Rights was that the "raising or keeping a standing army within the kingdom in time of peace unless it be with consent of parliament is against law" (Barnhart 1987, 30). The Mutiny Act in 1689 and the Act of Settlement in 1701, reiterated parliament's control over the army by requiring its annual approval of the existence and size of the army, as well as, requiring its consent to wage war for territories not under control of the government (Barnhart 1987, 30).

By the eighteenth century, the House of Common had gained control over almost every facet of war and peace—it controlled the military budget, the size of the army, the conditions of military service, and was the judge of whether, when, and how war should be waged. The king was dependent on the parliament for

money and forces to wage war. He was also dependent on it for political support among the people for going to war. Such dependency led the king to search for ways to circumvent parliament. In the subsequent years, the king dissolved parliament and only reinstated it when financial aid was needed to support war efforts, effectively usurping war power for himself (Barnhart 1987, 23). This was the state of affairs in Britain when the colonies in America began joining forces.

When the American states drafted the first national constitution, the Articles of Confederation, they wholeheartedly rejected the English example of government at the time. Sir William Blackstone, writing on the laws of England in the early 1700s, gave a detailed account of the power of the king. The king had absolute power over foreign affairs and war, including the power to make treaties and alliances, make war or peace, command the military, raise and regulate fleets and armies, and the right to send and receive ambassadors. After the colonies declared independence from England, all executive powers were passed to the Continental Congress (Stern and Halperin 1994, 12).

The intent of the Framers is clear. The delegates at the Philadelphia Convention recognized that a single person would more easily exercise the power of war than a group of deliberating legislators. They emphasized that the president, as successor to the Crown, would not be given the power of war and peace. The Framers felt confident that the Congress would exercise the war power not only more wisely, but also more sparingly than had been exercised by the Crown of England (Franck and Glennon 1993, 584).

Although the Framers did not believe the president should be given the power of war and peace, they did see a strong role for the president as Commander-in-Chief. The delegates of the Continental Congress derived this concept from the relationship they shared with General Washington during the Revolutionary War. Washington was considered the "first general", and his commission as Commander-in-Chief demonstrated their recognition of the need for a single head during war, and simultaneously reflect his subordination to the will of Congress (Glennon 1990, 81).

Constitutional Origins of the War Powers

It was with this background that the framers drafted the United States Constitution. Foremost in their mind was preserving the right of legislative control of the power to prepare for and make war. The War Powers provision of the U.S. Constitution as it pertains to Congress is found in Article I, Section 8, clauses 10-15, and reads as follows:

> The Congress shall have power...
> To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.
> To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.
> To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.
> To provide and maintain a navy.
> To make rules for the government and regulation of the land and naval forces.
> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.
> To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the disciplines prescribed by Congress....

And as it pertains to the President can be found in Article II, Section 2:

> The President shall be...
> The Commander in Chief of the Army and Navy of the United States, and of the Militia of several States, when called into the actual Service of the United States...

The purpose of Article II was to provide civilian control of the military, and that the Framers' intent was for the president to have the power of command, not to initiate war. The Framers of the U.S. Constitution thought it necessary to give certain powers to the legislature as a whole (rather than the Senate or the House individually) and the president, choosing to avoid concentration of power in one office (Hall 1991, 10-11).

Congress was also given the power of the purse as stated in the constitutional responsibility, "to raise and support armies". The Framers viewed the spending power of Congress as a check on the executive power to make war. James Madison, among the Framers of the Constitution, supported legislative control of war appropriations: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people" (Hamilton, Madison and Jay 1961, 359).

The only change from the original draft of the Constitution was an amendment proposed by Madison and Elbridge Gerry that gave Congress the power to declare war instead of the power to make war. The decision to change Congressional power to declare war was based on the need to clarify the executive responsibility to "repel sudden attacks" (Hall 1991, 17). In this way, the Framers yielded emergency war making power to the president. However, the

power to initiate hostilities would remain with the Congress. Hamilton describes the intent of the Framers: "It belongs to Congress only, *to go to war*. But when a foreign nation declares or openly and outwardly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary" (Hall 1991, 18).

The Framers empowered the President as Commander-in-Chief of the armed forces in the context of military responsibilities authorized by Congress. As stated above, Article II of the Constitution gives the president the authority to lead the armed forces, but only after the Congress has authorized them to serve. Hamilton defined the purpose of making the President Commander-in-Chief in *Federalist* No. 74, where he states, "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single head" (Hamilton, Madison, and Jay 1961, 447). The Framers of the Constitution designated the president as the Commander-in-Chief not because he was skilled at the art of war, but to ensure the civilian rule of the military and to guarantee efficient decision-making (Fisher 1995, 10).

Although the final wording of the war powers provision is hardly ambiguous, the struggle between the president and the Congress over the distribution of war powers continues to this day. Not more than ten years after the ratification of the Constitution, Madison and Hamilton (both delegates to the Philadelphia Convention) disagreed on the distribution of war powers. Each interpreted the Constitution differently. One viewed the Constitution as giving decisions on war and peace to the legislative body, and the other considered the

war-making power inherently the prerogative of the executive function. This closely mirrors the debate that is ongoing today (Smyrl 1988, 7). "The framers were quite deliberate about placing with Congress the fundamental power to deploy armed forces. Had they wanted to vest that control with the President, they had many models to choose from" (Stern 1994, 11). In fact, John Locke advocated that all foreign powers belonged to the executive branch. The Framers specifically rejected that notion, as it too closely resembled the English system, with which they were all too familiar. James Madison also realized that the executive was more likely to exercise war power than the legislature. He recognized that the Constitution "supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It [the Constitution] has accordingly with studied care, vested the question of war in the Legislature" (Gaillard Hunt 1910, 312).

Early U.S. Precedents

In the first few decades following the Philadelphia Convention, the roles of the legislative and executive branches conformed closely to the intent of the Framers. At the start, the president limited his actions to those authorized by the Congress, waiting on their decision to declare war and mount an offensive or remain neutral. Gradually, the extent of presidential action has expanded and the executive branch has claimed a larger role in initiating war.

The precedents set by George Washington in the Indian Wars and the Whiskey Rebellion, and John Adams in the Quasi-War with France, made it clear that the power to initiate military action is the responsibility of Congress. Thomas

Jefferson made a new precedent with the Barbary Wars (1801-1812). In response to hostilities towards U.S. merchants in the Mediterranean, he elected to send a small squadron of frigates to protect American ships and citizens. The president then asked "Congress for further guidance, stating he was unauthorized by the Constitution, without sanction of Congress, to go beyond the line of defense" and needed further authorization for "measures of offense also" (Fisher 1995, 25). Jefferson reserved the right to pursue defensive actions and seek congressional approval after the fact. All actions to date were considered congressionally authorized military actions. Congress didn't declare its first war until the War of 1812. The actions of President Polk in the Mexican War led the House of Representatives to censure him on the grounds that "the war had been unnecessarily and unconstitutionally begun by the President" (Fisher 1995, 34). The Supreme Court then limited presidential power stating that as Commander-in-Chief he must adhere to the policy declared by Congress in law.

During the next conflict, the president unilaterally authorized the Navy to bombard a Nicaraguan town from the sea until the city officials yielded. The president considered it within his war power to protect U.S. interests, even if they were not on U.S. soil. As a result of this conflict, Congress expanded the powers of the executive branch. Congress agreed that the president's role to protect American lives and property abroad required greater latitude on the part of the president. In congressional legislation, the president was authorized to "use such means not amounting to acts of war" to protect U.S. citizens abroad (Fisher 1995, 38). Despite these exceptions, the power of war and peace in the

nineteenth century remained primarily in the hands of Congress, with all branches recognizing legislative supremacy.

The Twentieth Century

In the early decades of the twentieth century, the President used his responsibility to protect American lives and property to intervene regularly in other countries. By the middle of the century, the role of the United States on an international level had shifted to world superpower. The U.S. also abandoned its usually isolationist stance. By the end of World War II, the U.S. had entered into several mutual-security agreements such as the North Atlantic Treaty Organization (NATO), the Rio Pact, and the United Nations (U.N.). After World War II, presidents would cite these agreements as international authority to enter into conflicts without congressional resolution. President Truman used U.N. resolutions, without requesting congressional authority, to send troops to Korea. President Bush used Truman's aggression in Korea as a precedent for taking the offensive action against Iraq. President Clinton relied on U.N. resolutions and NATO agreements as sufficient authority to use military force in Bosnia without first obtaining congressional approval (Fisher 1995, 70). Even when a president sought approval from Congress, it was clear he was looking merely for political support and believed constitutional authorization was unnecessary. President Bush "sought" and received joint authorization for the Gulf War, but he also said, "I don't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait" (Ely 1993, 3)

The Vietnam War was the wake up call for Congress. In an attempt to exert its constitutional authority, Congress gave the president a great deal of authority in Vietnam. In 1964, Congress passed the Gulf of Tonkin Resolution in response to the alleged attacks by North Vietnamese PT boats on a U.S. destroyer in the gulf. The Gulf of Tonkin Resolution gave the president extensive power. In the Resolution, the Congress provided that "the United States is . . . prepared, *as the President determines,* to take all necessary steps, including the use of armed force to assist any member" of SEATO (Glennon 1990, 94). Congress based this broad resolution on faith in the person who was the President at the time--Lyndon B. Johnson. Ideally, they should have made an "*institutional* judgment", focusing such a critical decision on what any President would do with such extensive power. Congress should also have questioned whether it had the constitutional authority to concede such power to the executive in the first place (Fisher 1995, 122). After the Vietnam conflict escalated beyond its expectations, Congress was greatly alarmed that it had given too much authority on the president.

The biggest concerns of Congress were the unsuccessful results of the war and the backlash of public sentiment. The Secretary of Defense, Robert McNamara, testified to the Senate Armed Service and Foreign Relations Committee that the U.S. objective was to remove U.S. forces from Vietnam as quickly as possible and still leave South Vietnam as an independent country without fear of aggression and subversion by the North (Fisher 1995, 115). However, the president simultaneously used the authority given to him by the

Gulf of Tonkin Resolution, to expand the number of U.S. servicemen and women in Vietnam from 18,000 to a peak strength of 500,000. Johnson also used congressional appropriations to subsidize foreign military support in the region. According to an audit by the General Accounting Office, the U.S. government invested an estimated $260 million to support Thai and $927.5 million to support South Korean contributions to the war effort. By the end of the Vietnam War, the president was able to use his role as Commander-in-Chief to move troops and vessels in ways that may have provoked hostilities.

Few members of Congress expected a war of such great magnitude. In 1969, the Congress passed the National Commitments Resolution. It revoked the extensive power given to the president in the Gulf of Tonkin Resolution. According to Majority Leader Mike Mansfield (D-MT), with the National Commitments Resolution, "the Senate has acted to reassert its historic and Constitutional role" (Smyrl 1988, 12). Congress held itself accountable for the expansion of presidential power, and partly blamed its own inaction for the virtual completeness of the transfer of the war power from the legislative body to the executive branch. Upon reflection, Congress was unprepared for the nation's expanding role as a world power and the need for greater urgency in support of foreign policy.

The President Has the Power

If the Framers of the Constitution explicitly intended the power to declare war to rest solely with Congress, was there any war power truly vested in the

executive? The powers of the President, as the Commander-in-Chief, were explained by Alexander Hamilton in *Federalist* No. 69:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy, while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature (Hamilton, Madison, and Jay, 1961, 417-418).

The *Prize Cases* of 1862 set the precedent for Congressional supremacy over the executive in regards to making war. The Supreme Court determined that in accordance with the Constitution, Congress alone has the power to declare either a national or a foreign war. In addition, it clearly stated that the president, as Commander-in-Chief, has no power to initiate or declare a war either against a domestic state or a foreign nation (Franck and Glennon 1993, 577). After the unambiguous language used by the Framers and the Supreme Court, it seemed clear the president had no power to initiate a war.

As mentioned, in the early years of our nation, the presidents acknowledged and respected the war power of Congress. However, the executive branch soon began a slow but steady capture of war-making power from the legislative branch. Throughout the nineteenth century presidents took it upon themselves to use armed forces for limited purposes. In doing so they expanded the definition of "self-defense" for which the president had authority to act without congressional authorization, to include the protection of American lives *and* property abroad, pursuing criminals across borders and suppression of

piracy on international waters. This practice became accepted and even began to be considered constitutional doctrine (Franck and Glennon 1993, 577). (Appendix 1 is a list of the 208 conflicts the United States has participated in, without a formal declaration of war, from 1798 - 1989. Appendix 2 reflects the few occasions Congress saw fit to declared war). Congress and the American people acquiesced, if not encouraged these actions by the president. However, it was not until the twentieth century that presidents truly claimed the right to act without Congressional authorization involving full-scale wars (Franck and Glennon 1993, 577).

Congress' submission has had monumental impacts. Congress bears a heavy burden of the responsibility for the transfer to the executive of the actual power to initiate war. A Report to the Senate Foreign Relations Committee considered this change one of the most "remarkable developments in the constitutional history of the United States", where actual power to initiate war was considered distinctive from the constitutional authority already delegated (S.REP. NO. 220, 1973). Since President Truman, nearly every President has gained a little more confidence in their power to declare war without Congress interfering, and expanded the power of the executive branch. In fact, when President Truman committed the armed forces to Korea in 1950 without Congressional authorization, hardly a voice of opposition was raised in Congress (Franck and Glennon 1993, 579). President Johnson confirmed the executive's claim to war power authority without Congressional declaration. Although presidents claim this power and have been exercising it very broadly in the last fifty years, this

does not make it legitimate. One Supreme Court Justice commented: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed" (Franck and Glennon 1993, 581).

The actions by the executive branch would not have been possible if Congress had exercised its war powers under the Constitution and either authorized or prevented the wars. Based on the language of the Constitution and the intent of the Framers, it is clear that the United States was designed to be a country whose status quo was peace. As illustrated in Appendices 1 and 2 (List of Undeclared and Declared Wars), the United States is not a country that has been at peace the last two hundred years. Since 1945, in undeclared wars alone, over 100,000 United States servicemen have died and over 400,000 have suffered from injuries as a result of battle (Graebner 1993, 117).

President Truman set a precedent with the Korean War. This was the first time a president used a mutual security agreement as authorization for military actions. Truman claimed legal authority from U.S. obligations under the United Nations Charter, and a U.N. Security Council Resolution. He acted on his own, without congressional authority. President Eisenhower did not agree with President Truman's actions or his view of executive war powers. President Eisenhower said, "I deem it necessary to seek the cooperation of Congress. Only with that cooperation can we give the reassurance needed to deter aggression" (Stern and Halperin 1994, 22). President Eisenhower believed the

resolve of the United States was stronger if the legislative and executive branches approached conflicts jointly. His approach was more in line with the Constitutional division of war powers, but future presidents would not follow the advice of President Eisenhower.

The executive branch and legislative branch still frequently debate the proper allocation of the war power. Yet the executive has many advantages in the competition to exercise the power of war. The president is always available to make a decision, unlike the Congress who is not always in session and on hand. The president "can act quickly, informally, and secretly. Whether as a matter of international law or the 'laws' of international politics, he can effectively commit the United States, and Congress cannot lightly or effectively oppose or disown him" (Henkin 1996, 32). The president also has control of information and expertise regarding the armed forces and foreign intelligence. In addition, American citizens and foreign governments "believe that it is principally he who determines United States policy towards [foreign countries]" (Henkin 1996, 31). Most people believe the president has and does in fact exercise broad war powers, but what is the source of his authority?

The primary source of the president's war-making power is the Commander-in-Chief clause: "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States . . . " (U.S. Const. Art. II, Section 2, Clause 1). There is also the executive power (U.S. Const. Art. II, Section 1, Clause 1). It is from this clause that presidents claim that U.S. treaty commitments authorize them to use military forces abroad for

purposes short of war, even when Congress has not authorized the initiation of such actions (Glennon 1990, 73). Neither of these sections of the Constitution grants the executive the power to initiate war. How can the executive take actions like President Bush in the Persian Gulf and President Clinton in Kosovo?

Proponents of plenary presidential war-making power often cite case law for support (Glennon 1990, 74). However, the case law lacks support for the idea that the Commander-in-Chief clause confers significant policy-making authority upon the president. In fact, a court is yet to face the question head on and decide the case. Most war-making power cases and disputes between Congress and the president are dismissed either as political questions or for lack of standing to bring the suit. Even where the Supreme Court has apparently upheld the legality of undeclared war, they have stressed that Congress has the ultimate authority and war-making power. In the early cases:

> The Supreme Court upheld the legality of undeclared war because Congress had chosen to proceed in that manner, not because of any executive power. Furthermore, the Court specifically declared that Congress could control the conduct of war even to a high degree, and that when it did so the executive acted unlawfully if it exceeded the legislature's limits (Glennon 1990, 78).

Besides constitutional text and case law, there is also custom. Many presidents have cited custom as a source of constitutional power. For the most part, early presidents respected the dominance of Congress in the war-powers area. That is not to say that these early presidents abandoned their role. On the contrary, they were vigorous and expansive in their use of executive power, yet they still deferred to legislative authority and deliberately sought congressional approval for actual military conflict, no matter how small the scale. Early

presidents "claimed no monetary, diplomatic, or military power to act in the national interest in the absence of an emergency, nor did any suggest that Congress was significantly limited in its control over assigned executive powers" (Glennon 1990, 79).

President Jefferson and President Jackson expressly stated their belief that Congress had the sole authority to declare war, no matter how limited. When faced with a dispute with Spain on the Florida border, President Jefferson requested instruction from Congress. He acknowledged that only Congress could authorize the president to pursue military action and thus grant the role of command to the executive. Jefferson yielded to the Congress all information and material in his possession that would enable them to make a decision on the appropriate course of action. Jefferson recognized that, in accordance with the Constitution, the decision to go to war ultimately rests with the Congress, and he said: "to their wisdom, then I look for the course I am to pursue, and will pursue with sincere zeal that which they shall approve" (Glennon 1990, 79).

President Jackson faced problems with Argentina near the Falkland Islands, and he too deferred to Congress. President Jackson dispatched an armed vessel to the area, but submitted the issue to Congress immediately. Jackson requested guidance from Congress on what it perceived to be the best course of action, and then awaited authorization for the executive to use military force to achieve the goal prescribed by Congress (Glennon 1990, 80). Presidents since World War II have not followed the standard set by Presidents Jefferson and Jackson. In the last sixty years the U.S. has been involved in

approximately fifty undeclared wars, illustrating how presidents have claimed the power to involve the armed forces, at their whim, in full scale and sustained warfare, without consultation with Congress (Glennon 1990, 80).

The intent of the Framers on this issue could be no clearer. Original documentation from the drafting of the Constitution indicates that the Framers intended the presidential war-making power to be extremely limited, with the Commander-in-Chief clause conferring nominal policy-making authority; creating more of a ministerial function. The war-making powers set out by the Constitution were specifically designed to reverse the power the English procedure granted to the crown. Despite the clear intent of the Framers and unambiguous language of the Constitution, the executive branch has become more powerful.

CHAPTER III

THE TREATY POWER

Neither the President nor the Senate, solely, can complete a treaty;
they are checks upon each other, and are so balanced
as to produce security to the people.
- James Wilson

The Framers of the Constitution viewed foreign relations as a sensitive issue and carefully considered the delegation of the treaty-making arm. They were reluctant for the United States to enter into treaties and wanted to make it difficult for future administrations to make them. The Framers felt the best way to do this was by delegating the treaty making power to the president, but only with the "advise and consent" of two-thirds of the Senate (Henkin 1996, 175). By doing this, the President of the United States could project one voice on foreign policy as the primary negotiator and carrier of the message, while still maintaining a source of checks-and-balances with the Senate taking on a legislative role (Westerfield 1996, 47).

The President of the United States has increasingly used treaties and executive agreements as a basis for U.S. military involvement in conflicts abroad. "The treaty power has been put to uses undreamed of by the Framers, e.g., arms control and the promotion of human rights; and that the treaty power has left room for congressional-executive agreements at least on some matters (e.g.,

international trade), and has accommodated many thousands of executive agreements by the President acting alone" (Henkin 1989, 714). The president and, inadvertently, the Senate may not use the treaty process to take from the House of Representatives its constitutional role in the war power. As discussed earlier, the Constitution clearly states that the use of force can only be used after following constitutional processes, which include *both* Houses of Congress. Mutual-defense treaties do not "transfer to the President the congressional power to make war" (Stern and Halperin 1994, 21). Authority for treaties is found in several places in the Constitution.

> Article I.
>
> Section 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal;...
>
> No State shall, without the consent of Congress,...enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.
>
> Article II.
>
> Section 2. The President shall be Commander-in-Chief of the Army and Navy of the United States,...He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls,...
>
> Article VI.
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding. (Westerfield 1996, 46)

Clearly the executive and the Senate have a joint responsibility in the treaty-making process. The president "decides whether to negotiate with a

particular country (or countries) on a particular subject. He appoints and instructs the negotiators and follows their progress in negotiation. If he approves what they have negotiated, he seeks the consent of the Senate" (Henkin 1996, 177). As previously mentioned, the Senate's role is largely legislative, providing advise and consent to the treaties negotiated by the president. However, there are several ways the Senate can express that:

> "(1) it may offer its consent unconditionally; (2) it may refuse its consent without further consideration; (3) it may offer its consent, provided certain conditions be added to the treaty as amendments, which, if accepted by the president and the other parties, become binding on all parties to the treaty; or (4) it may offer its consent, provided certain conditions be accepted as reservations which limit the obligations of the United States only (Westerfield 1996, 47).

There are pros and cons of the joint effort of treaty making between the president and the Senate. Accusations have been made that the Senate on occasion rejected a treaty not because of its merit or importance to the national interest, but because of partisan politics. Although the Senate has consented to the majority of the treaties proposed by the president, it still acts as a filter. Requiring Senate approval allows the president to seriously consider the treaties negotiated. In some instances, "Presidents have refused to send to the Senate treaties already negotiated, or have refrained from pressing for Senate consent to treaties submitted by their predecessors; they have withdrawn treaties from the Senate before it acted; they have refused to ratify treaties to which the Senate consented" (Henkin 1996, 179).

Senate Conditions

The Senate has the option of consenting to treaties subject to certain conditions. These conditions are called 'reservations', 'understandings', or 'declarations' (Henkin 1996, 180). The Senate has the authority to withhold its 'consent' on the condition that certain changes are made. The Senate can also give advance consent to a treaty, with the understanding that the treaty will be revised as directed. However, the president may decide not to present the treaty with the new terms required by the Senate, and therefore annul the proposed treaty.

Reservations are formal conditions that the Senate considers important enough to include in the terms of the treaty. Reservations can range from communicating a particular interpretation of the treaty as a condition of its consent, to "modifying or limiting [the United States] obligation under the treaty or under some particular provision" (Henkin 1996, 180). In some cases the Senate can be persuaded into achieving a minor modification of a treaty provision without requiring a reservation by conveying instead its 'understanding' of the provision. This understanding would be conveyed to the other parties and if accepted the treaty can be ratified without requiring a formal reservation.

Treaty Interpretation

The separation of powers has made the United States strong by creating checks and balances on each of the branches. But that same separation of powers has created some confusion in the interpretation of treaties. As the single voice on foreign policy the president defines the U.S. view and, therefore,

the meaning of a treaty. On the domestic front, the president is also responsible to ensure execution of the treaty. Congress has an obligation to enact legislation supporting the treaty and so has a need to interpret a treaty. And even further, the courts are required to interpret treaties in cases before them (Henkin 1996, 206).

There is truly only one source for interpretation, however. The essential meaning of the treaty comes from the Senate's interpretation when it gave its consent to the treaty. However, the Senate interpretation is largely based on Senate hearings where the executive branch relates the terms and meaning of the treaty to the Senate. Thus, the executive branch also plays a large role in interpreting treaties. The president cannot dispense with the requirement of Senate advice and consent by calling an essentially new treaty merely an interpretation of an earlier one. Nor can the president amend an earlier treaty and avoid the requirement of Senate approval (to what in reality is a new treaty) by calling the amendment an interpretation (Glennon 1990, 134).

The Senate should also be able to expect the executive branch to interpret treaties in the way they were represented at the Senate hearings. By interpreting the treaty differently than originally intended by the Senate, the president is in effect, changing or amending the current treaty or creating a new treaty. Both, of which, require Senate "advise and consent".

Treaty Termination

The Constitution of the United States clearly defines who has the authority to make a treaty, but it says nothing of who can terminate or denounce a treaty.

There are opposing opinions when looking for the answer to this question. Some think that only Congress can terminate a treaty, while others hold the opposing view that the president alone has the authority to terminate a treaty.

The former school of thought relies on the intent of the Framers. As Professor Louis Henkin states, "If the Framers required the President to obtain the Senate's consent for making a treaty, its consent ought to be required also for terminating it" (1996, 212). It also holds that if a treaty, once in effect, becomes the supreme law of the land, equal with any other law, then the Congress has the authority not to pass legislation that would support that treaty, thus nullifying it. John Jay in *Federalist* No. 64 says, "They who make treaties may alter or cancel them" (Hamilton, Madison, Jay 1961,394). It can also be reasoned that if Congress has the primary responsibility for war and peace that terminating a treaty inherently falls under its authority (Henkin 1996, 213).

If Congress does in fact have any input to the U.S. foreign policy, it is up to the president to voice that message to the other party. In many cases, when Congress has given input to terminate a treaty, the president has generally agreed and complied. However, it is the president's prerogative to disregard congressional inputs. In recent years, it has become more acceptable to leave it to the president to terminate treaties. With no clear guidance in the Constitution, some feel that the Framer's intended it to be more difficult for the United States to enter into treaties with foreign governments. However, breaking obligations are considered less risky and sometimes must be done quickly. Thereby, the

Framers may have considered the president, as the single voice for the United States abroad, as the principle authority to break treaties (Henkin 1996, 212).

Today, the Congress and the president are reaching equilibrium in this debate. Although the Constitution's intent is to make it easier to get out of international obligations than to enter them, the Congress wants to maintain its right to a voice in the termination of a treaty. After President Carter unilaterally terminated the 1955 Mutual Defense Treaty with the Republic of China (on Taiwan) in 1979 (this is also discussed further in Chapter 4), the Senate Foreign Relations Committee passed a resolution mandating Senate consent prior to the termination of mutual-security treaties. Senate Resolution 15 concluded that

> The President could terminate a treaty acting alone, but (1) only in accordance with international law; (2) only if such termination would not 'result in the imminent involvement of United States Armed Forces in hostilities or otherwise seriously and directly endanger the security of the United States'; and (3) only if unopposed by the Congress or the Senate (Glennon 1990, 147).

No president since President Carter has seriously tested the Senate's resolve on this issue.

Mutual-Security Treaties

The intent of the Framers and the early U.S. leaders was to avoid forming alliances as much as possible. However, by the 20th century the United States had developed into a military power, and alliances were difficult to avoid. The United States is currently obligated in seven mutual-security treaties, binding it with over forty foreign countries. The primary concern among legislators is that mutual-security treaties would automatically commit the United States to defend the other signatories of the treaty if attacked. However, in each treaty, it clearly

states that only in accordance with our own "constitutional process" or other similar language, will we commit military aid.

Misunderstandings have also occurred among presidents who thought that treaties gave them the authority to commit military force, without the consent of Congress. The Senate Foreign Relations Committee summarizes the treaties as follows:

> No mutual security treaty to which the United States currently is a party authorizes the President to introduce the armed forces into hostilities or requires the United States to do so, automatically, if another party to any such treaty is attacked. Each of the treaties provides that it will be carried out by the United States in accordance with its 'constitutional process' or contains other languages to make clear that the United States' commitment is a qualified one—that the distribution of power within the United States Government is precisely what it would have been in the absence of the treaty, and that the United States reserves the right to determine for itself what military action, if any, is appropriate. (Glennon 1990, 193-194)

With this so clearly stated by Congress, why is there still a question? Presidents have continued to use treaties as the justification for the use of armed forces in foreign wars. Truman used the U.N. Charter in the Korean War, Johnson used the Southeast Asia Treaty (SEATO) in the Vietnam War, Bush used the U.N. Charter in the Persian Gulf War, and Clinton used the NATO Charter in Kosovo. The answer is that while those treaties may justify the use of force under international law, they do not authorize the President of the United States to initiate war without explicit approval from Congress. No treaty or American interests, short of self-defense or emergencies, justifies the president making war without congressional approval.

In an attempt to explain this, first a brief overview of the current treaties will be given. Then, an in depth exploration of the U.N. Charter will be completed, followed by an analysis of two recent military actions—the Persian Gulf War and Kosovo.

The Rio Treaty

The Inter-AmericanTreaty of Reciprocal Assistance, also known as the "Rio Treaty", was the first mutual-security treaty entered into by the United States after World War II. Party to the treaty are twenty-three Western Hemisphere nations (Argentina, the Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, the United States, Uruguay, and Venezuela) (Glennon 1990, 207). The essence of the treaty is mutual defense where the parties "agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack . . . ", as stated in Article 3 of the Rio Treaty.

At the forefront of debate during the ratification of this treaty was the unconditional obligation of the United States to commit troops in the defense of one of the member states if attacked by any other state. Subsequent mutual security treaties include the language "in accordance with constitutional process". However, no such wording exists in this treaty. Concern of the level of obligation was resolved during negotiation of the treaty. The level of commitment by the

signatories was qualified by a provision stating that "each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation" (Article 3 of the Rio Treaty). It further asserts that "no State shall be required to use armed force without its consent" (Article 3 of the Rio Treaty).

Trepidation over U.S. commitment in the Rio Treaty boiled over into the debates in the Senate Foreign Relations Committee. After holding hearings, it was concluded that in the event of an armed attack, "We would be called upon to extend immediate assistance to the state attacked", however, "The character and amount of this assistance would be determined by our Government" (Glennon 1990, 209). With those assurances, the Rio Treaty was ratified in 1947.

The NATO Treaty

The North Atlantic Treaty (NATO) was ratified in 1949 as a regional mutual-security pact for Europe and the North Atlantic. Current parties include Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Iceland, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom, and the United States (Glennon 1990, 210).

With the controversy over the Rio Treaty still fresh in the minds of politicians in Washington D.C., the drafting of the NATO Treaty had the commitment of member states at the center. In light of that concern, the NATO Treaty provides that "its provisions [shall be] carried out by the Parties in accordance with their respective constitutional processes" (NATO Treaty, Article 11).

The principle provision of the NATO Treaty is article 5:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an attack occurs, each of them, in exercise of the right of individual or collective self-defense, . . . will assist the Party or Parties so attacked by taking forthwith . . . such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

The terms make it clear that no nation is committed to use armed force. It may do so if it deems such actions necessary and if such actions are approved through internal constitutional processes, but it is not required to do so. This interpretation is reflected in the Senate Committee on Foreign Relations hearings on the treaty, as well as correspondence between the Secretary of State and the president (Glennon 1990, 210).

Debate also developed regarding the effect of such a treaty on the war powers of the executive and legislative branches. During the hearings, Secretary of State Dean Acheson stated that "Article 5 . . . does not enlarge, nor does it decrease, nor does it change in any way, the relative constitutional position of the President and the Congress" (Glennon 1990, 211).

ANZUS Treaty

The Multilateral Security Treaty between Australia, New Zealand, and the United States (ANZUS) was ratified in 1951. United States negotiators of the ANZUS Treaty anticipated executive and congressional concerns. The treaty was prepared to take into account the vital interest items previously expressed by the Senate during the Rio and NATO Treaty debates. The ANZUS Treaty stated, and Secretary of State John Foster Dulles reiterated, that "any action in which

the United States joined would have to be taken in accordance with our constitutional processes" (Glennon 1990, 216). Debate in the Senate was cursory anticipating the standard answers of the U.S. negotiators. The Senate approved the Treaty overwhelmingly.

The Philippines Treaty

The Mutual Defense Treaty between the United States and the Republic of the Philippines was negotiated by the executive branch and considered by the Senate at the same time as the ANZUS Treaty.

The South Korea Treaty

Unlike the NATO and Rio Treaties, the Mutual Defense Treaty between the United States and the Republic of Korea does not hold that an attack on one party is regarded as an attack on both. Instead, an attack on one is recognized as being "dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes" (Mutual Defense Treaty, U.S.-Republic of Korea).

As has become the standard, the United States was not committed in any way to provide armed force in the defense of the Republic of Korea, unless the U.S. deemed those means appropriate and necessary. Senator Smith of New Jersey said the treaty did "not go beyond the general type of commitment which we have made in our other Pacific-area security treaties" (Glennon 1990, 217). There were also concerns regarding the implementation of the use of force. During the hearings in the Senate Foreign Relations Committee, Senator Wiley, Chairman of the Committee, said "there is nothing in the treaty which would

change, delimit or add to the powers of the President of the United States" (Glennon 1990, 217).

The SEATO Treaty

Congress approved the Southeast Asia Collective Defense Treaty (SEATO) in 1955. Current parties to the Treaty are Australia, France, New Zealand, the Philippines, Thailand, the United Kingdom, and the United States (Glennon 1990, 218). Much like the other Pacific-area treaties the SEATO Treaty provides that "each party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes" (SEATO Treaty, Article IV).

During the debates in the Senate Foreign Relations Committee the controversy of presidential war power debated during the NATO and Rio Treaties arose again. One representative recommended that Congress expressly define the term "constitutional processes" as requiring a declaration of war by Congress before armed forces could be used. However, the consensus of the Committee was that the "Treaty should simply make clear that it neither contracted nor expanded the President's powers" (Glennon 1990, 219). Senator George, the Committee Chairman, said the treaty left "no doubt that the constitutional powers of the Congress and the President are exactly where they stood before. [The SEATO Treaty] has no effect whatsoever of the thorny question of whether, how,

and under what circumstances the President might involve the United States in warfare without the approval of Congress" (Glennon 1990, 219).

Although Vietnam was not a Contract Party to the treaty, the State Department and other defender's of the constitutionality of the Vietnam War site accompanying protocol of the treaty as authorization. Signed and ratified at the same time as the SEATO Treaty, the parties "unanimously designate[d] for the purposes of Article IV of the treaty the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam" (Ely 1993, 14).

With the debate over how the treaty would impact presidential war power less than ten years old, President Lyndon Johnson used the U.S. obligation to the SEATO Treaty as leverage to obtain congressional approval of military involvement in Vietnam. Prior to that, Presidents Eisenhower and Kennedy steadily increased the number of American troops in Vietnam, creating a position where American soldiers were faced with hostile situations daily. As U.S. casualties were escalating in the face of increasing assaults from North Vietnam on both Laos and South Vietnam, President Johnson sent a special message to Congress requesting support for the U.S. operations already taking place in Southeast Asia. Excerpts from a letter President Lyndon Johnson wrote to Congress, dated 5 August 1964, are included here:

> To the Congress of the United States:
>
> These latest actions of the North Vietnamese regime have given a new and grave turn to the already serious situation in Southeast Asia. Our commitments in that area are well known to the Congress. They were first made in 1954 by President Eisenhower. They were further defined in the Southeast Asia Collective Defense Treaty approved by the Senate in 1955.

> This treaty with its accompanying protocol obligates the United States and other members to act in accordance with their constitutional processes to meet Communist aggression against any of the parties or protocol states.
>
> I recommend a resolution expressing the support of the Congress for all necessary action to protect our Armed Forces and to assist nations covered by the SEATO Treaty . . . (Westerfield 1996, 80-81)

The Japan Treaty

By the time the Treaty of Mutual Cooperation and Security between the United States and Japan was signed in 1960, the Senate and executive branch negotiators had a firm grasp on the U.S. role in these treaties and the wording to make it acceptable. Nearly identical to other Pacific-area treaties, in the Japan Treaty, "Each Party recognized that an armed attack against either Party . . . would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes" (Japan Treaty).

The United Nations Charter

Unlike other mutual-security agreements, this organization includes most of the nations of the world as its members. Following the devastation of World War II the drafters of the U.N. Charter sought to check the unilateral use of force as a method for resolving international disputes. The U.N. was to be a mechanism to prevent war and resolve disputes peacefully. The Charter was signed in San Francisco, California, on 26 June 1945, at the United Nations Conference on International Organizations (Westerfield 1996, 63). With its inception, many saw the rise of a new world order. The goal of the United Nations was to make war illegal and unnecessary. It would bring an end to the

need for unilateral acts of war, and replace it with a global police force that would secure peace for all (Franck and Patel 1991, 63). "The U.N. Charter is not merely a treaty, but also the constitutive instrument of a living global organization" (Franck and Patel 1991, 66).

The U.N. Charter established the Security Council as the most critical element of the United Nations, charged with the responsibility to maintain international peace and security (Henkin 1996, 251). Chapter VII of the U.N. Charter is at the heart of the Security Council's authority. Under it, the Security Council can determine when there is a threat to peace, a breach of peace, or an act of aggression, and the Council may make recommendations or decide what measures shall be taken (Appendix 3). There are five permanent members of the U.N. Security Council: France, the People's Republic of China, Russia, the United Kingdom, and the United States.

Article 42 is the only provision authorizing the use of armed force by the Security Council, followed by Article 43 which is the only provision describing the raising of armed forces (Glennon 1991, 77). According to Article 43, the military forces would be raised with the support of willing member states in accordance with special agreements. Much like related regional security treaties, support for Article 43 special agreements "shall be subject to ratification by the signatory states in accordance with their respective constitutional processes" (Franck and Patel 1991, 67).

For the United States, the implementing legislation of the U.N. Charter was the United Nations Participation Act (UNPA) of 1945. The UNPA gave the

internal government procedures for our participation in the United Nations. One of the key debates clarified in the UNPA was the dispensation of U.S. troops to the U.N. Security Council. "The Charter was seen as conferring no additional authority on the President to use United States armed forces in hostilities; the President could not . . . confer upon himself power to use armed force that he would not otherwise possess" (Glennon 1991, 78).

The Participation Act authorized the president to carry out Security Council resolutions under Article 41, which impose economic sanctions and other measures not involving the use of force. As the U.S. representative to the United Nations, the president is also authorized by the UNPA to negotiate Article 43 special agreements but they would only become binding with congressional consent. In this way, Congress explicitly denied the president any authority to make forces available to the Security Council without congressional approval. "Clearly, Congress did not think the President had any constitutional authority of his own, or derived any authority from the U.N. Charter, to make forces available for war, whether for a Security Council action under Article 42 or for collective self-defense with a state victim of an armed attack under Article 51" (Henkin 1989, 257).

Although the UNPA and other debates on mutual-security treaties clearly indicate that the president cannot take military action without the consent of the full Congress, these issues have continued to surface during the few military actions sponsored by the United Nations. Since its creation, the U.N. Security Council has authorized two collective military actions to defend a state that was

the victim of an armed attack and then to restore and maintain peace and security. In 1950, the Council recommended that member states place troops under a Unified Command to come to the defense of South Korea against aggression from North Korea. In 1990, the Council authorized willing states to come to the defense of Kuwait against aggression by Iraq. In both the Korean War and the Persian Gulf War (discussed later in this Chapter), the United States led the Security Council into action (Henkin 1996, 255). However, "In neither Korea nor the Persian Gulf did the Security Council require member states to use force—it simply authorized them to do so. Thus, in neither case was there a treaty obligation to commit American soldiers to combat" (Stern and Halperin 1994, 92).

The United Nations Charter *permits* action by states in collective self-defense with a victim of an armed attack (Article 51). It may even recommend such action, however, it *does not mandate* such action. The United States has no legal obligation to come to the assistance of a victim of an armed attack and, therefore, there is no international obligation from which the President might derive authority to do so (Henkin 1996, 257).

Three War Powers Models

Attempting to achieve a balance in the division of war powers between the legislative and executive branches has become even more challenging in light of the new world order that has emerged since the end of the Cold War. Since the creation of the United Nations Organization, three approaches to answer the question of a war powers balance have emerged. The police power model, the

political accommodation model and the modern contract model are explored here.

The Police Power Model

The police power model gives the President broad authority to deploy U.S. troops in any U.N.-authorized use of force, regardless of its size or character, with no special agreements in effect to set restrictions on the size of the forces. This model is "premised on an expansive conception of the President's constitutional war powers and views congressional authorization as essentially irrelevant in U.N. 'police actions'" (Stern and Halperin 1994, 88).

The police power model was first expressed during the Korean War, "When President Truman claimed the authority to send U.S. forces to combat as part of a U.N.-approved military action without the prior consent of Congress" (Stern and Halperin 1994, 86). Truman justified his action as within his authority as Commander-in-Chief since any U.N. action is police action, not war. Therefore, there is no need for congressional approval since a declaration of war is not necessary. Truman also expanded his authority in regards to repelling sudden attacks to include, not only attacks on U.S. forces and citizens, but also to protect "the broad interests of American foreign policy." This included safeguarding the U.N.'s "effectiveness as an institution and responding to threats to the Charter" (Stern and Halperin 1994, 87).

In defining his role as Commander-in-Chief so extensively, President Truman dismissed his domestic obligation to take action in accordance with the internal constitutional processes allowed for by the Charter, and to which the

Senate consented. In effect, this model dismisses the role of Congress in the question of war and peace, relegating them to the role of bystander.

Another claim made by the Truman Administration is that the U.N. Charter, as a treaty having been approved by the Senate, is the supreme law of the land. And as such, it is the President's constitutional duty to "faithfully execute" the U.N. Charter (Stern and Halperin 1994, 92). As discussed earlier, none of the mutual-security treaties consented to by the United States Senate is self-executing, whereby the treaty takes effect as domestic law without the passage of an implementing statute by the entire Congress (Ely 1993, 14). In other words, the president cannot assume that since the Senate has consented to the ratification of a treaty it can be acted upon without further consultation with the Congress. The UNPA implemented the U.N. Charter, but not specific Security Council Resolutions. The Constitution expressly delegated the power to initiate hostilities to both Houses of the Congress. Assuming U.N. Security Council Resolutions to be self-executing would exclude the Congress from the decision to commit forces to the U.N. Security Council.

Fundamentally, the Constitution stands supreme to any treaty. Jane Stromseth, Professor of Law at Georgetown University, summarizes this relationship:

> The war powers granted to Congress as a whole by the U.S. Constitution cannot be preempted by a treaty approved by the Senate alone, nor did the U.N. Charter attempt to do this. Instead, the Charter explicitly provided that any forces committed to the Security Council through the anticipated special agreements would be subject to the 'constitutional processes' of member states. Moreover, the Senate gave its advice and consent to the Charter on the explicit understanding that Congress would approve any

special agreements, and that the President would return to Congress for any additional forces required in a U.N.-authorized military enforcement action (Stern and Halperin 1994, 92).

The Political Accommodation Model

The political accommodation model first materialized during the Persian Gulf War. The model focuses on the size and risk of particular U.N.-authorized actions to determine the level of involvement of the United States Congress. The approach requires congressional approval before the president can commit troops in substantial numbers to a combatant situation where there is great risk of death. However, the president could obligate troops without congressional approval to small-scale operations where there is very little risk of escalation (Stern and Halperin 1994, 93).

In contrast to the police action model, the political accommodation model fosters communication between the Congress and the executive. It fulfills the intent of the Framers of the Constitution, consisting of deliberation by Congress when a significant number of Americans are put at risk in support of the U.N. It also allows the president to have the flexibility to act decisively with the U.N. Security Council when there are small-scale threats.

Two shortcomings have been found to exist with this model. First and foremost, is the problem of defining a small- or large-scale conflict. When the model was first used during the Persian Gulf crisis, the U.S. involvement was clearly defined as a large-scale wartime operation. However, it will not always be so easy to define. There will surely be cases where a small-scale peacekeeping operation in a country at civil war, rapidly escalates to a high-threat environment.

This is of great concern, as the U.N. Security Council gets more involved in peacekeeping operations around the world.

The second shortcoming arises when the U.S. Congress demonstrates an unwillingness to "share in the burden and responsibility of making hard decisions about whether to use military force in the face of conflicting pressures and uncertain outcomes" (Stern and Halperin 1994, 94). Such decision-making is made even more difficult when the president makes unilateral decisions, such as mobilizing thousands of troops into a hostile environment. These types of decisions come close to proclaiming the outcome in advance, giving Congress very little input.

A Modern Contract Model

The modern contract model is an updated version of what the 79th Congress attempted to put in place in 1945, drawing a clear line between the roles of the president and Congress. It alleviates some of the drawbacks of the political accommodation model. The modern contract model establishes "statutory numerical and purpose-based limits on U.S. participation in U.N.-authorized military actions" (Stern and Halperin 1994, 94).

This model provides a framework that has both domestic and international benefits. Domestically, the war powers balance established by the contract approach reduces the risk that U.S. participation in U.N. actions will spawn conflict-ridden war powers disputes between Congress and the president. Internationally, the U.N. is better equipped, with the use of special agreement forces, to respond promptly to various hostilities such as, humanitarian

emergencies, civil disorders, and small-scale cross-border conflicts (Stern and Halperin 1994, 97).

In the modern contract model the U.S. Congress would preauthorize a specific/limited number of U.S. troops, under Article 43 special agreements, to be used at the discretion of the U.S. President in support of United Nations peace enforcement and peacekeeping missions that fall short of large-scale operations. If there were a need to expand operations, the president would require specific authorization by Congress. This would allow the president and the Security Council the flexibility to act promptly, while maintaining congressional oversight. In the contract model, Congress has the opportunity, prior to a conflict, to shape U.S. participation in U.N. military actions. By controlling the number of troops available and the scale of conflict authorized, Congress is not forced simply to respond to executive-initiated decisions in the middle of a crisis (Stern and Halperin 1994, 97).

Professor Jane Stromseth best summarizes the three models:

> The police power model is too expansive, and unbounded a view of executive power. The political accommodation model accords better with the shared war powers set forth in the Constitution, but it depends critically on the willingness of the President and the Congress to resolve war powers differences cooperatively on a case by case basis—which may not be possible if the President is determined to act unilaterally or if Congress is unwilling to act. The contract model is a principled effort to strike a practical war powers balance before a crisis even occurs, and to give the United Nations the capacity to take prompt action on a limited scale. (Stern and Halperin 1994, 97-98)

The Persian Gulf War

Iraq's 1990 invasion of Kuwait prompted the United Nations to use its power as a peacekeeping body. However, it was the United States which urged the U.N. Security Council to take actions, and then led the coalition to expel Iraqi forces from Kuwait. Although the operations were conducted under the U.N. umbrella, the United States had the lead role and provided the military leadership for the operations. On 29 November 1990, the Security Council, upon the insistence of the Bush Administration, authorized the use of force to expel Iraqi forces from Kuwait unless Saddam Hussein removed them by 15 January 1991. The Bush Administration had already mobilized thousands of U.S. forces, activating the reserve and guard in addition to the regular active duty forces, to defend Saudi Arabia from potential threat, while simultaneously pressing Iraq to evacuate Kuwait. President Bush acted without congressional authorization or approval, initially invoking the police action model. As the deadline approached, Bush decided to seek the support of Congress before taking military action against Iraq (which Congress provided on 12 January 1991), creating the political accommodation model (Stern and Halperin 1994, 87).

Response to the Iraqi invasion of Kuwait occurred in two phases—Operation Desert Shield and Operation Desert Storm. Operation Desert Shield was primarily defensive, operated under the authority of the president as Commander-in-Chief of the United States armed forces and under obligation to the U.N. Charter. Operation Desert Storm was offensive in nature, conducted under the same authority as Desert Shield, in addition to joint resolution support

from Congress. On the surface, military action in defense of Kuwait progressed as the Founding Fathers intended, but in reality during every step of the operations there were conflicts between the president and Congress where the constitutional controversy over the war powers raged.

On 2 August 1990, Saddam Hussein invaded Kuwait and took control of the country. That same day, President Bush issued an Executive Order declaring a national emergency on the basis that the invasion was a "threat to national security and foreign policy of the United States" (Bush 1992, 131). On the same day, the U.N. Security Council issued S.C. Resolution 660, condemning the Iraqi invasion of Kuwait and demanding an immediate and unconditional withdrawal.

On 3 August 1990, President Bush sent a letter to Congress imposing sanctions against Iraq. The U.N. Security Council, complying with U.S. wishes, issued S.C. Resolution 661, imposing economic sanctions on both Kuwait and Iraq. Of key importance in this Resolution is the Security Council's statement that it was "acting under Chapter VII of the Charter of the United Nations" (S.C. Resolution 661, 2, 124). United Nations Charter Chapter VII authorization was the leverage President Bush needed to intensify U.S. actions to aid Saudi Arabia and Kuwait. That phrase granted member nations authority to use "all means necessary" to restore peace, to include not only defensive action, but offensive action as well (Westerfield 1996, 125).

On 9 August 1990, President Bush notified Congress that the number of armed forces deployed to Saudi Arabia would increase, but that war did not

seem imminent, and that further sanctions on Iraq would be imposed. This letter conforms to Section 4 of the War Powers Resolution. President Bush specifically stated that hostilities were not imminent, probably to prevent triggering Section 4(a)(1) of the War Powers Resolution which requires the president to make a report to Congress within forty-eight hours of the deployment of armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances". President Bush was not yet requesting permission from Congress. He did, however, give them the opportunity to debate the issue and offer guidance (Westerfield 1996, 127).

As the conflict progressed, President Bush maintained a constant dialogue with Congress to keep it updated regarding almost every detail of the deployment of armed forces along with the rationale for doing so. Bush sent letters to Congress when he ordered the U.S. Navy to blockade all shipping to and from Iraqi and Kuwaiti ports and when he mobilized the U.S. reserves as a result of Saddam Hussein's decree to use civilians as "human shields". He also addressed joint sessions of Congress to keep them thoroughly, although retroactively, informed. Although the Bush Administration kept the Congress more informed during the Gulf crisis than in any crisis past or since, the Congress voiced its concern that the president should have obtained prior approval from them before committing armed forces (Westerfield 1996, 138).

In Congress' first formal resolution on the Persian Gulf crisis, Senate Concurrent Resolution 147, 2 October 1990, the Congress endorsed the actions of the President of the United States and the Resolutions passed by the U.N.

Security Council. It states, "Congress strongly approves the leadership of the President in successfully pursuing the passage of United Nations Security Council Resolutions". In addition, "the Congress supports continued action by the President in accordance with United States Constitutional and statutory processes, *including the authorization and appropriation of funds by the Congress* . . . [emphasis mine]". This is at the heart of one of the debates over the war powers. Does fiscal authorization equate to military action? The phrase above would appear to give the president the Congressional consent necessary to continue the buildup of forces and plans to repel Iraqi aggression, to include the use of force. This same issue surfaced during the Korean and Vietnam Wars. Congress is reluctant to refuse funding for troops who are already on the front lines, since it implies abandonment of our own American military soldiers. Therefore, congressional approval to appropriate funds does not necessarily equate to the authorization of military action. President Bush was still required to request congressional authorization before engaging U.S. forces in hostile actions, as mandated by the U.S. Constitution and the War Powers Resolution.

Although tensions were escalating, on 16 November 1990, President Bush reiterated his feeling, as stated in his 9 August 1990 letter, that "involvement in hostilities was [not] imminent". As before, this was probably done consciously to prevent triggering the War Powers Resolution. Several members of Congress, recognizing the impending necessity to take grave action against Hussein (contrary to what Bush stated), filed suit to have President Bush seek approval from Congress before he launched an all-out attack. Only nine days later, on 29

November 1990, the United Nations Security Council passed S.C. Resolution 678, which "authorizes Member States . . . to use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area" and "requests all States to provide appropriate support for the actions."

It was not until 8 January 1991 that President Bush requested a joint resolution from the Congress expressing its support of U.N. S.C. Resolution 678, which he believed would send "the clearest possible message to Saddam Hussein that he must withdraw . . . from Kuwait". Bush acknowledged that a joint resolution was necessary to reinforce the United States' "unity to act decisively," and our willingness to "[stand] with the international community" (Bush 1992, 13-14). At no time, however, did President Bush reference the War Powers Resolution. In fact, in a press conference on the 9th of January, President Bush stated that he was not required to seek the Joint Resolution to act. He stated that he already had the "constitutional authority" to "fully implement Resolution 678" (Westerfield 1996, 153).

After extensive debate, the U.S. Congress passed Joint Resolution 77, "Authorization for Use of Military Force against Iraq", on 14 January 1991 (just one day prior to Saddam Hussein's deadline to withdraw Iraqi troops from Kuwait). The Resolution did not authorize the president to use "all necessary means" as requested, and therefore was not a "blank check" for the president's use of force (Congress being fearful of a repeat of the Gulf of Tonkin Resolution). Instead, while authorizing the president to use "United States Armed Forces

pursuant to United Nations Security Council Resolution 678 (1990)", it also placed restrictions on the president, consistent with the War Powers Resolution.

To the end, President Bush asserted that his "request for congressional support did not . . . constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the armed forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution" (Bush 1992, 40).

The Kosovo Conflict

The United States was the backbone and driving force behind a bombing campaign in Yugoslavia in the spring of 1999. The stated goal was to end the ethnic cleansing and systematic displacement of ethnic Albanians from Kosovo by the Serbian forces. The "Kosovo Conflict", as it is referred to since Congress never declared war (officially named Operation Allied Force), was politically divisive in the United States. The harshest of critics claimed that this was your typical "Wag the Dog" scenario through which the president hoped to focus attention away from his image problems as a result of recent events (the Lewinsky affair and impeachment hearings). Committing ground forces to Kosovo was voted on and denied by Congress and air strikes were barely approved. President Clinton relied on NATO and humanitarian reasons (alleged ethnic cleansing) as justification for sending the U.S. military to Kosovo. NATO forces, led by the United States Air Force, began bombing Yugoslavia on 24 March 1999. At that time, the only thing that Congress and President Clinton agreed on was that "the 1973 War Powers Resolution had become obsolete"

(Cohen 1999). Congress was simply unwilling to enforce the War Powers Resolution.

Before the bombing over Yugoslavia began the House passed a resolution, on 11 March 1999, which "authorized [the President] to deploy United States Armed Forces personnel to Kosovo as part of a NATO peacekeeping operation implementing a Kosovo peace agreement" (Cohen 1999). The Senate did not pass a resolution until the eve of the advertised start of the bombing campaign, 23 March 1999. The Senate non-binding resolution authorized the president, in cooperation with our NATO allies, to conduct air operations and missile strikes against Yugoslavia. President Clinton never formally asked Congress to declare war against Kosovo before the bombing began. In fact, it was not until days after the NATO bombing began and a day after Congress recessed for two weeks that Clinton did formally *notify* Congress of this military actions on 26 March 1999. In the notification, he cited his own constitutional authority as justification for his military actions, as well as "the views and support" expressed in resolutions passed by the House and Senate earlier in the month (Cohen 1999). Several recent presidents argued on similar grounds. First, they argued that they had independent war powers under the Constitution and, second, that vague resolutions from Congress are effectively authorizations for hostilities. According to Richard Cohen, the two legislative measures Clinton relied on did not anticipate the intensive NATO air strikes that would later occur. Cohen also noted that, ironically, Clinton Administration support for the resolutions at the time of their passage was ambivalent.

As the NATO air strikes in Kosovo intensified, it quickly became apparent that the United States needed additional funding. Would Congress further endorse the Kosovo Conflict by providing additional funding? The president requested six billion dollars in emergency spending to keep the air war over Kosovo operational through the summer of 1999 (APN 1999). Congress did in fact provide additional funding; more than the president requested, but earmarked the additional funding for military pay raises, training, additional weapons, and other improvements. Similar to the funding dilemma in the Persian Gulf War, presidents often believe that this type of funding bill equals congressional authorization of U.S. military actions. Those are the arguments that Presidents Johnson and Nixon made concerning the Vietnam Conflict even after Congress repealed the Gulf of Tonkin Resolution and passed the War Powers Resolution.

Some members of Congress saw Kosovo as the perfect opportunity to revive the War Powers Resolution or at least force the war powers question to the Supreme Court. On 21 April 1999, Congressman Roscoe Bartlett (R-6-MD) released the following statement:

> I have heard enough debate. It is time for Congress to reclaim its prerogative, debate and vote on whether to commit our nation to war under Article 1, Section 8 of the Constitution. President Clinton's unilateral decision to order the United States military to intervene in a civil war by bombing Yugoslavia violated our Constitution (Bartlett 1999).

Congressman Bartlett proclaimed that allowing one man to decide whether to engage our country is a recipe for disaster, the same recipe we followed with Vietnam. He added, "The men and women who volunteer to serve in our military

and whose lives are on the line deserve better. America deserves better" (Bartlett 1999). Evidently, better consists of a yes or no vote of Congress on whether to go to war against Kosovo. Either way, the responsibility lies with Congress. Congressman Bartlett admittedly would have voted no, but he believed that every member of Congress must debate and vote on this issue. More important than the final vote is the rule of law (Bartlett 1999). Nevertheless, President Clinton bombed Kosovo without a Congressional declaration of war vote taking place or other authorizations of hostilities.

Ironically, Yugoslavia attempted to limit the bombing that the United States and NATO was conducting by turning to the United Nations' World Court. Yugoslavia asked the United Nations' highest judicial body on 29 April 1999 to "rule that NATO's bombing breaches international law in a legal bid to end the air strikes" (News Services 1999, A1). Yugoslavia filed suits against ten NATO allies, requesting the court to order an immediate halt to NATO's campaign. The lawsuits didn't halt the bombing, but they were an international legal attack on the action.

President Clinton suffered blows against the Kosovo Conflict at home on 29 April 1999, as well, evidenced by the tie vote (213-213) by the House of Representatives withholding support for the NATO air campaign (News Services 1999, A1). The House refused to pass (on the tie vote) the Senate proposal endorsing the air war, but they also voted against ordering the president to halt military actions supporting its role in the NATO bombing. Essentially, Congress neither endorsed nor condemned the presidential led military actions. However,

the House did pass a bill on 29 April 1999 in which Clinton was prohibited from sending ground troops into Kosovo without prior congressional approval (Hosler 1999, 8A). This was a reaffirmation of the same requirements the War Powers Resolution already places on the president. The very fact that U.S. armed forces, under the NATO umbrella, continue to serve as peace-keepers in Kosovo seems contrary to the congressional bill passed forbidding ground forces without prior authorization from Congress. "On the plus side, all Yugoslav military forces and all but a token handful of Serbian police are out of Kosovo. In their place are 50,000 NATO troops, including 7,000 Americans, enforcing the peace and protecting the returned civil population as it rebuilds Kosovo" (Caldwell 1999, B3).

The Senate decided to avoid further voting on the issue altogether. This meant that they decided to stand on the resolution they passed supporting the air war in Yugoslavia. The senators claimed they did not want to send the mixed signals the House sent with their voting on 29 April 1999. Senate Democratic Leader, Tom Daschle, said that the Senate should "wait until there is a clear option that we actually have to make a decision on" (Hosler 1999, 8A). This lack of initiative is exactly what grants the president a significant advantage in exercising the war power of the United States. When the Congress does not act "until they have to make a decision", the decision has already been made for them. If the war is going well or has public support, Congress tends to pass supporting legislation either on the eve of the first day of bombing or it approves the action after the fact. No Congressman is willing to vote against war when

"our boys are already there." This would give the appearance of a member of Congress not supporting the men and women of the armed forces. That is exactly why the votes must take place sooner rather than later if Congress hopes to retain any of their war power.

Representative Tom Campbell (R-California) and 25 other House members filed a suit against the Clinton Administration over the bombing in Kosovo. On 4 June 1999, they asked U.S. District Judge Paul Friedman to rule that President Clinton had violated the Constitution and the 1973 War Powers Resolution by attacking Yugoslavia and Serbian forces in Kosovo (Torry 1999, A5). Their attorney, Jules Lobel, is the same person who argued in federal court a decade ago that President Bush could not legally attack Iraqi troops without first obtaining congressional approval. That case became moot after the House and Senate approved the use of force in January 1991 (Torry 1999, A5). Again, the House and Senate had waited too long to make a real vote on the issue. By January of 1991, our troops and aircraft were in place and ready to strike. President Bush was not waiting on congressional approval, but merely granting Hussein time to withdraw in compliance with President Bush's deadline.

Lobel believes that public opinion is shifting and he believes a majority will soon argue that it is not a good thing to have a country where the president can take us to war at any time, using his own discretion. In fact, he "is convinced that the time will come when a federal court will slap down a president for sending troops into combat without congressional authorization. He compares the current fight over presidential authority to the divisive slavery question of the 1830s and

1840s" (Torry 1999, A5). Even if public opinion shifts, it is not likely that federal court judges will be inclined to intervene in a dispute between the other two branches of government. The required circumstances would probably be a clear logjam, where the president has sent troops to war over an unambiguous declaration from Congress opposing the action. This is an unlikely scenario.

It took Judge Friedman only four days to decide that the lawmakers did not have standing to bring the case and he threw the case out of the district court on 8 June 1999 (Bresnahan 1999). What does Congress have to do in order to gain standing against the President? It may have to point to legislation approved by a majority of Congress or perhaps passed into law over presidential veto disapproving the war. The judge may also require more than half of Congress to join the lawsuit against the president. Friedman acknowledged that judges have frequently "expressed great reluctance to intercede in disputes between the political branches of government that involve matters of war and peace" (Bresnahan 1999). Courts simply are not willing to intercede. That means Congress must reclaim the war power on its own.

This leaves the executive branch free to pursue hostilities to protect important American interests or humanitarian efforts without congressional approval. Can we trust the president to limit the use of military forces? President Clinton justified U.S. intervention in Kosovo because he claimed that Yugoslav President Slobodan Milosevic was engaged in the ethnic cleansing of Albanians there. However, now that the U.N. tribunal investigating the Balkans has issued its report, a different perspective is beginning to emerge. Western officials cited

the genocide death toll at 10,000 or more. Yet, recent accounts show that only about 2,100 bodies have been exhumed in Kosovo. "If the number of ethnic Albanians killed is roughly 3,000, it will approximate the estimated number of Serbs and Albanians killed by NATO bombing" (London 1999, 7). Of course 3,000 murdered people warrants international attention, but "the justification for U.S. intervention was genocide--and thus far there is very little evidence to support that claim" (London 1999, 7).

The Kosovo Conflict raises several questions about the projection of American power, because if the loss of several thousand people warrants intervention, there are dozens of candidates around the globe at all times. Herbert London warns that "the idea that the United States will use its military assets for humanitarian reasons--however they are justified--will at some point exhaust the nation's will to resist when real threats must be countered" (London 1999, 7). President Clinton's exaggerated comparison of Kosovo to World War II genocide inspired a U.S. response this time, but will the American people always be willing to respond when the executive branch cries wolf?

CHAPTER IV

CONGRESSIONAL STRUGGLE

The Constitution is an invitation for a struggle between the president and Congress over control of the war power
(Chemerinsky 1997, 275)

The War Powers Resolution

Congress formally brought the Vietnam War to an end by refusing funds for all combat activities in Southeast Asia in conjunction with the cease-fire in 1973. By the end of the Vietnam War, the magnitude of the presidential war powers climbed to such heights that Congress felt compelled to take action by passing the War Powers Resolution in 1973 (Appendix 4). The War Powers Resolution was partly a direct response to the events of the Vietnam War, but is was also an evolutionary climax of institutional struggles and constitutional debate (Fisher 1995, 128). There were two schools of thought about the War Powers Resolution. One school saw the need to clarify the role of the president as Commander-in-Chief and the other that considered the action unnecessary and unconstitutional.

The essence of the resolution is to promote "collective judgment" by Congress and the president when U.S. forces are sent into hostilities. Both

Congress and the president should be in mutual agreement in actions that may require military force. The statute also places legislative control on the executive war powers through a sixty- to ninety-day deadline on presidential initiatives to use force and the use of a concurrent resolution to require him to remove troops engaged in hostilities. Supporters of the War Powers Resolution saw this as a critical piece of legislation to return the distribution of war powers under the Constitution to the state the Framers originally intended it.

There are some scholars and politicians who consider the War Powers Resolution unconstitutional. According to this school of thought, the most flagrant violations of the president's constitutional rights are Section 2(c), Section 3, Section 4, Section 5 (b), and Section 5(c). I do not find their arguments persuasive, but I outline them below for sake of counterargument.

Section 2(c) of the Resolution may be considered an unconstitutional infringement on the autonomous constitutional power of the president. Section 2 (c) "limits the constitutional powers of the president as Commander-in-Chief to introduce U.S. armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances"; those circumstances being "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Those opposed to the War Powers Resolution consider this section contrary to the rights given the president in the Constitution. According to Mr. Robert F. Turner, former three-term chairman of the Committee on Executive-Congressional Relations of the

American Bar Association Section of International Law and Practice, the president, as Commander-in-Chief, has the authority to deploy and use the Army and Navy, which Congress has provided him, as he deems necessary. The only exception to this is if the president determines it is necessary to initiate offensive actions against another state (such as an attack on Iraq), in which case he must obtain statutory approval from both Houses of Congress before taking such action (1991, 110).

Section 3 of the War Powers Resolution requires the president to consult with Congress "in every possible instance" prior to introducing U.S. troops into "hostilities or into situations where imminent involvement in hostilities" exist. The presidential consultation with Congress is essential and expected, especially when dealing in issues of major foreign policy where the support of Congress and the citizens are essential. However, opponents to the resolution draw the line where Congress *directs* the president to consult them and considers that act unconstitutional. It impairs the president's privilege to use discretion in revealing matters that are sensitive to national security (Turner 1991, 111).

In section 4 of the War Powers Resolution, Congress requires the president, in the absence of a declaration of war, to submit to them a detailed report within forty-eight hours. The opposing argument here is that Congress does not have the constitutional power to compel the president to provide such reports regarding ongoing hostilities, particularly since they should be considered coequal branches of government. In addition to being legally invalid, the practical effect is also undesirable. Possible evidence of the detrimental effects

of such detailed reporting to Congress can be seen in the Vietnam conflict. Some political scientists cite congressional involvement for hindering more aggressive and strategic military action that may have turned the war in the favor of South Vietnam (Turner 1991, 113).

Section 5(b) requires that the president remove troops from any area where hostilities are present, or involvement in hostilities is imminent, within sixty-two or ninety-two days if Congress does not act to authorize the continued presence of U.S. forces. This provision of the resolution may be the most controversial and significant, since by directing the actions of the president to withdraw troops, Congress is encumbering on the president's responsibility outlined in the Constitution as Commander-in-Chief (Turner 1991, 114).

The last section considered by some to be unconstitutional is Section 5(c). This provision gives Congress the authority by concurrent resolution to direct the president to remove U.S. armed forces. The dispute here is the use of the "concurrent resolution" to give binding direction to the executive branch. Concurrent resolutions require only a simple majority of each House of Congress to pass and is more appropriately used for Congress to express its opinions. War Powers Resolution critics say a simple majority vote of Congress cannot assure the Commander-in-Chief power of the executive branch (Turner 1991, 115). In fact, such usurpation of power by Congress would require constitutional amendment.

One critical element missing from most of these arguments is that Congress specifies that these actions must be taken "in the absence of a

declaration of war." Narrowly construed, if Congress has not declared war or authorized military actions, the president, as Commander-in-Chief, does not have the authority to be involved in such actions. As discussed earlier, the intent of the Framers was not only to give Congress the power to declare war, but also the power to initiate hostilities.

Constitutionality

In the event that the War Powers Resolution is truly unconstitutional, why has the Supreme Court not made a ruling indicating such? The Supreme Court has rarely spoken on the constitutionality of the president using troops in a war or war-like circumstances without congressional approval (Chemerinsky 1991, 275). The only cases that exist are the Civil War *Prize Cases*, in which the Court ruled that the president had the power to impose a blockade on southern states without congressional declaration of war. The Court ruled that the president had the responsibility to respond with force to invasions from foreign nations or rebellions from within (Chemerinsky 1991, 208).

The Supreme Court has generally dismissed cases since then on the grounds that they are "nonjusticiable political questions." The political question doctrine restrains the court from reaching beyond its mandate to hear cases or controversies. Political disputes are not considered cases or controversies suitable for the court. "The political question doctrine has been applied to strike a balance between competing democratic values: popular sovereignty and constitutional imperatives" (Hall 1991, 84). Application of the political question doctrine to foreign affairs is still unsettled. In *Goldwater v. Carter* (1979), the

Supreme Court dismissed the lawsuit by several congressmen seeking to prevent President Carter from unilaterally terminating the 1955 Mutual Defense Treaty with the Republic of China. The Court found this issue to be a political question and therefore nonjusticiable. The Court also considered the case not to be "ripe" for hearing, meaning that each party had to take action, creating a controversy for the Supreme Court to hear (Hall 1991, 89).

Dozens of cases were filed in the federal courts during the Vietnam War, arguing that since there was no declaration of war, the War was unconstitutional. "Although the Supreme Court did not rule in any of these cases, either as to justiciability or on the merits, most of the lower federal courts considered the cases to present nonjusticiable political questions" (Chemerinsky 1997, 276). Cases such as the following were among those filed in the federal courts during the Vietnam war: Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (3d Cir.), cert Denied, 416 U.S. 936 (1973); DaCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1963); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir.), cert. Denied, 404 U.S. 869 (1971).

Similarly, challenges to the constitutionality of President Reagan's use of armed forces in El Salvador were dismissed by the lower federal courts as posing a "political question" (Chemerinsky 1997, 276). See Crockett v. Reagan, 720 F2d 1355 (D.C. Cir. 1983), cert denied, 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Lowry v. Reagan, 676 F.Supp. 333 (D.D.C. 1987). President Bush also faced these same issues during the Persian Gulf War as challenges to American involvement were also

dismissed on political question grounds (Chemerinsky 1997, 276). The Judiciary Branch has found a way to avoid providing a clear answer to a question almost as old as this country. Still, the War Powers Resolution provides the best insight to the executive/legislative battle over war powers.

To this date the Supreme Court has not heard a case on the question of the constitutionality of the War Powers Resolution. In order for the Supreme Court to make a judgement, the circumstances would need to be ideal, where a member of Congress filed suit against the president for violating the Resolution, or the president filed suit against Congress for holding him accountable to it. Only then will the case be "ripe" to be heard by the Supreme Court. But just because a case is ripe, does not necessarily mean it is justiciable. Based on the Supreme Court's historic unwillingness to venture into these issues and its propensity for finding them to be political questions, answers from the judiciary are unlikely in the future (Chemerinsky 1997, 278).

The passage of the War Powers Resolution was an attempt by Congress to reassert greater influence in formulating U.S. foreign policy, especially in regard to the use of the armed forces. In the latter half of the twentieth century, the executive branch became a dominant force in U.S. foreign and military policy. But, when the executive branch takes initiatives without the legislature's consent, the War Powers Resolution gives them an outlet to limit or reverse those initiatives. Senator Jacob Javits (R-NY) was in the House of Representatives when the War Powers Resolution came to pass. He describes the evolution as follows:

> Obviously, the fashion of declaring war as we did in World Wars I and II may be obsolete. Nowadays, and since World War II, conflict does not happen that way. There is no formality about it. We slip into it slowly but surely and it gets very fuzzy at the end. No President wants to give up that power. [Presidents] who understand the dreadful penalty, cruelty and barbarism of war don't come along every Wednesday so some new definition of authority is essential and that is what the War Powers Resolution is about (Barnhart 1987, 57).

Critics question the necessity and effectiveness of the War Powers Resolution. Senator Tower of Texas considered the legislation "the most potentially damaging of the 1970's" (Barnhart 1987, 60). But regardless of the critics, the legislation is still in effect with no future of being repealed in the courts. Withstanding the test of time, the War Powers Resolution has several long-term impacts.

First, the War Powers Resolution is a symbol of congressional resurgence in foreign affairs and in the use of its war-making powers. Senator Walter Mondale emphasized the symbolic importance of the Resolution to a Congress "seeking to reassert its coordinated power over the basic decisions affecting the course of our Nation" (Barnhart 1987, 60). Nearly ten years later, the Exon Amendment was passed as part of a military procurement authorization bill in 1981. The Amendment reaffirmed the War Powers Resolution, citing it as a safeguard against misinterpretation of U.S. foreign and defense policies and stressed adherence to the provisions of consultation. Since then, the Sinai Multinational Force Agreements and the Lebanon Resolution have corroborated the War Powers Resolution. The Lebanon Resolution, in particular, invoked the War Powers Resolution over the initial disapproval of the executive branch.

Passage of the Lebanon Resolution signaled the strength of a united Congress exercising its war making powers under the War Powers Resolution (Barnhart 1987, 62).

Second, the War Powers Resolution serves as a mechanism to facilitate congressional reaction to international crises. The War Powers Resolution sets the "legislative machinery in place to permit Congress to respond in an appropriate and timely fashion to its constitutional responsibilities" in crisis situations (Barnhart 1987, 63). Many scholars have criticized the language of the War Powers Resolution as ambiguous language that may have the opposite effect and potentially broaden presidential power instead of limiting it. But the War Powers Resolution has survived intact. This, by itself, is evidence of its durability.

Finally, the War Powers Resolution acts as a partial, if erratic, constraint of presidential decisions to commit U.S. armed forces into combat. This is the real test of the legislation. Regardless of its usefulness as a symbol or mechanism, the success of the War Powers Resolution "ultimately will depend upon how well it achieves its purpose of introducing restraints on presidential war making" (Barnhart 1987, 66). Thus far, the War Powers Resolution has done little more than encourage presidents to report to Congress via letter and usually expost facto.

Some extreme critics of the War Powers Resolution have called for repeal of the legislation. According to Mr. Turner, the "War Powers Resolution has had a very detrimental impact on the operational effectiveness of U.S. armed forces"

(1991, 129). The War Powers Resolution sends the message to the rest of the world that the president does not hold the sole power to wage war for the U.S. The president and Congress must play their appropriate constitutional roles. Experience proves Congress is reluctant to play their role or exercise that power. The net effect is that the United States loses the power of deterrence. No matter how much firepower a country has, aggressors are not deterred if they know that other powers are unwilling or unlikely to use it. The words of Fidel Castro illustrate this: "I understand how your government works, and I know that none of your congresses will allow any of your presidents to do to me what they would like to do to me" (Turner 1991, 130). Clearly, deterrence is not a factor for Castro. Mr. Turner cites several other problems with the War Powers Resolution. He believes that the sixty-day limit encourages enemies to protract and escalate hostilities to increase U.S. casualties. Turner believes that it violates Locke's warning about controlling foreign relations by antecedent law, and that it deprives Congress of its inherent institutional rights (1991, 148-149).

However, critics who urge repealing the War Powers Resolution appear to be in the minority. The growing role of the United States as a world power in the latter half of the Twentieth Century inspires advocates of executive power to argue the contemporary climate requires decisive presidential action. However, if the threat to national security has increased so dramatically, as Turner believes, then the risk of presidential error and aggrandizement is also increased. Advocates of the War Powers Resolution believe this is cause for greater scrutiny of military actions by Congress as provided for by the Constitution and

reasserted in the War Powers Resolution. The War Powers Resolution does not function perfectly, but repealing it would probably be seen as an expansion of the authority of the executive branch. Some supporters of the resolution actually believe that it gives the president *too much* latitude. The resolution gives the president the authority to use military force unilaterally for up to sixty days, any time, anywhere, for any reason (Fisher 1995, 188). Turner and others consider the sixty-day limit a threat to national security because this window allows the president the opportunity to conduct entrenched military operations that would be considered acts of war. Supporters of the resolution agree the president needs some emergency authority, but not to the extent of invading other countries as is potentially authorized under the current wording of the War Powers Resolution (Fisher 1995, 192). It is ironic that the executive branch reads sections of the War Powers Resolution as expanding presidential power, when Congress clearly designed it to limit the president to the constitutionally specified war power.

The Power of the Purse

Another instrument available to Congress to limit the power of the executive branch is the "power of the purse". Article I, Section 8, of the Constitution provides that "the Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." The Constitution ties the power to tax to the need to provide for the common defense. Clauses 12-14 of this same Section further define the Congress' responsibility over defense affairs:

> Clause 12: To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

Clause 12: To provide and maintain a navy.

Clause 13: To make rules for the government and regulation of the land and naval forces.

Congress has demonstrated repeatedly that the power of the purse is its ultimate power to have the final say in military affairs. With this tool, Congress has molded the programs, policy, and budget of the Pentagon (Lehman 1992, 270). The Framers deliberately divided the government by making the President the Commander-in-Chief while giving Congress the decision to finance military operations. The control of the budget is potentially the most influential power in the war-making policy arena. However, Congress must exercise the power in order to influence the president.

CHAPTER V

WHERE DO WE GO FROM HERE?

The easy conclusion is that Congress possesses the constitutional authority to initiate and declare war. Modern history shows that the president is very likely to take any action he deems necessary to protect our national interests abroad and yet not define those actions as war no matter the military involvement. Perhaps that is because we cannot afford to reach political stalemates in today's environment, or perhaps it is because history is on the president's side. In the years since the War Powers Resolution became law, presidents have acted quite consistently. They have generally cited their power as Commander-in-Chief, treaty obligations and authority, and a general right to protect our national interests in order to unilaterally apply military force abroad.

Even when the executive branch sought congressional approval in advance, they were not concerned if Congress failed to specifically declare war. The intent of the Framers is clear--only Congress has the power to declare or initiate war. A requirement that Congress declare war before involving the United States military in hostilities would be very difficult and clearly result in less military deployments due to lack of political support from Congress. Whether or not you agree with the outcome of a congressional vote in any one circumstance is less

important than following a defined standard that is not subject to presidential abuse and usurpation of power.

What are the realities as we enter the Twenty-First Century? The United States is a global power, probably the only remaining superpower. The post World War II role of the United States has changed significantly with more emphasis on U.S. involvement in affairs and "hot-spots" around the globe, such as the Middle East and the Baltic regions. Foreign affairs is fraught with uncertainty and risk today. I believe it is more critical now than ever to return to the Founding Fathers' designed division of the war powers.

In order to successfully return to their plan, several things must happen. First, Congress must seize the initiative; they must declare war when necessary and withhold all military funding (if that is what it takes) when the president unilaterally exercises the war power. Second, Congress and the president must cooperate in foreign affairs. Congress must be willing to share the responsibility of war powers by making the difficult vote when it counts, not on the eve of bombing or after the hostilities are over. Presidents must also share information with Congress and follow their direction--if war is not declared, U.S. troops simply should not be deployed to hostile environments absent emergency justifications. Finally, the president should never deploy troops into a hostile environment absent a congressional declaration of war or authorization. Presidential reliance on Commander-in-Chief power, treaties, and national interest is not sufficient justification for usurpation of war power.

Congress has not been seizing the initiative; it has not declared war in more than fifty years, in spite of the numerous military confrontations during that time. Congress has acquiesced during the presidents' usurpation of power by allowing the president to exercise the full war power of the United States based on anything less than a congressional authorization or declaration of war. This does not mean that Congress has lost the war power; Congress does not lose the power to declare war, simply by not exercising it. If Congress would either declare war when necessary or prevent the president from exercising the war power unilaterally, the intent of the Founding Fathers would be met. Either the legislative branch would vote to declare war or the United States would go to war only sparingly—the result intended by the Founding Fathers. That is why they assigned the war powers to the deliberative body of the United States.

It is crucial that the president and Congress work together to show unanimous support of the United States whenever military action is required. Aside from emergency situations, cooperation is required in support of Mutual-Security Treaties in accordance with the internal constitutional process, by the War Powers Resolution, and is desirable as a matter of public policy. Yet, Mr. John Lehman, former secretary of the Navy under Reagan, tells us:

> Since 1973, the 'pious, nonoperative, non-binding, non-enforceable language' of the War Powers Act described by Senator Eagleton as the bill's heart has led to numerous conflicts between the President and Congress. The vagueness of the resolution has meant, in practice, that the executive has ignored and avoided living up to the requirements of the resolution in times of crisis or hostility. Since the bill's passage, history has shown that Congress behaves just as it did before it was passed, supporting executive action in direct proportion to its success and to the political profit to be derived from such support (1992, 97).

This is not cooperation. Congress must vote when the situation or hostility arises. Congress has grown too comfortable putting all the power and responsibility in the President's hands. They have avoided ever declaring a war which the U.S. went on to lose, but at too high a cost. If Congress would cooperate and vote, more hostilities would be avoided and perhaps U.S. resolve would be high enough to ensure victory in future wars.

The final requirement is for the president to resist involving the U.S. military in undeclared wars around the globe. Even President Clinton, in a speech to the 54th session of the United Nations, "urged the world body to continue intervening in humanitarian conflicts such as Kosovo and East Timor, even as he admitted, 'we cannot do everything everywhere'" (Cummings 1999, B9). Perhaps that is because President Clinton recognized, based on the lack of congressional support for the air war in Kosovo, that even the one true superpower cannot promise to be there every time. He did say that "Bosnia, Kosovo, and East Timor all serve as models for an expanded U.N. role in curbing the kind of brutal violence that has repulsed and rallied the international community. . . . But global leaders must approach the issue with humility and the recognition that promising too much can be as cruel as caring too little" (Cummings 1999, B9). Considering President Clinton's willingness to use U.S. armed forces abroad without Congress' authorization, his limiting speech is surprising and encouraging. Regardless, his term in office is coming to a close.

The current presidential election cycle enables us to glimpse into the minds of the various potential future presidents. What do they think is the proper

role of the president and Congress with respect to war powers? Former presidential candidate, Senator John McCain believes American troops should be sent into combat overseas not only when vital American interests are involved, but "when our principles and our values are so offended that we have to do what we can to resolve a terrible situation" (Hall 2000, 6). This sounds very similar to the humanitarian justification (preventing genocide) that President Clinton used to intervene in Kosovo. That should not be a surprise, since Senator McCain's only criticism during the Kosovo Conflict was that President Clinton declared he was not pursuing a ground war and that Congress would not pass a resolution authorizing the use of "all necessary force." Senator McCain would lead the United States into war for humanitarian reasons, and he would not limit the war to air strikes. It is unclear whether McCain believes the president must wait for congressional approval.

Governor George Bush contends that a president should deploy U.S. armed forces only in areas that are vital to our national strategic interest. He sited examples such as the closing of the Panama Canal and the preservation of a peaceful and prosperous Europe and Asia, which may ultimately be a blanket statement for military involvement in almost any crisis. However, Governor Bush does not think the U.S. should to try to be the peacekeepers all around the world (Hall 2000, 6). It is also unclear whether Bush believes the president must wait for congressional approval.

Senator McCain is no longer a presidential candidate this election, but Governor Bush is the Republican primary winner. Can Governor Bush or Vice

President Gore resist the urge to unilaterally exercise the war power? Modern history tells us no. Will Congress seize the initiative? Modern history says no. Will they cooperate? Unfortunately, only if their political goals happen to coincide. Therefore, there is no reason to expect substantial change. This debate will likely survive many future elections.

APPENDIX 1

LIST OF UNDECLARED WARS

The following list covers more than two hundred instances of the United States using forces abroad without a congressional declaration of war. The list only covers the years 1798 to 1989, so the "Persian Gulf War", Somalia, Yugoslavia, Kosovo and other instances are not included. There are many other instances the list does not include (covert actions, mutual security organizations, etc.). The purpose of the list is simply to demonstrate the numerous times the United States has used forced absent a declaration of war. The original source for the list was the Congressional Record—Senate (January 10, 1991): S130-S135 (Westerfield, 197-206).

1.	1798-1800	Undeclared naval war with France.
2.	1801-1805	Tripoli, The First Barbary War.
3.	1806	Mexico (Spanish Territory). Invasion of Rio Grande.
4.	1806-1810	Gulf of Mexico. American boats against Spanish & French.
5.	1810	West Florida (Spanish Territory).
6.	1812	Parts of East Florida. Occupation by Gen. Matthews.
7.	1813	West Florida (Spanish Territory). Seizure of Mobile Bay.
8.	1813-1814	Marquesas Islands. Fort built on Nukahiva Island.
9.	1814	Spanish Florida. Gen. Andrew Jackson takes Pensacola.
10.	1814-1825	Caribbean. Fighting in Cuba, Puerto Rico, and others.
11.	1815	Algiers. The Second Barbary War.
12.	1815	Tripoli. Decatur's squadron at Tunis and Tripoli.
13.	1816	Spanish Florida. United States destroys Nicholis Fort.

14.	1816-1818	Spanish Florida. First Seminole War.
15.	1817	Amelia Island. United States lands and fights smugglers.
16.	1818	Oregon. USS Ontario takes Columbia River.
17.	1820-1823	Africa. United States raids slave traffic.
18.	1822	Cuba. U.S. Navy burns pirate station.
19.	1823	Cuba. U.S. Navy lands in multiple locations.
20.	1824	Cuba. USS Porpoise pursues pirates.
21.	1824	Puerto Rico (Spanish Territory). Attack pirates at Fajarado.
22.	1825	Cuba. U.S. and Britain capture pirates at Sagua La Grande.
23.	1827	Greece. Pirates hunted at Argenteire, Miconi, and Androse.
24.	1831-1832	Falkland Islands. Capture of 3 American ships investigated.
25.	1832	Sumatra. Retaliation to village for attack on American ships.
26.	1833	Argentina. U.S. interests in Buenos Aires protested.
27.	1835-1836	Peru. U.S. interests protected during revolution.
28.	1836	Mexico. Gen. Gaines occupies Nacogdoches (Texas).
29.	1838-1839	Sumatra. Retaliation for attacks on U.S. shipping.
30.	1840	Fiji Islands. Retaliation for attacks on U.S. ships.
31.	1841	Drummond Island. Murder of seaman avenged.
32.	1841	Samoa. Murder of seaman avenged.
33.	1842	Mexico. Com. Jones occupies Monterrey and San Diego.
34.	1843	China. *St. Louis* lands after dispute at Canton.
35.	1843	Africa. Four U.S. ships land to punish attacks on shipping.
36.	1844	Mexico. U.S. forces protect Texas against Mexico.
37.	1849	Smyrna. U.S. forces gain release of seized American.
38.	1851	Turkey. Demonstration along coast after massacre at Jaffa.
39.	1851	Johanns Island. Retaliation for imprisonment of American.
40.	1852-1853	Argentina. Marines protect American interests.
41.	1853	Nicaragua. United States protects American interests.
42.	1853-1854	Japan. Perry Expedition.
43.	1853-1854	Ryuku and Bonin Islands. Perry opens for commerce.
44.	1854	China. U.S. interests protected during Shanghai civil strife.

45. 1854 Nicaraqua. Town destroyed to avenge American minister.
46. 1855 China. U.S. interests protected against pirates.
47. 1855 Fiji Islands. Reparation sought for attacks on Americans.
48. 1855 Uruguay. U.S. interests protected during revolution.
49. 1856 Panama. U.S. interests protected during insurrection.
50. 1856 China. Attack on U.S. boat avenged.
51. 1857 Nicaragua. Walker's attempt to control country opposed.
52. 1858 Uruguay. Two U.S. ships to protect U.S. interests.
53. 1858 Fiji Islands. Retaliation for murder of two U.S. citizens.
54. 1859 Turkey. Naval retaliation for massacre of Americans.
55. 1859 Paraguay. Navy retaliates for attack on naval vessel.
56. 1859 Mexico. U.S. forces pursue Cortina across Mexican border.
57. 1859 China. U.S. interests in Shanghai protected.
58. 1860 Angola, Portugese West Africa. U.S. interests protected.
59. 1860 Columbia. U.S. interests protected during revolution.
60. 1863 Japan. Retaliation for firing on U.S. ship at Shimonoseki.
61. 1864 Japan. U.S. minister to Japan protected.
62. 1865 Panama. U.S. lives & property protected during revolution.
63. 1866 Mexico. Matamoras captured to protect U.S. interests.
64. 1866 China. Retaliation for assault on U.S. consul at Newchwang.
65. 1867 Nicaragua. Marines occupy Managua and Leon.
66. 1867 Island of Formosa. Retaliation for murder of American crew.
67. 1868 Japan. U.S. interests protected during civil war.
68. 1868 Uruguay. U.S. interests protected during insurrection.
69. 1868 Columbia. U.S. interests protected at Aspinwall.
70. 1870 Mexico. Pirate ship *Forward* destroyed.
71. 1870 Hawaiian Islands. U.S. flag at half-mast at Queen's death.
72. 1871 Korea. Retaliation for murder of *General Sherman* crew.
73. 1873 Columbia. U.S. interests protected during civil insurrection.
74. 1873 Mexico. Border crossed to pursue cattle thieves.
75. 1874 Hawaiian Islands. U.S. interests protected.

76.	1876	Mexico. Town of Matamoras policed temporarily.
77.	1882	Egypt. U.S. interests protected during looting of Alexandria.
78.	1885	Panama. Transit protected during revolution.
79.	1888	Korea. U.S. interests in Seoul protected during unrest.
80.	1888	Haiti. American steamer retaken.
81.	1888-1889	Samoa. U.S. citizens & consulate protected during civil war.
82.	1889	Hawaiian Islands. U.S. interests protected during revolution.
83.	1890	Argentina. U.S. consulate & legation protected.
84.	1891	Haiti. U.S. interest on Navassa Island protected.
85.	1891	Bering Strait. Seal poaching stopped.
86.	1891	Chile. U.S. consulate & others protected during revolution.
87.	1893	Hawaii. Provisional government under S.B. Dole protected.
88.	1894	Brazil. U.S. shipping protected during civil war.
89.	1894	Nicaragua. U.S. interests protected following revolution.
90.	1894-1895	China. Marines move to Peking for protection.
91.	1894-1895	China. U.S. nationals at Newchwang protected.
92.	1894-1896	Korea. U.S. interests protected during Sino-Japanese War.
93.	1895	Columbia. U.S. interests protected during bandit attack.
94.	1896	Nicaragua. U.S. interests protected in Corinto.
95.	1898	Nicaragua. U.S. interests protected in San Juan del Sur.
96.	1898-1899	China. Legation and consulate guarded during civil unrest.
97.	1899	Nicaragua. U.S. interests protected from Gen. Juan Reyes.
98.	1899	Samoa. U.S. interests protected during civil unrest.
99.	1899-1901	Philippine Islands. U.S. interests protected & islands taken.
100.	1900	China. Lives protected during Boxer uprising.
101.	1901	Columbia. Transit of isthmus protected during revolution.
102.	1902	Columbia. U.S. interests protected during civil war.
103.	1902	Columbia. Transit of isthmus protected during civil war.
104.	1903	Honduras. U.S. consulate protected during revolution.
105.	1903	Dominican Republic. U.S. interests protected.
106.	1903	Syria. Consulate protected during feared Moslem uprising.

107. 1903-1904 Abyssinia. U.S. consul general protected.
108. 1903-1914 Panama. U.S. interests protected during canal construction.
109. 1904 Dominican Republic. U.S. interests protected.
110. 1904 Tangier, Morocco. U.S. troops demonstration.
111. 1904 Panama. U.S. lives protected during feared insurrection.
112. 1904-1905 Korea. U.S. Legation at Seoul guarded.
113. 1904-1905 Korea. Marine guard sent to Seoul for protection.
114. 1906-1909 Cuba. U.S. interests protected during revolution.
115. 1907 Honduras. U.S. interests protected during war.
116. 1910 Nicaragua. U.S. interests protected in Corinto.
117. 1911 Honduras. U.S. interests protected during civil war.
118. 1911 China. U.S. interests protected during nationalist revolution.
119. 1912 Honduras. U.S. forces protect American-owned railroad.
120. 1912 Panama. U.S. troops supervise elections of canal zone.
121. 1912 Cuba. U.S. interests protected in Oriente and Havana.
122. 1912 China. U.S. interests protected during revolution.
123. 1912 Turkey. U.S. Legation guarded during Balkan War.
124. 1912-1925 Nicaragua. U.S. interests protected during near revolution.
125. 1912-1941 China. U.S. interests protected in several instances.
126. 1913 Mexico. U.S. Marines evacuate U.S. citizens during strife.
127. 1914 Haiti. U.S. interests protected during civil unrest.
128. 1914 Dominican Republic. U.S. Navy assists Puerto Plata.
129. 1914-1917 Mexico. Pershing's expedition and other activity.
130. 1915-1934 Haiti. U.S. helps maintain order during chronic insurrections.
131. 1916 China. U.S. interests protected during riot.
132. 1916-1924 Dominican Republic. U.S. helps during insurrections.
133. 1917 China. U.S. interests protected during civil unrest.
134. 1917-1922 Cuba. U.S. interests protected during insurrection.
135. 1918-1919 Mexico. Bandits pursued across border.
136. 1918-1920 Panama. Police duty during elections at Chiriqui.
137. 1918-1920 Soviet Russia. U.S. interests protected during war.

138.	1919	Dalmatia. Order maintained at request of Italy.
139.	1919	Turkey. USS *Arizona* protects U.S. consulate.
140.	1919	Honduras. Order maintained in neutral zone.
141.	1920	China. Lives protected at Kiukiang.
142.	1920	Guatemala. U.S. interests protected during internal war.
143.	1920-1922	Russia. Radio station on Bay of Vladivostok protected.
144.	1921	Panama-Costa Rica. Naval squadron helps prevent war.
145.	1922	Turkey. Citizens protected when nationalists enter Smyrna.
146.	1922-1923	China. U.S. lives protected during civil unrest.
147.	1924	Honduras. U.S. lives and interests protected during election.
148.	1924	China. Lives protected during Chinese factional hostilities.
149.	1925	China. Lives protected in International Settlement.
150.	1925	Honduras. Foreigners protected during civil unrest.
151.	1925	Panama. U.S. interests protected during strikes & riots.
152.	1926	China. U.S. lives protected at Hankow and Kiukiang.
153.	1926-1933	Nicaragua. U.S. lives and interests protected upon coup.
154.	1927	China. U.S. lives protected during hostilities.
155.	1932	China. U.S. lives protected during Japanese occupation.
156.	1933	Cuba. Naval forces demonstrate during revolution.
157.	1940	Newfoundland & Caribbean. Air and naval bases protected.
158.	1941	Greenland. Taken under protection by United States.
159.	1941	Dutch Guiana. Troops occupy to protect aluminum supply.
160.	1941	Iceland. Taken under protection by United States.
161.	1941	Germany. Navy protection of shipping lanes to Europe.
162.	1945	China. U.S. troops help disarm and repatriate Japanese.
163.	1946	Trieste. Troops sent because Yugoslav shot U.S. plane.
164.	1948	Palestine. Consular guard protects U.S. consul general.
165.	1948-1949	China. U.S. Embassy and U.S. lives protected.
166.	1950-1953	Korean War. Assistance to ROK under UN resolutions.
167.	1950-1955	Taiwan. U.S. Seventh Fleet protects Taiwan from Chinese.
168.	1954-1955	China. U.S. Navy evacuates U.S. personnel.

169.	1956	Egypt. Marines evacuate U.S. nationals during Suez crisis.
170.	1958	Lebanon. Assistance given during insurrection from outside.
171.	1959-1960	The Caribbean. Marine protection during Cuban crisis.
172.	1962	Cuba. President Kennedy "quarantines" missiles to Cuba.
173.	1962	Thailand. Marines protect Thailand from Communist threat.
174.	1962-1975	Laos. U.S. military support to Laos.
175.	1964	Congo. Airlift of foreign troops to rescue foreigners.
176.	1964-1973	Vietnam War. U.S. helps S. Vietnam against communists.
177.	1965	Dominican Republic. U.S. interests protected during revolt.
178.	1967	Congo. U.S. provides support to Congo government.
179.	1970	Cambodia. U.S. helps South Vietnam against Viet Cong.
180.	1974	Evacuation from Cyprus.
181.	1975	Evacuation from Vietnam. Evacuation of U.S. nationals.
182.	1975	Evacuation from Cambodia. Evacuation of U.S. nationals.
183.	1975	South Vietnam. U.S. and S. Vietnam nationals evacuated.
184.	1975	*Mayaguez* incident. U.S. forces retake from Cambodia.
185.	1976	Lebanon. U.S. nationals and Europeans evacuated.
186.	1976	Korea. Troops reinforced after U.S. personnel killed in DMZ.
187.	1978	Zaire. Support provided to Belgian & French rescues.
188.	1980	Iran. Attempt to rescue American hostages in Iran.
189.	1981	El Salvador. Military advisors train counterinsurgency.
190.	1981	Libya. Nimitz planes shoot down Libyan jets after they fire.
191.	1982	Sinai. Multinational force and observers under P.L. 97-132.
192.	1982	Lebanon. Marines help PLO withdraw from Beirut.
193.	1982	Lebanon. U.S. aids in restoration of Lebanese sovereignty.
194.	1983	Egypt. U.S. assists Sudan and Egypt against Libya.
195.	1983-1989	Honduras. U.S. ferries Honduran troops to repel Nicaragua.
196.	1983	Chad. U.S. assists Chad against Libyan forces.
197.	1983	Grenada. U.S. troops help restore law and order.
198.	1984	Persian Gulf. U.S. assists Saudi against Iranian fighter jets.
199.	1985	Italy. Navy pilots force Egyptian airliner hijackers to land.

200.	1986	Libya. Hostile exchange of Libyan and U.S. missiles.
201.	1986	Libya. U.S. conducts bombing strikes in Libya.
202.	1986	Bolivia. U.S. assists Bolivia in antidrug operations.
203.	1987-1988	Persian Gulf. U.S. assists reflagging operations in Kuwait.
204.	1988	Panama. U.S. increases troops during Noriega regime.
205.	1989	Libya. U.S. Navy shoots down two Libyan jets.
206.	1989	Panama. U.S. troops seize Noriega after election ignored.
207.	1989	Andean Initiative on War on Drugs. U.S. against drug trade.
208.	1989	Philippines. U.S. jets help Aquino repel a coup attempt.

APPENDIX 2

LIST OF DECLARED WARS (Westerfield, 207)

Congress declared war only five times between 1787 and 1999.

1. **War of 1812**. On June 18, 1812, the United States declared war against the United Kingdom of Great Britain and Ireland. (1812-1815)

2. **Mexican War**. On May 13, 1846, the United States declared war against Mexico. (1846-1848)

3. **The Spanish-American War**. On April 25, 1898, the United States declared war against Spain. (1898)

4. **World War I**. On April 6, 1917, the United States declared war against Germany and on December 7, 1917, against Austria-Hungary. (1917-1918)

5. **World War II**. On December 8, 1941, the United States declared war against Japan, on December 11 against Germany and Italy, and on June 5, 1942, against Bulgaria, Hungary, and Romania. (1941-1945)

APPENDIX 3

EXCERPTS FROM THE U.N. CHARTER -- CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE AND ACTS OFAGRESSION

Article 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures, as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and or rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43.

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces assistance, and facilities, including rights or passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44. When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45. In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force

contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46. Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff committee.

Article 47.

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at tits disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

Article 48.

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the

Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49. The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

APPENDIX 4

TEXT OF THE WAR POWERS RESOLUTION

Public Law 93-148 [H.J.Res. 542], 87 Stat. 555, 50 U.S.C. 1541-1548, passed over President's veto November 7, 1973

JOINT RESOLUTION Concerning the war powers of Congress and the President

Resolved by the Senate and House of Representatives of the United States in Congress assembled,

SHORT TITLE

Sec. 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Congressional legislative power under necessary and proper clause

Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested

by the Constitution in the Government of the United States, or in any department or officer hereof.

(c) Presidential executive power as Commander-in-Chief; limitation

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

Sec. 3. 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, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

Sec. 4. Reporting requirement

(a) 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--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated
by the circumstances;

(2) 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

(3) 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 -

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) Other information reported

The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Periodic reports; semiannual requirement

Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

Sec. 5. (a) Transmittal of report and referral to Congressional committees; joint request for convening Congress

Each report submitted pursuant to section 4 (a)(1) of this title shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Termination of use of United States Armed Forces; exceptions; extension period

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4 (a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the 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.

(c) Concurrent resolution for removal by President of United States Armed Forces

Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory

authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONALLL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

Sec. 6. (a) Time requirement; referral to Congressional committee; single report

Any joint resolution or bill introduced pursuant to section 5 (b) of this title at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote

Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee

Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) of this section and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5 (b) of this title. The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses

In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5 (b) of this title. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY FOR CONCURRENT RESOLUTION

Sec. 7. (a) Referral to Congressional committee; single report

Any concurrent resolution introduced pursuant to section 5 (c) of this title shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote

Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee

Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) of this section and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such

House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses

In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

Sec. 8. (a) Inferences from any law or treaty

Authority 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 - (1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.

(b) Joint headquarters operations of high-level military commands

Nothing in this chapter shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to November 7, 1973, and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) Introduction of United States Armed Forces

For purposes of this chapter, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Constitutional authorities or existing treaties unaffected; construction against grant of Presidential authority respecting use of United States Armed Forces Nothing in this chapter - (1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this chapter.

SEPARABILITY CLAUSE

Sec. 9. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to any other person or circumstance shall not be affected thereby.

BIBLIOGRAPHY

American Political Network (APN). "The End is not in Sight". *American Political Network*, Volume 10, No. 9, National Briefing TV. 20 April 1999.

Barnhart, M. (Ed.). *Congress and United States Foreign Policy.* New York: State University of New York Press, 1987.

Bartlett, Rosco. "Our Constitutions is at Stake in the War in Kosovo". *Government Press Releases by Federal Document Clearing House*, no page. 21 April 1999.

Bresnahan, John. "Campbell Suit Dismissed by Federal Judge". *Roll Call*, no page. 10 June 1999.

Bush, George. "Statement on Signing the Resolution Authorizing the Use of Military Force against Iraq—January 14, 1991". *Public Papers of the Presidents of the United States: George Bush*, Vol. 1, 40. Washington, D.C: U.S. Government Printing Office, 1992.

Bush, George. "Letter to Congressional Leaders of the Persian Gulf Crisis—January 8, 1991". *Public Papers of the Presidents of the United States: George Bush*, Vol. 2, 13-14. Washington, D.C: U.S. Government Printing Office, 1992.

Bush, George. "Letter to Congressional Leaders Reporting on the National Emergency with Respect to Iraq". *Public Papers of the Presidents of the United States: George Bush*, Vol. 2, 131. Washington, D.C: U.S. Government Printing Office, 1992.

Caldwell, Robert J. "What worked, What didn't in Kosovo?". *The Washinton Times*, B3. 10 October 1999.

Chemerinsky, E. *Constitutional Law.* New York: Aspen Law & Business, 1997.

Cohen, Richard E. "Congress Sits on the Sidelines". *National Journal*, no page. 3 April 1999.

Cummings, Jeanne. "Clinton Encourages U.N. to Continue Intervening in Humanitarian Conflicts". *The Wall Street Journal*, B9. 22 September 1999.

Ely, John Hart. *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath.* New Jersey: Princeton University Press, 1993.

Fisher, L. *Presidential War Power.* Kansas: University Press of Kansas, 1995.

Franck, Thomas M. and Faiza Patel. "UN Police Action in Lieu of War: "The Old Order Changeth"". *American Journal of International Law,* Volume 85, Issue 1, 63-74. 1991.

Franck, Thomas M. and Michael J. Glennon. *Foreign Relations and National Security Law: Cases, Materials and Simulations.* Minnesota: West Publishing Company, 1993.

Gaillard Hunt (Ed.). *The Writings of James* Madison: "Letter of April 2, 1798 to Thomas Jefferson". 1910.

Glennon, Michael J. *Constitutional Diplomacy.* New Jersey: Princeton University Press, 1990.

Glennon, Michael J. "The Constitution and Chapter VII of the United Nations Charter". *American Journal of International Law*, Volume 85, Issue 1, 74-88. 1991.

Graebner, Norman A. "The President as Commander in Chief: A Study in Power". *The Journal of Military History,* Volume 57, Issue 1, 111-132. 1993.

Hall, D. *The Reagan Wars.* San Francisco: Westview Press, 1991.

Hall, John. "Distinct Choices for Commander in Chief". *The Tampa Tribune*, Page 6. 20 February 2000.

Hamilton, Alexander, James Madison and John Jay. *The Federalist Papers.* New York: The Penguin Group, 1961.

Henkin, Louis. "The Constitution for Its Third Century: Foreign Affairs". *American Journal of International Law*, Volume 83, Issue 4, 713-717. 1989.

Henkin, Louis. *Foreign Affairs and the United States Constitution.* New York: Clarendon Press, 1996.

Hosler, Karen. "Senate avoids vote on using added force in Yugoslavia". *The Baltimore Sun*, A8. 1 May 1999.

Lehman, J. *Making War.* New York: Maxwell Macmillan International, 1992.

London, Herbert. "Exhausting the Nation's Will to Act". *Journal of Commerce*, Page 7. 8 December 1999.

News Services. "Russians Urge U.N. Peacekeeping Force". *The Florida Times-Union*, A1. 30 April 1999.

S.REP. NO. 220. "Report of the Senate Foreign Relations Committee on the War Powers Act". 93rd Congress, 1st Session. 1973.

Smyrl, M. *Conflict or Codetermination? Congress, the President, and the Power to Make War.* Massachusetts: Ballinger Publishing Company, 1988.

Stern, Gary M. and Morton H. Halperin. *The U.S. Constitution and the Power to go to War: Historical and Current Perspectives.* Connecticut: Greenwood Press, 1994.

Torry, Jack. "Breakthrough in the Balkans". *Pittsburgh Post-Gazette*, A5. 6 Jun 1999.

Turner, R. *Replealing the War Powers Resolution.* New York: Brassey's (US), Inc., 1991.

Westerfield, Donald L. *War Powers: The President, the Congress, and the Question of War.* Connecticut: Praeger Publishers, 1996.

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