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PUTTING CONSTITUTIONAL TEETH INTO A PAPER TIGER: HOW TO FIX THE WAR POWERS RESOLUTION

BRIAN J. LITWAK*

I. INTRODUCTION

On March 19, 2011, American and European forces unleashed an aerial attack of warplanes and Tomahawk missiles on a scale unknown to the Arab world since the Iraq War.¹ President Obama explicitly authorized the use of the American military to enforce a United Nations-sanctioned no-fly zone in Libya.² Serving as a domestic counter-balance to the President's actions in Libya was the War Powers Resolution (WPR),³ legislation requiring the President to remove all troops engaged in hostilities without categorical authorization from Congress within sixty days.⁴ Sixty-one days after the President authorized the use of American forces, however, those forces were still actively imposing a no-fly zone over Libya in the absence of congressional authorization.⁵ Did President Obama breach the bounds of his constitutional authority? Does the WPR mark a congressional infringement on the President's power as commander-in-chief?⁶ Although the WPR has been the subject

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1 See, e.g., David D. Kirpatrick, Steven Erlanger & Elisabeth Bumiller, *Allies Open Air Assault on Qaddafi's Forces in Libya*, N.Y. TIMES, Mar. 19, 2011, at A1.

2 See *id.*; see also Helene Cooper & Steven L. Myers, *Obama Takes Hard Line with Libya After Shift by Clinton*, N.Y. TIMES, Mar. 18, 2011, at A1 (noting, however, that the use of force would be limited—no ground troops and a hostile engagement lasting “days, not weeks”).

3 War Powers Resolution, 50 U.S.C. §§1541–48 (2006) [hereinafter War Powers Resolution].

4 See *id.* § 1544(b) (“Within sixty calendar days . . . the President shall terminate any use of United States Armed Forces . . . 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.”). Technically, pursuant to the WPR, the President must remove the armed forces in sixty days with an allowable thirty day extension if the President certifies to Congress in writing that there is “unavoidable military necessity respecting the safety of [the troops]” See *id.*; discussion *infra* Part II.A.

5 See, e.g., Felicia Sonmez, *Libya Conflict Sparks War Powers Debate in Senate*, WASH. POST, May 19, 2011, available at http://www.washingtonpost.com/blogs/2chambers/post/libya-conflict-sparks-war-powers-debate-in-senate/2011/05/19/AFpb8I7G_blog.html.

6 U.S. CONST. art. II, § 2 (“The President shall be the Commander in Chief of the Army and Navy of the United States”).

of much scholarly debate, the overwhelming majority of commentators largely view it as a legislative catastrophe.⁷

The War Powers Resolution has failed its mandate to create a partnership between Congress and the President when deciding to use armed force. This failure is mainly attributable to its statutory language, which effectively prohibits the exercise of the judiciary from bolstering the WPR's legal credibility.⁸ However, subtle substantive changes to the WPR can make it a constitutionally operable statute capable of fostering an environment conducive to cooperation between the governmental branches, as originally contemplated by its drafters, without infringing on the President's power as commander-in-chief.

This Article will first briefly discuss the history of the WPR, the operable provisions, and the Executive's longstanding failure to comply with the WPR. Part III will analyze the legal ineffectiveness of the trigger provisions of the WPR. Finally, Part IV will propose amendments to fix the WPR and fit it into a constitutionally viable framework.

II. THE WAR POWERS RESOLUTION

“War is Hell.”⁹ Perhaps no event in United States history exemplified this phrase like the Vietnam War. A congressional resolution permitted Presidents Johnson and Nixon to drag the United States through a highly unpopular war (lasting over ten years and causing the loss of over 58,000 American lives) without a formal congressional declaration of war.¹⁰ The Vietnam experience created a permanent skepticism of unchecked presidential authority in the war powers arena.¹¹ The cynicism of unchecked Presidential power served as the catalyst driving the drafting of the WPR. Passed over President Nixon's veto in 1973, the WPR's stated goal was to “assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be

7 See, e.g., Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995); Thomas M. Franck, *Rethinking War Powers: By Law or by “Thaumaturgic Invocation”?*, 83 AM. J. INT'L L. 766 (1989) (arguing that the WPR was good in theory, but faulty in its drafting and execution). *But see* Michael B. Weiner, Note, *A Paper Tiger with Bite: A Defense of the War Powers Resolution*, 40 VAND. J. TRANSNAT'L L. 861 (2007) (arguing that the WPR has had a positive practical effect on the implementation of presidential unilateral use of force). The phrase “paper tiger” has been a fitting term used to describe the War Powers Resolution. A translated Chinese phrase, “paper tiger” is defined as “one that is outwardly powerful or dangerous but inwardly weak or ineffectual.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 897 (11th ed. 2004).

8 See Franck, *supra* note 7, at 768–70.

9 General William Tecumseh Sherman, Commencement Address at the Michigan Military Academy (June 19, 1879).

10 The Vietnam War was not a declared war pursuant to Congress's Article I power. Rather, Congress authorized the President, pursuant to the Gulf of Tonkin Resolution, to use armed force in Vietnam, with the resolution to “expire when the President shall determine that peace and security of the area is reasonably assured . . .” See DONALD L. WESTERFIELD, *WAR POWERS: THE PRESIDENT, THE CONGRESS, AND THE QUESTION OF WAR* 2–3 (1996). This would mark the last time Congress permitted the President to use armed force without a time constraint. See *id.*

11 See *id.* at 4. This skepticism is alive and well today, often embodied by the common mantra, “Will this [conflict] turn into another Vietnam?” See, e.g., Paul Steinhauser, *Will Afghanistan Turn into Another Vietnam?*, CNN POLITICS (Oct. 19, 2009), <http://politicalticker.blogs.cnn.com/2009/10/19/cnn-poll-will-afghanistan-turn-into-another-vietnam/>.

lawful.”¹²

A. Operable Provisions

Section 1542 obliges the President to “consult with Congress before introducing United States Armed Forces into hostilities or into situations where involvement in hostilities is clearly indicated by the circumstances”¹³ Section 1542 also mandates that the President “consult regularly” with Congress until the troops are no longer engaged in hostilities.¹⁴

Section 1543 requires that the President report to Congress, in the absence of a declaration of war, whenever he introduces armed forces abroad *in certain situations*.¹⁵ Those situations include when troops are introduced (1) into hostilities or imminent hostilities, (2) into the territory, airspace, or waters of a foreign nation (except to supply, replace, repair, or train), or (3) in numbers which substantially enlarge the armed forces equipped for combat already in the foreign nation.¹⁶ Distinguishing between these three categories is not an arbitrary exercise. As discussed below, categorizing under the latter two of these three scenarios requires *only* that the President report to Congress.¹⁷

Section 1544(b) provides the timing limitations on the unilateral Presidential introduction of troops. “Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1). . . the President shall terminate any use of United States Armed Forces”¹⁸ The sixty day period can be extended by an additional thirty days if the President certifies to Congress in writing that the extension is necessary to safeguard the removal of the troops.¹⁹ Curiously, the only provision triggering the reporting provision is section 1543(a)(1), the introduction into hostilities or imminent hostilities.²⁰ Based on the statutory language, a report filed under either Section 1543(a)(2) or 1543(a)(3) would not set the sixty-day clock ticking.²¹ Since the President is not required to specify under which subsection of 1543(a) he is filing his report, it is impossible for Congress to undeniably assert that the 60-day period had been triggered by a report filed pursuant

12 See ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 33–34 (1991); War Powers Resolution, 50 U.S.C. § 1541(a) (“It is the purpose of this chapter to . . . insure that the collective judgment of both the Congress and President will apply to introduction of United States Armed Forces into hostilities”).

13 See War Powers Resolution, 50 U.S.C. § 1542.

14 See *id.*

15 See *id.* § 1543(a); see also RICHARD F. GRIMMET, THE WAR POWERS RESOLUTION 4 (2002); Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 81–82 (1984). The reporting requirement necessitates the President report to Congress within forty-eight hours after troops are deployed.

16 War Powers Resolution, 50 U.S.C. § 1543(a)(1)–(3).

17 See MARC. E. SMYRL, CONFLICT OR CODETERMINATION? 38 (1988). In other words, only one scenario, introduction into “hostilities or imminent hostilities” under Section 1543(a)(1), triggers the other operable provisions of the WPR. *Id.*

18 War Powers Resolution, 50 U.S.C. § 1544(b) (emphasis added).

19 *Id.*; see Vance, *supra* note 15, at 82.

20 War Powers Resolution, 50 U.S.C. § 1544(b).

21 See Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT’L L. 571, 572 (1984).

specifically to Section 1543(a)(1).²²

A crucial omission from the text of the WPR is the definition of what constitutes “hostilities” or “imminent hostilities.” The state of “hostilities” is precisely what distinguishes Section 1543(a)(1)—initiating the oversight provisions in Section 1544—from Sections 1543(a)(2) and 1543(a)(3), which only mandate a presidential reporting requirement.²³ The 1973 House report on its original war powers bill indicated the legislative intent behind the word “hostilities:”

[T]he word hostilities was substituted for the phrase armed conflict . . . because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompass a state of confrontation in which no shots have been fired, but in which there is a clear and present danger of armed conflict.²⁴

Since it was not included in the final version of the WPR, this definition of “hostilities” does not carry the force of law, and the Executive has shown no inclination to adopt it.²⁵ Section 1544(c) of the WPR provides a mechanism for withdrawal separate from the automatic sixty day withdrawal provision. The subsection requires the President to remove armed forces at any time if Congress directs by concurrent resolution.²⁶ The legal effectiveness of both the automatic withdrawal provision in Section 1544(b) and the concurrent resolution in Section 1544(c) are discussed in depth later in this Article.

B. Widespread Noncompliance

One of the pervasive criticisms of the WPR has been the President’s ability to circumvent its language.²⁷ Although its constitutionality is not seriously in question,²⁸ presidents have largely ignored the consultation requirement in Section 1542. As history has shown, presidents have unilaterally deployed forces on a regular basis without first seeking to consult with Congress.²⁹ Since the enactment of the WPR, Section 1543(a)(1) (the time limit triggering provision) has been formally

22 See *id.* This is exactly what presidents have done over the years to easily circumvent the reporting requirement in section 1543(a)(1).

23 See SMYRL, *supra* note 17, at 38–39.

24 *Id.* at 39 (quoting H.R. DOC. NO. 93-287, at 7 (1973)).

25 See, e.g., Memorandum Opinion for the Attorney General: Authority to Use Military Force in Libya, (Apr. 1, 2011) [hereinafter Krass Memorandum].

26 War Powers Resolution, 50 U.S.C. § 1544(c).

27 See, e.g., Glennon, *Too Far Apart*, *supra* note 7.

28 See Vance, *supra* note 15, at 87 (noting that Congress could not wisely or effectively exercise its war-making constitutional power without first possessing the necessary knowledge to act). This specific consultation requirement is a clear example of Congress drafting a necessary and proper law to effectuate a constitutionally vested power.

29 See, e.g., *id.*

acknowledged in a presidential report only once.³⁰ Of the other more than ninety reports filed, the overwhelming majority have been labeled as either “consistent with the WPR” or “consistent with Section 1543 of the WPR,”³¹ without specifying the exact subsection under which the report was being filed. Other instances where U.S. forces have been deployed in potentially hostile situations simply have not been reported.³² Rather than “insur[ing] that the collective judgment of both Congress and the President”³³ is employed in deciding when to use force in foreign affairs, the Executive has creatively circumvented (and sometimes completely neglected) the WPR. The legal inoperability of the WPR has made presidential evasion of the WPR’s operable provisions commonplace in the decision to use armed forces abroad.

III. LEGAL INEFFECTIVENESS OF THE WPR

A judicial reluctance to enforce the WPR’s operative provisions has been the impetus underlying widespread presidential circumvention of the WPR. The inarticulate drafting of the WPR has often resulted in judicial application of the political question doctrine, which thereby precludes judicial enforcement of the WPR. Furthermore, the unconstitutionality of the one-house veto has been lingering over Section 1544(c) since the Supreme Court’s decision in *INS v. Chadha*.³⁴ These two independent legal doctrines have coalesced to render the operable provisions of the WPR unenforceable, reducing the WPR to a paper tiger wanting of judicial consideration and enforcement.

A. The Political Question Doctrine

First announced by the Supreme Court in *Baker v. Carr*,³⁵ the political question doctrine holds that certain categories of disputes are nonjusticiable or inappropriate for the courts to hear.³⁶ In the arena of foreign affairs, courts have been especially willing to decline to adjudicate cases, invoking the political question doctrine where the court lacks the “institutional capacity to handle certain matters.”³⁷

In *Crockett v. Reagan*,³⁸ twenty-nine members of Congress sought declaratory judgment against the President for supplying military equipment and aid to the government of El Salvador in violation of the WPR.³⁹ The President claimed that the military personnel sent to El Salvador were

30 See Franck, *supra* note 7, at 769. President Ford’s report citing section 1543(a)(1) was made during the *Mayaguez* rescue operation. The report was made after the deployment of a rescue team, where there was virtually no possibility of the engagement lasting more than a few hours. In situations where longer engagements have been contemplated, no section 1543(a)(1) reports have been filed. See *id.* at 769 n.13.

31 See, e.g., GRIMMETT, *supra* note 15, at 69–86.

32 See, e.g., *id.* at 87–88.

33 War Powers Resolution, 50 U.S.C. § 1541(a).

34 462 U.S. 919 (1983).

35 369 U.S. 186, 208-09 (1962).

36 See *id.*; see generally, THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 35–39 (1992).

37 MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 14–15 (1990).

38 558 F. Supp. 893 (D.D.C. 1982), *aff’d per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

39 *Id.* at 895.

performing a limited training and advisory function for the El Salvadorian military and, therefore, were not engaged in “hostilities” as contemplated in Section 1543(a)(1).⁴⁰ The plaintiffs painted a different picture, claiming the military personnel were planning specific operations and working in areas exposed to heavy combat.⁴¹ The United States District Court for the District of Columbia dismissed the case as nonjusticiable, concluding that the factfinding necessary to determine whether U.S. forces were introduced into hostilities was “appropriate for congressional, not judicial, investigation and determination.”⁴² Relying on *Baker*, the court categorized the case as one “characterized by a lack of judicially discoverable and manageable standards for resolution.”⁴³

Less than a year later, the United States District Court for the District of Columbia dismissed another alleged violation of the WPR on identical grounds.⁴⁴ Pertaining to U.S. sponsored paramilitary activities in Nicaragua, the court dismissed the suit, holding that it “lack[ed] judicially discoverable and manageable standards for resolving the dispute presented.”⁴⁵ Courts have reaffirmed this position on numerous occasions. In *Lowry v. Reagan*,⁴⁶ the plaintiffs (comprising 113 members of Congress) suffered a similar fate. The court, asked to decide if U.S. actions in the Persian Gulf constituted “hostilities,” declined to exercise jurisdiction over the claims, again citing the political question doctrine. The court held: “[W]ith regard to cases concerning foreign relations, that these matters often ‘lie beyond judicial cognizance’ due [sic] the need for a ‘single-voiced statement of the Government’s views.’”⁴⁷ As noted in *Sanchez-Espinoza*,⁴⁸ the court’s refusal to decide the questions of hostilities was prompted, in part, due to the risk of the “potentiality of embarrassment [resulting] from multifarious pronouncements by various departments on one question.”⁴⁹ When a court is faced with an elusive set of facts concerning foreign affairs and differing positions on the presence of “hostilities” presented by the President and Congress, it will dismiss the dispute as nonjusticiable under the guise of the political question doctrine.

The court’s exercise of the political question doctrine, excusing itself from deciding the differing positions of the Executive and Congress, combines multiple aligning considerations. First, as a

40 *Id.* at 897.

41 *Id.*

42 *Id.* at 898.

43 *Id.* The court went on to say that Congress possessed the resources and expertise needed to resolve the disputed questions of fact concerning the presence of “hostilities” in El Salvador. *Id.* It also noted that, assuming the question of fact were resolved, the only appropriate remedy it could order was a report being filed, thereby starting the sixty-day automatic withdrawal clock. *Id.*

44 *See Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff’d*, 770 F.2d 202 (D.C. Cir. 1985).

45 *Id.* at 600.

46 676 F. Supp. 333, 336 (D.D.C. 1987) (finding the increased military action in the Persian Gulf, including a Navy ship firing on an Iranian ship and general naval escorts of Kuwaiti tankers, was nonjusticiable).

47 *Id.* at 339–40 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

48 568 F. Supp. at 600.

49 *Id.* at 600 (quoting *Baker*, 369 U.S. at 217).

practical matter, courts lack the institutional capacity to decide the presence of hostilities.⁵⁰ Second, the Constitution delegates foreign affairs decisions to the two political branches, not the courts.⁵¹ Third, deciding the issue of hostilities in foreign affairs would take the courts into “uncharted legal terrain,” where no law exists and applicable standards are wanting.⁵² Given the omission of a definition of “hostilities” in the WPR⁵³ and the absence of a workable legal standard, courts would have an extremely difficult time navigating this “uncharted terrain” in foreign affairs. Consequently, courts have opted to leave the resolution of the disputes to those elected branches both capable and constitutionally committed to making decisions concerning the use of force abroad.⁵⁴ Although not the only tool invoked by courts to skirt tough decisions concerning the separation of war powers,⁵⁵ the political question doctrine is an oft-accepted argument by courts in justifying the dismissal of claims made pursuant to the WPR.⁵⁶

B. *The One-House Veto*

Section 1544(c) of the WPR authorizes Congress, via passage of a concurrent resolution, to direct the President to remove troops engaged in hostilities (absent a declaration of war or specific congressional authorization). Notwithstanding the difficulties of defining hostilities,⁵⁷ the Supreme Court struck a devastating blow to this provision in *I.N.S. v. Chadha*.⁵⁸ In *Chadha*, a provision of the

50 See *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1983), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (“The Court lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact”); GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 37, at 315. *But see Crockett*, 558 F. Supp. at 898–99 (“Were a court asked to declare that the War Powers Resolution was applicable to a situation like that in Vietnam, it would be absurd for it to decline to find that U.S. forces had been introduced into hostilities after 50,000 American lives had been lost.”).

51 See *Ange v. Bush*, 752 F. Supp. 509, 512 (D.D.C. 1990) (“Primary among the conditions is the textually demonstrable constitutional commitment of the war powers to both political branches and the respect due [sic] the political branches in allowing them to resolve this long-standing dispute over the war powers by exercising their constitutionally conferred powers.”) (internal quotation marks omitted); *Sanchez-Espinoza*, 568 F. Supp. at 599 (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention, inasmuch as they are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”) (citations omitted) (internal quotation marks omitted); GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 37, at 315; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–8 (1959).

52 See GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 37, at 315.

53 See discussion *supra* Part II.A.

54 See GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 37, at 315.

55 For instance, courts have used theories of remedial discretion, ripeness, and lack of standing to dismiss claims alleging presidential violations of the WPR. See, e.g., *Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990) (remedial discretion); *Ange*, 752 F. Supp. at 513 (ripeness); *Cambel v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (standing).

56 Some commentators have argued that the operable provision of the WPR (Section 1544(b)) is a prima facie unconstitutional infringement on the President’s constitutional power. See, e.g., TURNER, *supra* note 12, at 113. However, courts have not ruled on the constitutionality of the WPR’s sixty-day time limit, and trying to define the parameters of where the President’s power to use force ends and Congress’s authority begins (or vice-versa) is an extensive task well beyond the scope of this Note.

57 See discussion *supra* Part III.A.

58 462 U.S. 919 (1983).

Immigration and Naturalization Act allowed either chamber of Congress, by passing a resolution, to reverse an Attorney General's decision to suspend an alien's deportation.⁵⁹ The Court held that such congressional action "alter[ed] the legal rights, duties and relations of persons . . . outside of the legislative branch," and thus, the action equated to "legislation." Chief Justice Burger concluded that, based on the structure of the Constitution, the one-house veto violated the Presentment Clause since it was legislation not presented to the President.⁶⁰ A concurrent resolution under Section 1544(c) of the WPR would undoubtedly alter the rights and duties of the Executive and, thus, be legislative in nature. After *Chadha*, this concurrent resolution would seemingly violate the Presentment Clause and therefore be unconstitutional.⁶¹ In *Chadha*, Justice White recognized the applicability of the one-house veto to the WPR, noting "[T]he legislative veto was . . . [t]he key provision of the War Powers Resolution authoriz[ing] the termination by concurrent resolution of the use of armed forces in hostilities."⁶²

Several arguments have been advanced to distinguish the *Chadha* one-house veto from the concurrent resolution of Section 1544(c). The most obvious argument (and easiest to dispose of) is that *Chadha* involved a one-house veto whereas Section 1544(c) utilizes a concurrent resolution. The credibility of this argument vanished after the Supreme Court's decision in *Process Gas Consumers Group v. Consumer Energy Council*, which explicitly extended *Chadha* to concurrent resolutions.⁶³

To reconcile with *Process Gas Consumers Group*, commentators argue that the differences in rationale underlying *Chadha* and Section 1544(c) render *Chadha* distinguishable.⁶⁴ The strongest argument expounded is that the legislative veto in *Chadha* was designed to be a check on delegated authority to the Executive; the WPR, on the other hand, only codified congressional understanding of the authority it possesses under the Constitution, without conferring any surplus authority to the Executive.⁶⁵ Section 1548(d)(2) of the WPR strengthens this argument by explicitly disavowing any interpretation of the WPR as granting the President additional constitutional authority.⁶⁶ Since there is no delegation of authority to the Executive, there cannot be a reserved right to veto the delegated

59 *Id.* at 923–29.

60 *Id.* at 954–55 ("Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President."). The Presentment Clause states that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it . . ." U.S. CONST. art. I, § 7, cl. 2.

61 Like the Immigration and Naturalization Act in question in *Chadha*, the WPR contains a separability clause. War Powers Resolution, 50 U.S.C. § 1548. Thus, if the concurrent resolution in Section 1544(c) were held to be unconstitutional, the remainder of the WPR would not be invalidated with it.

62 *Chadha*, 462 U.S. at 970 (White, J., dissenting) (citation omitted).

63 See *Process Gas Consumers Grp. v. Consumer Energy Council*, 463 U.S. 1216 (1983).

64 See, e.g., John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1395–98; Vance, *supra* note 15, at 86–87.

65 See Sidney Buchanan, *In Defense of the War Powers Resolution: Chadha Does not Apply*, 22 HOUS. L. REV. 1155, 1178 (1985).

66 War Powers Resolution, 50 U.S.C. § 1547(d)(2) ("Nothing in this joint resolution . . . shall be construed as granting any authority to the President . . . he would not have had in the absence of this joint resolution.").

authority (in the form of a legislative veto), and therefore, *Chadha* does not apply.⁶⁷ Although a logical argument, it suffers the fatal flaw of presupposing that the decision in *Chadha* is subject to subtle distinctions. Rather, it appears the highly formalistic *Chadha* majority opinion is “a work of mechanical simplicity,”⁶⁸ suggesting no proclivity to attempt to distinguish between refined differentiations underlying the rationale of legislative vetoes. This formalistic reading of the majority opinion is bolstered by the sweeping claims made by the concurrence and dissent in *Chadha*,⁶⁹ as well as subsequent court decisions interpreting it.⁷⁰ Although not universally agreed upon, it is highly likely that the Supreme Court would rule that the concurrent resolution provision of Section 1544(c) of the WPR is unconstitutional.⁷¹

C. Criticisms of the WPR

To promulgate a workable solution to the WPR, it is first necessary to discuss the present criticisms of the statute. Several salient criticisms emerge from the resounding sea of disapprovals the WPR has accumulated throughout its long and oft-attacked history. As discussed earlier, the first and most transparent criticism of the WPR stems from widespread (virtually unanimous) and long-standing presidential refusal to comply with both the WPR’s text and spirit.⁷² The logical corollary is that the WPR has failed to prevent the President from unilaterally deploying armed forces abroad.⁷³ Instead of fostering an environment conducive to collaboration between the political branches when

67 Buchanan, *supra* note 65, at 1178; Vance, *supra* note 15, at 86–87.

68 Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A. L. REV. 599, 630 n.101 (1984) (“Instead of examining the particular veto legislative in a constitutional context, the Court adopted a rigid textual formula that virtually ensures that all legislative vetoes will be struck down . . .”).

69 Both Justice Powell and Justice White noted that the majority opinion would render *all* legislative vetoes unconstitutional. *Chadha*, 462 U.S. 919, 959–60 (1983) (Powell, J., concurring); *id.* at 974 (White, J., dissenting).

70 See, e.g., WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW 402–03 (3d ed. 2011) (noting that when confronted with legislative veto cases the Supreme Court has “continued to take a rule-oriented approach, and to reject arguments for flexibility or experimentation”).

71 Of course, the unconstitutionality of Section 1544(c) presupposes that Congress possess the political will to terminate hostilities by invoking the concurrent resolution, a presupposition that has yet to occur in the almost forty years the WPR has been on the books. See 50 U.S.C. §1544(c).

72 See discussion *supra* Part II.B. Widespread presidential circumvention of the operable provisions of the WPR, see, e.g., Krass Memorandum, *supra* note 25, certainly has not “insure[d] that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities” as originally contemplated by the WPR. See War Powers Resolution, 50 U.S.C. §1541(a).

73 See Krass Memorandum, *supra* note 25, at 7 (referring to multiple instances the President has deployed force abroad without congressional approval, including, to name a few, deployments to: Libya (1986), Panama (1989), Somalia (1992), Bosnia (1995), Haiti (1994 & 2004), and Yugoslavia (1999)). The Justice Department’s memo took the historical practice unilateral presidential uses of force one step further, claiming that the longstanding use of military force abroad in the absence of prior congressional approval added to the “gloss” placed on the Executive’s constitutional authority. See *id.* at 6 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952)) (Frankfurter, J., concurring) [hereinafter *Steel Seizure Case*]. This position has not been without sharp criticism. See MICHAEL J. GLENNON, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion* (Apr. 6, 2011), <http://harvardnsj.org/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion/>.

deciding to introduce forces into hostilities, the WPR has instead allowed the Executive to fashion creative arguments to exploit the poor statutory drafting of the WPR and to evade the WPR's central purpose. While these criticisms demonstrate an overall failure of the WPR to achieve its articulated goal, several other flaws in the WPR remain.⁷⁴

Another unforeseen consequence of the WPR's statutory language, fatal to its proper operation, has been a reversal in the originally contemplated roles of the President and Congress. Since the "hostilities" report pursuant to Section 1543(a)(1) is the only provision to set the sixty-day clock ticking,⁷⁵ presidents have continually refused to specify under which Section 1543(a) provision they are filing.⁷⁶ The consequence of presidential circumvention of this poorly drafted statutory language has transformed the "automaticity" of the sixty-day limiting provision into a "procedural edifice [that] turned out to be a house of cards."⁷⁷ The house of cards collapsed when the assumption that presidents would specify what section a report was filed under turned out to be a fallacy. Originally thought to be the obligation of the President to specify the relevant subsection, it was never contemplated that Congress would be statutorily compelled to declare that hostilities were in effect.⁷⁸ This role reversal—having Congress, not the President, being forced to implement the resolution by declaring hostilities are afoot—renders the self-activating nature of resolution inapposite.

Another salient criticism hovering around the WPR relates to its failure to focus the debate surrounding the wisdom of using force abroad. The WPR, as originally contemplated, was supposed to create a sixty-day window, forcing the President and Congress to debate the wisdom of deploying forces (or keeping deployed forces) abroad.⁷⁹ Instead, the WPR has undesirably transformed the foreign policy debate into a "miasma of legalities."⁸⁰ The absence of the ticking clock to force a conversation concerning the wisdom of using force abroad has left a void in the foreign policy debate. Unfortunately, this void has been filled with esoteric arguments relating to the constitutionality of foreign policy initiatives, not the overarching prudence of such actions.⁸¹ The shifting emphasis of debate, from the wisdom of the use of force to the constitutionality of such actions, has reduced the WPR into a byzantine legal edifice, devoid of public comprehension or interest.⁸² The prevalence of these criticisms amplifies the need for amending the WPR.

IV. FIXING THE WAR POWERS RESOLUTION

As the WPR currently stands, constitutional power in foreign affairs is a zero-sum game. As presidential power expands, congressional power retracts. The expanse of presidential power has

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75 See discussion *supra* Part II.A.

76 See discussion *supra* Part II.B.

77 See Glennon, *The War Powers Resolution Ten Years Later*, *supra* note 21, at 573.

78 *Id.* at 574.

79 See War Powers Resolution, 50 U.S.C. § 1552 (consultation requirement); ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 12 (1983).

80 See Franck, *Rethinking War Powers*, *supra* note 7, at 770.

81 *Id.*; see also Glennon, *Too Far Apart*, *supra* note 7, at 31.

82 See GLENNON, *CONSTITUTIONAL DIPLOMACY*, *supra* note 37, at 121.

severely negated congressional influence in the war powers discussion.⁸³ It is readily possible to amend the WPR to create “a compact between Congress and the President for making the Constitution work in what is generally admitted to be a gray area.”⁸⁴ However, without the courts serving as independent arbitrators, the disputes between these two branches will go unchecked. Thus far, the judiciary has failed to bolster congressional standing in the arena of foreign affairs.⁸⁵ Modest changes to the language and structure of the WPR can create substantial changes to the operation of the statute, fostering an environment conducive to cooperation between the branches while simultaneously forcing the judiciary to moderate disputes.

A. Solving the Political Question Riddle

Currently, the WPR contains no manageable standards for a court (or the public) to determine when the President must obtain congressional approval prior to deploying armed forces abroad.⁸⁶ Courts have acknowledged, at the very least, a potential willingness to adjudicate disputes between the political branches in the WPR context.⁸⁷ However, without clear, simple standards to apply, courts will continue to be sidelined by the limits of their institutional capacity to handle political questions. To rectify this, Congress could make minimal alterations to the WPR. First, a definition of “hostilities” is necessary. As articulated in the House Committee report, the word “hostilities” was substituted for “armed conflict” to broaden the scope of the WPR.⁸⁸ The report continued:

[I]n addition to a situation in which fighting has actually begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. Imminent hostilities denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.⁸⁹

With this clear definition, courts would have a workable standard making the issue of when “hostilities” originated a justiciable contention.⁹⁰ As raised in *Lowry v. Reagan*,⁹¹ without a feasible definition of hostilities, courts will continue abstaining from deciding war powers disputes lying “beyond judicial cognizance.”⁹² Defining hostilities is a crucial step to alleviating the political ques-

83 Harold Hongju Koh, *Why the President (Almost) Always Wins In Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

84 PAT M. HOLT, THE WAR POWERS RESOLUTION: THE ROLE OF CONGRESS IN U.S. ARMED INTERVENTION 1 (1978).

85 See discussion *supra* Part III.

86 See Franck, *Rethinking War Powers*, *supra* note 7, at 772.

87 See *Crockett v. Reagan*, 558 F. Supp. 893, 898–99 (D.D.C. 1982) (“Were a court asked to declare that the War Powers Resolution was applicable to a situation like Vietnam, it would be absurd for it to decline that U.S. forces had been introduced into hostilities . . .”).

88 GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 37, at 114 n.241 (quoting H.R. REP. NO. 93-287 (1973)).

89 *Id.*

90 Using this definition, launching hundreds of tomahawk missiles to enforce a no-fly zone in Libya would undoubtedly constitute an “armed conflict” triggering the reporting requirement. See *supra* text accompanying note 1.

91 676 F. Supp. 333 (D.D.C. 1987).

92 *Id.* at 340.

tion riddle.

Perhaps more important than the court's *ability* to resolve a political question is the court's *willingness* to do so. Restraining the alteration of the WPR to simply include a definition of "hostilities" leaves the applicable judicial remedy—declaring that the President must file a hostilities report—with far less stark consequences than a non-statutory alternative.⁹³ A judicial remedy *only* triggering the sixty-day clock to begin ticking produces a more judicially tolerable result than forcing an immediate, and potentially harmful, extraction of troops.⁹⁴ Radical changes to the structure of the WPR (or a complete repeal of the WPR) would result in the judiciary being left with limited remedies beyond injunctive relief. If this were the case, courts would continue to veil themselves behind the political question masquerade to avoid the "dark specter" of potentially issuing an injunctive order compelling troops engaged in combat to stop fighting.⁹⁵ However, a court's affirmative interpretation of the presence of "hostilities" would only set the sixty-day clock ticking, forcing a dialogue between the President and Congress.⁹⁶ This judicial remedy resolves the political questions while still "giv[ing] appropriate deference" to the branches "constitutionally empowered to conduct foreign relations."⁹⁷

A simple deletion from the WPR could prevent continuing presidential evasion of the operable provision in Section 1543. Since the reporting requirement does not necessitate the President to specify under what provision of Section 1543 he is reporting,⁹⁸ Sections 1543(a)(2) and 1543(a)(3) should be deleted from the statute. This deletion would end the "semantic circumvention" of the sixty-day clock via presidential gamesmanship refusing to specify what provision of Section 1543 he is filing under.⁹⁹ Left with only one operable provision, any report filed (or judicially ordered to be filed) would trigger the sixty-day clock. Furthermore, Sections 1543(a)(2) and 1543(a)(3), if followed literally, would result in superfluous information that need not be conveyed to Congress given the

93 Such non-statutory alternatives could include ordering an injunction compelling the troops to stop fighting and withdraw from the armed conflict.

94 See Franck, *Rethinking War Powers*, *supra* note 7, at 153. Mr. Franck sums up this point nicely, stating, "Foreign relations can and should be conducted in accordance with the law, but not as invoked by the blade of a judicial guillotine." *Id.*

95 *Id.*

96 See *Crockett v. Regan*, 558 F. Supp. 893, 899 (D.D.C. 1982) ("Even if the factfinding here did not require resolution of a political question, this Court would not order withdrawal of U.S. forces at this juncture. At most, it could order that a report be filed. This conclusion is based upon the structure and legislative history of the WPR."). It is possible for other judicial remedies, such as deciding when hostilities began and starting the clock retroactively from that date. However, this approach has two main flaws. First, it would require the judiciary to perform a historical inquiry deciding exactly when in time the hostilities became imminent, a daunting task eliciting feelings of political question non-justiciability. Second, it could result in a court concluding the sixty-day window had closed, thereby ordering the President to remove troops. This order both risks presidential disobedience and renders a judicially invoked close to hostilities without ever fostering a dialogue between the President and Congress concerning the wisdom of the deployed force. See Ely, *supra* note 64, at 1417.

97 See *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 599 (D.D.C. 1983) (dismissing a lawsuit brought against the Reagan administration for actions in Nicaragua on grounds that it presented a nonjusticiable political question).

98 See discussion *supra* Part II.A.

99 See GLENNON, *CONSTITUTIONAL DIPLOMACY*, *supra* note 37, at 114.

stated goal of the WPR.¹⁰⁰ Terminating these non-essential provisions would clarify the WPR while simultaneously closing a loophole frequently exploited by the Executive.

B. Constitutional Framework

Aside from making the conflicts under the WPR justiciable, the second major revamping of the WPR should occur in Section 1544(b). The constitutionality of the section has never been resolved,¹⁰¹ and a consensus among legal scholars is nonexistent. Some commentators view the automatic withdrawal provision as an unconstitutional infringement on the President's unitary power as commander-in-chief,¹⁰² while others view the provision as striking the correct balance between the shared war power of Congress and the President set forth by the text and structure of the Constitution.¹⁰³

Although the balance of power between the political branches in the foreign affairs arena is by no means concrete,¹⁰⁴ past Supreme Court cases outline vague parameters concerning the allocation of war powers. The President's Article II power as Commander-in-Chief vests with it a degree of limited power to unilaterally decide to employ armed forces in certain circumstances.¹⁰⁵ The explicit

100 The stated goal of the WPR is to “insure the collective judgment” of the President and Congress when introducing armed forces into “hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” War Powers Resolution, 50 U.S.C. § 1541(a). With this as the stated goal, why Congress felt it needed information concerning the introduction of armed forces “into the territory . . . of a foreign nation while equipped for combat” of reports when troops “substantially enlarge” the U.S. presence in a foreign country is inexplicable given the logical disconnect of these two provisions’ language with the language of the articulated goal. *See id.* § 1543(a)(2)–(3). Notwithstanding the logical disconnect of these two sections, the technical language of the provisions would require the President to file superfluous reports. For instance, when a U.S. pilot flies a cargo plane over the United Kingdom en route to the Middle East while carrying a loaded pistol, a report would have to be filed under the literal language of Section 1543(a)(2). Likewise, if the military conducts a parade in a country with little other American armed forces present, a colorable argument arises that the military presence was “substantially enlarge[d],” warranting a report under Section 1543(a)(3).

101 *See, e.g.,* *Lowry v. Reagan*, 676 F. Supp. 333, 341 (D.D.C. 1987) (dismissing the complaint while noting that if Congress had presented a ripe issue, the court could have analyzed the constitutionality of the WPR).

102 *See, e.g.,* TURNER, THE WAR POWERS RESOLUTION, *supra* note 79, at 108 (“The idea that Congress can . . . deprive the President of a fundamental expressed constitutional power . . . is incompatible with our system of separation of powers.”).

103 *See, e.g.,* GLENNON, COST OF EMPTY WORDS, *supra* note 73, at 2–3. Interestingly, at one point the Office of Legal Counsel to the President wrote “The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.” *Presidential Power to Use Armed Forces Abroad without Statutory Authorization*, 4A Op. Office of the Legal Counsel, Dep’t of Justice 185, 196 (1980). Not surprisingly, this quote has not been reiterated or acknowledged in subsequent memos spawned by the Executive branch.

104 *See supra* Part III.

105 *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803) (“By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.”).

right of Congress to declare war counterbalances this autonomous presidential power.¹⁰⁶ Furthermore, while historical practice demonstrates that the President may engage in less formal hostilities without a declaration of war,¹⁰⁷ case law indicates that Congress may regulate the boundaries of less formal hostilities.¹⁰⁸

Furthermore, when analyzing constitutional disputes, it is necessary to view presidential power relevant to its disjunction or conjunction with that of Congress.¹⁰⁹ As famously spelled out by Justice Jackson, this analysis precedes by categorizing the presidential action in one of three zones.¹¹⁰ When the President acts “pursuant to . . . an authorization [by] Congress, his authority is at [a] maximum.”¹¹¹ The converse is also true; when the President “takes measures incompatible with the . . . will of Congress, his power is at its lowest ebb”¹¹² Lastly, when the President acts and is met with congressional silence, he operates in a “zone of twilight,” where the distribution of powers is uncertain and “congressional inertia” may enable the presidential action.¹¹³

C. Authorization for Unilateral Presidential Action

Using these cases as a constitutional framework, Congress should make several amendments to Section 1544(b) to strengthen its position with respect to the President. First (and perhaps counter-intuitively), Congress should articulate the instances where the President, acting without the need for Congressional consent, can unilaterally engage in hostilities.¹¹⁴ These limited instances should be carefully articulated and based on both practical necessity and policy realities.¹¹⁵ For instance, Congress should explicitly authorize the President to use armed forces without consent (1) to repel an armed attack on United States or its armed forces, and (2) to effectuate the prompt recovery of U.S. citizens held captive abroad.¹¹⁶ Both of these provisions share a commonality: recognizing the institutional difficulties of Congress in making rapid decisions during a time of crisis.¹¹⁷ The more

106 U.S. CONST. art. I, § 8.

107 See *supra* note 73 (discussing the “historical gloss” placed on the presidency).

108 See *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding that a presidential order contradicting a congressional statute during hostilities between the U.S. and France was invalid).

109 See *Steel Seizure Case*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

110 *Id.* at 635–38.

111 *Id.* at 635–37.

112 *Id.* at 637.

113 *Id.*

114 Although Section 1541(c) of the WPR appears to spell out the instances where the President can deploy force unilaterally, it fails for two reasons. First, the section is merely a prefatory declaration. See Franck, *Rethinking War Powers*, *supra* note 7, at 771–72. Second, the Committee Conference Report explicitly states that the operative provisions of the WPR “are not dependent on the language of this subsection.” H.R. REP. NO. 93-547 (1988) (Conf. Rep.).

115 Although there is mention of the constitutional power of the President, see War Powers Resolution, 50 U.S.C. §1541(c), this provision carries no legal implications with respect to the remainder of the WPR.

116 See *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186) (“Now as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President.”); Franck, *Rethinking War Powers*, *supra* note 7, at 772.

117 See TURNER, THE WAR POWERS RESOLUTION, *supra* note 79, at 109.

complex the foreign policy decision, the longer the congressional debate, potentially risking the safety of Americans and losing the benefits of decisiveness.¹¹⁸ As a practical policy matter, typical hostage rescue missions run virtually no risk of extending beyond a sixty-day window.¹¹⁹ Similarly, an armed attack on the United States necessitates decisive action, which the Executive branch is far better suited to handle than the legislature.¹²⁰ Within these specified areas, the President would possess authorization to deploy armed forces exclusively at his discretion.

D. Congress's Ability to Limit the President in the Zone of Twilight

Practical matters aside, this explicit authorization of unilateral presidential actions produces a “zone of twilight,” in which Congress and the President have concurrent authority.¹²¹ In this scenario, congressional “inertia, indifference or quiescence”¹²² enables the President to continue military actions without the expressed disapproval of Congress. This position is consistent with the historical prevalence of presidential use of military actions abroad without prior congressional approval.¹²³ Further, the “systematic, unbroken executive practice” of unilaterally deploying troops in the face of unsuccessful (or nonexistent) congressional legal and political challenges¹²⁴ reinforces (and helps create) the “gloss” on the Presidency.¹²⁵ Since a legal challenge on this longstanding presidential practice would be difficult to effectuate,¹²⁶ acknowledging the existence of a sphere of limited, yet unilateral, Executive power helps further a constitutionally sound revamping of the WPR.

Although this allowance of presidential action in a twilight zone may seem to expand presidential power contrary to the stated goal of the WPR, in effect, the opposite is true. First, the pressures of public opinion have a pervasive influence on presidential decisions.¹²⁷ However, given that public

118 *Id.*

119 *Cf. id.* at 68–71 (suggesting that once a President authorizes a rescue mission, the mission would not rarely take more than sixty days to complete).

120 *See id.* at 109.

121 *See Steel Seizure Case*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

122 *Id.*

123 *See* Krass Memorandum, *supra* note 25, at 7 (“[T]he pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, evidences the existence of broad constitutional power.”).

124 *See Steel Seizure Case*, 343 U.S. at 610–11 (Frankfurter, J., concurring); *see also* J. Richard Broughton, *What is it Good For? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 689–90 (2001) (“Indeed, Congress has continually acquiesced in presidential decision making regarding the use of American troops in hostilities around the globe.”).

125 *See Steel Seizure Case*, 343 U.S. at 610–11 (Frankfurter, J., concurring); *see also* MICHAEL A. GENOVESE & ROBERT J. SPITZER, *THE PRESIDENCY AND THE CONSTITUTION: CASES AND CONTROVERSIES* 30 (2005).

126 *See* GENOVESE & SPITZER, *supra* note 125, at 30 (quoting Justice Frankfurter’s concurring opinion in the *Steel Seizure* case, enunciating that “systematic” and “unbroken” presidential exercises of authority, which Congress acknowledges without challenge, become “part of the structure of our government”).

127 *See, e.g.*, Susan Page, *Polls Can Affect President’s Hold on Party*, USA TODAY, July 20, 2009, at A6, *available at* <http://www.usatoday.com/news/washington/presidential-approval-tracker.htm> (asserting that public opinion bears directly upon the critical factor in gathering necessary legislative cooperation: political capital).

disapproval was not sufficient to bring a timely end to the Vietnam conflict,¹²⁸ this alone does not reliably safeguard against prolonged Executive misuse of the armed forces. Other provisions serve to statutorily reinforce the power of public disapproval. For instance, the President would still be bound by the confines of the sixty-day limiting provision.¹²⁹ Also, congressional action in disjunction with the presidential use of force would place his power “at its lowest ebb,” subject to the strictest judicial scrutiny.¹³⁰ Defining a “zone of twilight” in the foreign affairs arena does not infringe on a historically exercised presidential right and simultaneously casts into place congressional checks on the Executive’s power.

As briefly discussed above, Congress, by passing a law in disjunction with the President’s actions within the “zone of twilight,” could regulate less formal military engagements.¹³¹ *Little v. Barreme*¹³² bolsters the proposition that Congress can police the standards of informal hostilities.¹³³ If Congress passed a law regulating presidential action within less formal hostilities, any presidential matter incompatible with the expressed provision would shift the President from operating in Jackson’s “twilight” to the third category, subjecting the presidential action to strict judicial scrutiny.¹³⁴ Proposed parameters to less formal hostilities would serve as an invitation to the President to negotiate with Congress, lobbying his case for foreign intervention on the merits, rather than circumventing the issue on legal technicalities.

E. Congressional Power of the Purse

A final amendment to Section 1544(b) would replace the automatic withdrawal of troops provision with an automatic withholding of funds for presidential actions exceeding the sixty-day limit (without statutory authorization) after filing the hostilities report. Presumably, if a President refused to terminate the use of armed forces after the expiration of the sixty-day window¹³⁵ the President would be acting against the explicit will of Congress and therefore his power would be at its “lowest ebb.”¹³⁶ However, this analysis, like many of those in the separation of powers context, is riddled with complications. To begin, a President would likely declare Section 1544(b) to be an unconstitutional infringement on his Article II powers, simply leading him to disregard the statutory mandate

128 See SMYRL, *supra* note 17, at 12–13 (noting that President Nixon continued the war despite his promise to end it and amid increasing violence at protests).

129 See *supra* Section II.A (explaining the operative effect of the sixty-day limit). As discussed *supra* Part IV.A, this assumes that the proposed amendments were enacted, thereby reducing the efficacy and prevalence of the political question doctrine.

130 *Steel Seizure Case*, 343 U.S. at 637–38 (Jackson, J., concurring). In extreme cases, impeachment (or the threat thereof) could also be a viable option available to Congress to limit the President.

131 Franck, *Rethinking War Powers*, *supra* note 7, at 772–73.

132 6 U.S. (2 Cranch) 170 (1804).

133 See *id.*; Franck, *Rethinking War Powers*, *supra* note 7, at 772.

134 *Steel Seizure Case*, 343 U.S. at 637–38.

135 See War Powers Resolution, 50 U.S.C. §1544(b).

136 See *Steel Seizure Case*, 343 U.S. at 637–38.

and continue the military operations.¹³⁷ Congressional reliance on a judicial remedy in this context may prove to be misguided. In *Ange v. Bush*,¹³⁸ the United States District Court for the District of Columbia indicated a strong reluctance to decide disputes between the political branches in the war powers theater.¹³⁹ The court noted, “Meddling by the judicial branch in determining the allocation of constitutional powers where the text of the Constitution appears ambiguous as to the allocation of those powers ‘extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power.’”¹⁴⁰ On a more fundamental level, a directive terminating the use of armed forces possesses strong undertones of a Commander-in-Chief-like dictate. These undertones are exacerbated by both the lack of textual support for the mandate and the alternative approaches available to Congress firmly based in constitutional text.

Due to Section 1544(b)’s possible infringement on the President’s Article II power, as well as the latent possibility of judicial abstention from deciding the dispute, Congress should amend the Section’s language to ground it in an expressly conveyed constitutional power, namely the power over the purse.¹⁴¹ Attaching a fund cutoff forcefully bolsters the constitutionality of Section 1544(b) because it derives from an *exclusively* legislative power, rather than the “often usurped and much disputed congressional war-making power.”¹⁴² Couching the automatic cutoff provision pursuant to an expressed congressional power solves the problem voiced by the court in *Ange v. Bush*, not requiring judicial “meddling” into constitutionally ambiguous allocations of power.¹⁴³ Further, attaching the WPR to the power of the purse is consistent with the Framers’ understanding of the balance of war powers in the Constitution. As James Madison noted, “For there never was, and I can say never will be, an efficient government, in which both are not vested. The only rational meaning is that the sword and the purse are not to be given to the same member.”¹⁴⁴ As the Framers recognized, the primary check on presidential use of the military is the unequivocal power of the purse in the hands

137 See, e.g., Krass Memorandum, *supra* note 25 (failing to acknowledge a situation, other than “a planned military engagement that constitutes a ‘war,’” which would impose a constitutionally-based limit on presidential authority to employ armed forces); Koh, *supra* note 83, at 1264.

138 752 F. Supp. 509 (D.D.C. 1990).

139 See *id.* at 514 (explaining the operative effect of the sixty-day limit).

140 *Id.* (quoting *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981) (citations and internal quotations omitted)).

141 U.S. CONST. art. I, § 9, cl. 7. This amendment could read in relevant part: “no funds made available by any law, other than those explicitly authorizing the engagement in hostilities in question, may be expended to carry on hostilities.” This would be inserted in place of the “President shall terminate any use of Armed Forces . . .” language used in Section 1544(b).

142 Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse Strings Restrictions*, 60 MINN. L. REV. 1, 33 (1975). There is virtually no question of Congress’s ability to make funds available for specific purposes and specified periods of time. Likewise, cutting off funds based on a contingency—the expiration of the sixty-day clock after a hostilities report is filed—is certainly not unprecedented. *Id.* (citing Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 620(x) (codified at 22 U.S.C. § 2370(x) (2006))).

143 See *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990) (“Congress has many options to check the President. Congress can . . . exercise its appropriations power to prevent further offensive and/or defensive military action . . .”).

144 John C. Yoo, *CLIO at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1206–07 (1999) (quoting 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282 (Merrill Jensen ed., 1976)).

of the legislature.¹⁴⁵

Automatic fund withholding after the expiration of sixty days (and without statutory authorization) has several strengths. First, with the WPR as written, political impasses are inevitable and judicial resolution is unobtainable, leaving Congress with one option—the immediate cutoff of funds for the support of forces engaged in hostilities.¹⁴⁶ The clear language of this amendment would put the President on notice of the pending unavailability of funding to continue operations.¹⁴⁷ The stark consequences resulting from a political stalemate between the branches would pressure both sides to reach an accord or face the political reverberations in the next election. Most importantly, a looming (and actually enforceable) deadline would effectuate the stated goal of the WPR,¹⁴⁸ creating an environment where cooperation between the political branches was not only wise, but necessary.

V. CONCLUSION

On October 20, 2011, the District Court for the District of Columbia dismissed Representative Dennis Kucinich’s lawsuit against President Obama claiming a violation of the WPR for the President’s use of force in Libya.¹⁴⁹ A frustrated court “express[ed] its dismay that the plaintiffs [were] seemingly using the limited resources of [the] Court to achieve what appear[ed] to be purely political ends, when it should [have been] clear to them that [the] Court [was] powerless to depart from clearly established precedent of the Supreme Court and the District of Columbia Circuit.”¹⁵⁰ As the court made clear, the WPR is fundamentally broken. Courts will not fix the problem for Congress. The WPR has not fostered an environment conducive to shared participation in the war powers arena as originally contemplated. In a field where constitutional parameters allocating power are tenuous, Representative Kucinich’s lawsuit perpetuates the WPR’s status as a fierce paper tiger, while doing nothing to rectify a problem spanning almost three decades. Without legal bite, the WPR will continue to fail at achieving its original mandate. However, modest changes to the language of the WPR can make it a constitutionally operable statute that necessitates political cooperation in the decision to use force abroad while allowing judicial resolution.

145 *See id.* In fact, during the ratification debates between Federalists and Antifederalists, the latter did not ever mention congressional power to declare war as a potential check on the executive. Rather, the Antifederalists saw a President bent on war as being able to achieve that goal, with the legislature’s control over finances as the primary check. *Id.*

146 *See Vance, supra* note 15, at 93 (favoring an amendment which would stop the flow of any funds supporting forces engaged in hostilities beyond the term of legislative approval, both direct and indirect).

147 *See id.* (suggesting such an amendment would be an appropriate deterrent because the executive would no longer have the ability to redirect funds appropriated for other purposes).

148 *See War Powers Resolution*, 50 U.S.C. §1541(a) (ensuring cooperation between the political branches when introducing armed forces into hostilities).

149 *See Kucinich v. Obama*, No. 11-1096, 2011 WL 5005303, at *1 (D.D.C. Oct. 20, 2011).

150 *Id.* at *4 n.4. Representative Kucinich was also the lead plaintiff in *Kucinich v. Bush*, 236 F.2d 1 (D.D.C. 2002), in which the court dismissed the plaintiffs’ claims against the President citing a nonjusticiable political question.