ARTICLES

TRIGGERING CONGRESSIONAL WAR POWERS NOTIFICATION: A PROPOSAL TO RECONCILE CONSTITUTIONAL PRACTICE WITH OPERATIONAL REALITY

by
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In 1973, a supermajority of Congress overcame President Nixon's veto to enact the War Powers Resolution. That law was intended to restore the Founders' vision of cooperative war-making authority between the two political branches. Since that time, two areas of uncertainty have plagued the efficacy of the law: the arguable intrusion into the exclusive war-making authority of the President and the uncertainty as to what events trigger the law's obligations. In an effort to cure these defects, a group of experts recently proposed adoption of a substitute law: the War Powers Consultation Act of 2009. This proposed successor statute shifts the focus of statutorily mandated inter-branch war powers cooperation from the express authorization emphasis of the War Powers Resolution to notification and cooperation. While this shift in emphasis is both logical and more aligned with historical constitutional practice than the War Powers Resolution, the proposal still struggles to define an effective trigger for this notification and cooperation mandate. This Article will review how the War Powers Consultation Act seeks to cure the defects of the War Powers Resolution and to impose a more effective cooperative war-making relationship between the two political branches. It will then propose a critical improvement: a more effective notification and cooperation trigger to implement the statute's purpose, one that is derived from the nature of the military operations this cooperative decision-making mandate is intended to enhance. The Article will explain how linking the congressional notification mandate of the proposed law to operational rules of engagement will provide the most effective pragmatic

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notification trigger, mitigate the risk of interpretive avoidance of the law's mandate, and reconcile the scope of the cooperative war-making obligation with constitutional authority.

I. INTRODUCTION

Thirty-six years ago Congress enacted the War Powers Resolution,[1] perhaps the most controversial foray into the realm of national security affairs ever attempted by the legislative branch. Capitalizing on a mortally wounded executive and a tidal wave of popular discontent over perceived military adventurism, Congress was able to override a presidential veto[2] to implement the purported purpose of the statute: to restore the constitutional balance of war-making power between the legislative and executive branches of government.[3] To achieve this purpose, the law imposed upon the President notification, consultation, and express authorization requirements as conditions precedent to the employment of U.S. armed forces in all hostilities other than those responsive to attacks on U.S. territory or armed forces.[4]

Since its enactment, the efficacy—or lack thereof—of the War Powers Resolution has been the source of both political and scholarly debate.[5] Although no President has ever acknowledged the

[1] War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48 (2006)).

[2] *See* Veto of the War Powers Resolution, 5 PUB. PAPERS 893 (Oct. 24, 1973).

[3] War Powers Resolution § 2(a), 50 U.S.C. § 1541(a) (2006).

[4] *Id.* §§ 1541(c), 1542.

[5] *See, e.g.*, Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149 (2001); Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995); Walter L.

constitutionality of the law, all have endeavored to act "consistent[ly] with"[6] its notification and consultation requirements. The effect of the express authorization requirement of the law has been more complicated. In practice, the "zone of twilight"[7] of authority created by the now ubiquitous "sixty-day clock,"[8] and the fact that Congress has provided express statutory authorization for all but one military campaign since 1973 exceeding this time period, has perpetuated the uncertainty related to this prior authorization provision of the law.[9] This uncertainty is indeed ironic considering this provision was the very core of the congressional effort to restrain executive military adventurism. However, the one military campaign to exceed this time limit absent express congressional authorization added substantial weight to the arguments that this provision was from its inception ultra vires.[10]

That military campaign, the associated congressional response, and the litigation[11] it generated were all instructive on the question of whether the War Powers Resolution had in fact "restored" the constitutional war-making balance intended by the Framers or whether it

Williams, *The Sixty-Day Rule of the War Powers Resolution: Section 5(b)*, 2 J. NAT'L SECURITY L. 80 (1998); Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330 (1984); Note, *Realism, Liberalism, and the War Powers Resolution*, 102 HARV. L. REV. 637, 645 (1989).

[6] This "consistent with" language has been used by many Presidents since Nixon in letters to Congress regarding the War Powers Resolution. *See, e.g.*, Letter to Congressional Leaders Reporting on the Deployment of United States Military Personnel as Part of the Kosovo International Security Force, 2 PUB. PAPERS 1544, 1544 (Nov. 14, 2003) (George W. Bush); Letter to Congressional Leaders on the Situation in Somalia, 1 PUB. PAPERS 836, 836 (June 10, 1993) (William Clinton); Letter to Congressional Leaders on the Persian Gulf Conflict, 1 PUB. PAPERS 52, 52 (Jan. 18, 1991) (George H.W. Bush); Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Reprisal Against Iran, 2 PUB. PAPERS 1212, 1212 (Oct. 20, 1987) (Ronald Reagan). *See also* Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125, 128 (2000) ("[N]o President has ever acknowledged the Resolution's timetable of sixty or ninety days for withdrawal of troops (unless Congress were to authorize their participation in hostilities) to be running.").

[7] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (stating that reconciling the area between Presidential power and that of Congress requires "congressional inertia, indifference or quiescence [which] may sometimes . . . enable, if not invite, measures on independent presidential responsibility"). For an in-depth examination of this opinion and its impact on presidential power, see Corn, *supra* note 5, at 1157–62.

[8] 50 U.S.C. § 1544(b). *See also* Williams, *supra* note 5, at 80 ("[T]he President must either obtain congressional approval or terminate within sixty days any use of U.S. armed forces in 'hostilities or . . . situations where imminent involvement in hostilities is clearly indicated.'" (quoting 50 U.S.C. § 1541(a))).

[9] That campaign was the seventy-nine day NATO air campaign against Serbia during the Kosovo War of 1999. *See* Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (holding that members of Congress did not have standing to challenge this action), *cert. denied*, 531 U.S. 815 (2000). *See also* Corn, *supra* note 5, at 1149–51.

[10] *See* Corn, *supra* note 5, at 1149–51, 1157–62.

[11] *See Campbell*, 203 F.3d at 20.

had in fact distorted that balance.[12] By purporting to dictate one, and only one, modus operandi of constitutionally permissible inter-branch war powers cooperation, the Resolution contradicted a long-established practice of cooperative flexibility between the President and Congress in relation to the decision to initiate and sustain war. By so doing, it deprived future Congresses of the flexibility that their predecessors had historically relied on, arguably distorting the constitutional "gloss"[13] of war-making authority that had been established since the inception of the Republic.[14] When Congress failed to invoke the War Powers Resolution in response to the air campaign against Serbia, instead reverting back to the practice the Resolution sought to displace, it suggested that this practice, and not the express authorization requirement established in the Resolution, reflected the true constitutional balance of war-making power.[15]

But this does not mean the War Powers Resolution has been irrelevant. To the contrary, by enhancing the probability that Presidents would notify Congress regarding the use of the armed forces in hostilities and consult with key congressional leaders on such uses, the law actually reinforced the pre-existing constitutional war-making paradigm. This is because the foundation of this paradigm is the inference of support Presidents are entitled to draw from congressional acquiescence to war-making initiatives. Or, in the inverse, Presidents will invariably interpret the failure of Congress to affirmatively oppose[16] such initiatives as a license to continue operations.[17] However, the value of congressional acquiescence is proportionally related to the knowledge available to Congress about the military operations. Thus, by enhancing notice and consultation between the President and Congress, the Resolution strengthened the constitutional hand of Presidents by bolstering the significance of congressional acquiescence or implied support.

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[12] Corn, *supra* note 5, at 1157–62.

[13] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

[14] *See* Corn, *supra* note 5, at 1157–62.

[15] *Id.*

[16] Even when there has been affirmative opposition presented to the court, it has refused to address the issue, instead deeming it a political question. *See Campbell*, 203 F.3d at 28. *See also* Michael Hahn, Note, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351, 2381–83 (2001).

[17] *See* Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (in allowing President Reagan to suspend all contracts and judgments against Iranian assets, the Court held that "[s]uch failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive" (quoting Haig v. Agee, 453 U.S. 280, 291 (1981))).

This paradigm was, however, well known to the drafters of the War Powers Resolution.[18] In fact, it is impossible to read the law as anything short of an explicit rejection of the validity of presidential reliance on "implied consent" by Congress. But this rejection was focused primarily on post hoc reliance[19] on such implied support, reflecting a concern over the ability of the President to straightjacket Congress by creating a proverbial *fait accompli*.[20] After all, how politically realistic would it be to expect Congress to act to halt a military operation initiated by the President while U.S. forces are engaged in combat? Thus, Congress sought to ensure that no future President could create such an untenable situation by establishing a pre-commitment express authorization requirement.[21]

While the logic of this provision was meritorious, it was constitutionally overbroad. In fact, denying the President the ability to rely on implied congressional support was a more troubling constitutional straightjacket because it deprived the political branches of the freedom to cooperate on war-making initiatives in a manner that served the interests of each branch and therefore the nation.[22]

The inherent flaws in the War Powers Resolution have recently become the focus of an initiative far more important than the scholarly debate that has previously been the dominant focus of critique and debate.[23] In a recently published report (Miller Report),[24] the National

[18] *Cf.* RICHARD F. GRIMMETT, CONG. RES. SERV., WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 1 (2009), *available at* http://www.fas.org/sgp/crs/natsec/RL33532.pdf ("Many Members of Congress became concerned with the erosion of congressional authority to decide when the United States should become involved in a war or the use of armed forces that might lead to war."). The War Powers Resolution "requires the President in every possible instance to consult with Congress before introducing American armed forces into hostilities or imminent hostilities unless there has been a declaration of war or other specific congressional authorization." *Id.*

[19] *See Dames & Moore*, 453 U.S. at 680–82.

[20] This paradigm arose when President Ford authorized force to rescue the crew of the Mayaguez from their Khmer Rouge captors. *See* David E. Rosenbaum, *Members of Congress Generally Endorse the Military Action Against Cambodians: But Some Note the Law Requires Consultation*, N.Y. TIMES, May 16, 1975, at 15 ("There was no dissent in Congress from the President's contention that he had the Constitutional authority and obligation to intercede with force under his powers as commander in chief.").

[21] GRIMMETT, *supra* note 18, at Summary ("The purpose of the [War Powers Resolution] is to ensure that Congress and the President share in making decisions that may get the United States involved in hostilities. Compliance becomes an issue whenever the President introduces U.S. forces abroad in situations that might be construed as hostilities or imminent hostilities. Criteria for compliance include prior consultation with Congress, fulfillment of the reporting requirements, and congressional authorization." (citation omitted)).

[22] *See* Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 182–86 (1998) [hereinafter Corn, *War Power*]; *see also* Geoffrey S. Corn, Campbell v. Clinton*: The "Implied Consent" Theory of Presidential War Power is Again Validated*, 161 MIL. L. REV. 202 (1999).

[23] *See* sources cited *supra* note 5.

War Powers Commission, composed of distinguished former public officials and nationally renowned constitutional scholars, proposed the enactment of the War Powers Consultation Act of 2009 as a replacement for the War Powers Resolution.[25] The Commission performed its work at the Miller Center of the University of Virginia, and its report articulates in compelling terms why the War Powers Resolution has failed[26] and why consultation between the two political branches has and remains the *sine qua non* of constitutionally legitimate war powers decisions. Accordingly, the members of the Commission:

> [U]rge that in the first 100 days of the next presidential Administration, the President and Congress work jointly to enact the War Powers Consultation Act of 2009 to replace the impractical and ineffective War Powers Resolution of 1973. The Act we propose places its focus on ensuring that Congress has an opportunity to consult meaningfully with the President about significant armed conflicts and that Congress expresses its views. We believe this new Act represents not only sound public policy, but a pragmatic approach that both the next President and Congress can and should endorse.
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> The need for reform stems from the gravity and uncertainty posed by war powers questions. Few would dispute that the most important decisions our leaders make involve war. Yet after more than 200 years of constitutional history, what powers the respective branches of government possess in making such decisions is still heavily debated. The Constitution provides both the President and Congress with explicit grants of war powers, as well as a host of arguments for implied powers. How broadly or how narrowly to construe these powers is a matter of ongoing debate. Indeed, the Constitution's framers disputed these very issues in the years following the Constitution's ratification, expressing contrary views about the respective powers of the President, as "Commander in Chief," and Congress, which the Constitution grants the power "To declare War."[27]

The proposal's focus on "meaningful" consultation is unsurprising. Indeed, this was a key concern of the drafters of the War Powers Resolution. As is noted throughout the Miller Report, consultation must be meaningful in order to ensure the cooperative decision-making

[24] JAMES A. BAKER, III ET AL., UNIV. OF VA., MILLER CTR. OF PUB. AFF., NATIONAL WAR POWERS COMMISSION REPORT (2008), *available at* http://millercenter.org/policy/commissions/warpowers/report [hereinafter MILLER REPORT].

[25] The commission was made up of ten individuals, six of whom were former executive branch officials, and headed by prior Secretaries of State Warren Christopher and James A. Baker, III. For a complete list, see *id.* at At a Glance.

[26] *Id.* at 5–8, 21–28.

[27] *Id.* at 6.

process essential to constitutionally valid war powers decisions.[28] This in turn leads to the core of the Commission's proposal: that consultation occur prior to, or immediately after, a use of the armed forces in a "significant armed conflict."[29] This term is defined[30] in the proposal as either a use of the armed forces expressly authorized by Congress, or any other use ordered by the President that involves hostilities lasting more than seven days.[31]

It is clear from the Miller Report that the key objective of this proposal is not only to ensure cooperation between the political branches of government in relation to the decision to engage the nation in hostilities, but perhaps more importantly to define with greater precision than did the War Powers Resolution those situations in which such cooperation is required. As I will argue below, this objective is consistent with the historical constitutional "gloss" of war powers.[32] However, it is the thesis of this Article that the proposal suffers from the same inherent flaw that hobbled the notification and consultation provisions of the War Powers Resolution, namely a twilight zone surrounding the trigger for such notification and consultation. Like the failed concept of "hostilities[] or . . . . situations where imminent involvement in hostilities is clearly indicated by the circumstances,"[33] the

[28] *Id.* at 30–31 (describing "meaningful" consultation as "a seat at the table" provided through "clear and simple mechanisms by which to approve or disapprove war-making efforts").

[29] The authors of the Miller Report chose this because it "defines the scope of the statute" to exclude "minor hostilities, emergency defensive actions, or law enforcement activities where the President should have license to act more unilaterally." In addition, the War Powers Resolution should be implicated in a limited capacity, as the Commission "want[ed] to involve Congress only in conflicts where consultation seems essential." *Id.* at 35–36.

[30] *Id.* at 8 ("Significant armed conflict" is defined as "combat operations lasting, or expected to last, more than one week."). The authors make it clear that this meaningful consultation is not automatically triggered by "lesser conflicts—*e.g.*, limited actions to defend U.S. embassies abroad, reprisals against terrorist groups, and covert operations . . . ." *Id.*

[31] These lesser conflicts could include "attacks that exceed a week in duration [which] would still escape the consultation and approval/disapproval requirements if they were found by the president to be 'limited acts of reprisal against terrorists or states that sponsor terrorism.'" Michael J. Glennon, Comment, *The War Powers Resolution, Once Again*, 103 AM. J. INT'L L. 75, 76 (2009) (citing MILLER REPORT, *supra* note 24, at 36). Attacks on Iran, North Korea, Cuba, Sudan, and Syria "could therefore be the object of military action without any consultation with or authorization by Congress." *Id.*

[32] By constitutional "gloss," I refer to the customary practice of inter-branch cooperation in war making that falls within Justice Frankfurter's conception of historical "gloss" as expressed in his seminal concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, (*Steel Seizure*), 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). *See also* Corn, *War Power*, *supra* note 22, at 240.

[33] War Powers Resolution § 2(a), 50 U.S.C. § 1541(a) (2006); The George Washington University Law School War Powers Project, *Legislative Reforms*, 2 J. NAT'L SECURITY L. 157, 159 (1998); MILLER REPORT, *supra* note 24, at 25.

concept of "armed conflict"[34] will almost inevitably be susceptible to interpretive debate. In addition, the seven-day trigger, like the ubiquitous sixty-day clock, will almost inevitably lead to assertions that the President has plenary authority to initiate hostilities, an assertion that is simply overbroad. Finally, and perhaps most problematically, it is unlikely that any President will acquiesce to mandated consultation obligations for armed conflicts "thrust" upon the nation, irrespective of duration. Instead, it is much more likely that Presidents will continue to assert such responsive military operations are conducted pursuant to their exclusive authority to respond to sudden attacks by "meeting force with force."[35]

There is, however, simply no question that the effort to eliminate the War Powers Resolution's express authorization requirement—the provision of the Resolution most inconsistent with the history of constitutional war powers[36]—and the effort to define a more effective triggering event for consultation,[37] is perhaps the ideal remedy to the ongoing debate over how to effectively balance the war powers of the two political branches. What is therefore needed to "close this deal" is a more effective consultation trigger. Such a trigger will ensure Congress is placed on notice in advance of military operations that implicate its institutional war authorization (or prohibition) role. If properly tailored, this would facilitate the ability of Congress to "take a stand" on a war-making initiative in a timely manner, prevent the President from presenting Congress with a *fait accompli*, and validate reliance on subsequent congressional acquiescence.

The consultation trigger of the proposed War Powers Consultation Act provides the starting point for ensuring any future war powers consultation is constitutionally "meaningful." However, the efficacy of this proposal will remain compromised until uncertainty is eliminated as to when such consultation is constitutionally required. Enhancing this proposal with a more precisely tailored and operationally grounded

[34] MILLER REPORT, *supra* note 24, at 8.

[35] The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.'"); Sterling v. Constantin, 287 U.S. 378, 399–400 (1932) ("The nature of the [executive] power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless."); Comm. on Fed. Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, 59 THE RECORD 41, 64 (2004). *See also* 50 U.S.C. §§ 1541–48.

[36] *See* Corn, *supra* note 5, at 1154–55.

[37] I use the terms "notice" and "consultation" throughout the Article somewhat interchangeably. Both terms are intended to include both the notice to Congress necessary to facilitate war powers consultation and the inter-branch interaction resulting from such notice.

"trigger" for such pre-execution notice and consultation with Congress is therefore essential. This trigger must be more carefully tailored than either the current "hostilities[] or . . . situations where imminent involvement in hostilities is clearly indicated"[38] language of the War Powers Resolution, terms that to this day remain undefined, or the "significant armed conflict"[39] trigger of the proposed successor statute. In addition, the trigger must be tailored to exempt from mandatory notification and consultation uses of the armed forces falling under the inherent and exclusive authority of the President—namely responses to sudden attacks.

This Article proposes such a trigger. Instead of using general terms subject to divergent definitions (and therefore evasion), it proposes a trigger derived from the principles of military operations. This trigger is linked to the nature of the Rules of Engagement proposed for approval by the National Command Authorities (NCA)[40] in relation to a given military operation.[41] These rules reflect the fundamental nature of the authority granted to the armed forces by the President as an aspect of all military operations involving the use of combat power against an enemy or opponent. Accordingly, they provide a viable mechanism to distinguish responsive uses of armed force from operations where the United States initiates combat activities. It is only in this latter category that pre-operation congressional consultation should be mandatory. Linking such notification to the authorization of "mission specific" Rules of Engagement—a concept that is explained below—will substantially contribute to the efficacy of the historically validated war-making balance between the President and Congress and cure the single glaring defect in the proposed War Powers Consultation Act.

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[38] 50 U.S.C. § 1541(a) ("It is the purpose of this [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.").

[39] MILLER REPORT, *supra* note 24, at 8.

[40] The "National Command Authorities" is defined as "[t]he President and the Secretary of Defense or their duly deputized alternates or successors. Commonly referred to as NCA." Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245, 245 n.2 (1997) (citing JOINT CHIEFS OF STAFF, JOINT PUBL'N 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 473 (Apr. 12, 2001, as amended through Oct. 31, 2009), *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf [hereinafter DOD DICTIONARY]).

[41] CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B: STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES § 6 (June 13, 2005) [hereinafter CJCSI 3121.01B], *reprinted in* INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 95, 96–97 (2007), *available at* http://www.fas.org/irp/doddir/army/law2007.pdf.

Part II of the Article summarizes the historic constitutional war-making relationship between the President and Congress and includes discussion of those uses of the armed forces conducted under exclusive authority of the President. Part III discusses how the War Powers Resolution sought to modify this constitutional historical "gloss"[42] and how the Serbian air campaign revalidated this pre-Resolution war authorization paradigm. Part III also explains why a consultation mandate is more consistent with the Constitution than an express authorization mandate. Part IV explains how linking a notification requirement to the nature of mission specific Rules of Engagement strikes an effective balance between the institutional interests of both political branches. Part V concludes with a proposal for revision of the War Powers Consultation Act that links notification obligations to the issuance of status-based Rules of Engagement.

II. SETTING THE CONDITIONS: A BRIEF REVIEW OF THE CONSTITUTIONAL WAR-MAKING BALANCE OF POWER

A. Historical Practice and Its Limitations

Perhaps the single most elusive question related to the relationship between the Constitution and the preservation of national security is how the Founders intended war powers to be exercised by the federal government.[43] In attempting to discern the answer to this question, scholars, government officials, and judges have struggled with the cryptic indicators provided by both the text of the Constitution and the debates surrounding its drafting and ratification.[44] Based on this evidence, all but

[42] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 610–11 (1952); Corn, *supra* note 5, at 1157–62.

[43] For an in-depth discussion of this issue beyond that of this Article, see Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145 (1995).

"The founders wanted to ensure that any decision to declare or commence war reflected the concurrence of many people of diverse viewpoints rather than the inclinations of the President alone. Their preference for legislative deliberation reflected a substantive judgment that war, with all its accompanying risks and hardships, should be difficult to commence. The founders also wanted the people's direct representatives in the House of Representatives to be involved in any decision to declare war. The people would bear the burden of combat—their lives and resources would be put on the line. Furthermore, their sustained support would be more likely if their representatives participated in the decision to go to war. Although the President unilaterally could not commence war, as *Commander in Chief the President was empowered to conduct military operations authorized by Congress as well as to 'repel sudden attacks' in emergency situations that allowed no time for advance congressional approval*." *Id.* at 148–49 (citing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–7, 47 (1993)) (emphasis added).

[44] *See generally Steel Seizure*, 343 U.S. at 610 (1952) (Frankfurter, J., concurring); Corn, *War Power*, *supra* note 22, at 182–86 ("Many scholarly works . . . dismiss the role of the judiciary in resolving these issues and instead analyze the purported meaning of the Constitution and the debates surrounding its founding."); Damrosch, *supra*

the most stoic defenders of plenary congressional war powers acknowledge that the authority to initiate, sustain, and execute war was deliberately diffused between Congress and the President.[45] This diffusion of war powers created what, for many, is viewed as an enigma: did the Declaration Clause in Article I indicate that Congress—and only Congress—could authorize the initiation of war?[46] Or, did the decision to change "make war" to "declare war" indicate that the President was vested with a certain degree of inherent authority to initiate war?[47] Is the President vested with inherent power to initiate war by virtue of his authority as Commander-in-Chief? In the pragmatic words of Justice Jackson in his landmark concurrence in *Steel Seizure*:

> A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.[48]

Irrespective of what the Founders may have intended with this diffusion, historical practice cannot be ignored. Indeed, the longstanding practice of the two political branches of government becomes more than an interpretive aid. Under Justice Frankfurter's conception of constitutional "gloss,"[49] there is a compelling argument that this historical

note 6, at 128–30; Stromseth, *supra* note 43; Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's* War and Responsibility, 34 VA. J. INT'L L. 903, 904 (1994).

[45] *See* GRIMMETT, *supra* note 18, at 1 ("Under the Constitution, war powers are divided. Congress has the power to declare war and raise and support the armed forces, while the President is Commander in Chief." (citations omitted)); MILLER REPORT, *supra* note 24, at 12 ("The extent of the authority of both the President and Congress to take the country to war is far from clear. . . . [T]he Executive and Legislative Branches do not agree about the scope of their powers; our history provides no clear line of precedent; and the Supreme Court has provided no definitive answer to this fundamental question."); Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A. L. REV. 599, 611 (1984); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007). For a more exhaustive history of the framer's executive power discussions, see David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75, 95–106 (2007). "The Framers' rejection of the British model, grounded in their fear of executive power and reflected in their derision of monarchical claims and prerogatives, was repeatedly stressed by defenders of the Constitution." *Id.* at 98.

[46] Ides, *supra* note 45, at 611 ("The power to declare war . . . makes it clear that the authority of Congress in this regard covers a broad spectrum . . . . [T]he authority of Congress encompasses both the endpoints and the vast territory in between.").

[47] *See id.* at 612–13 (discussing the history behind the Declaration Clause).

[48] *Steel Seizure*, 343 U.S. at 634–35 (Jackson, J., concurring) (footnote omitted).

[49] *Id.* at 610 (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow

practice has established the working constitutional war-making paradigm. While it is beyond the scope of this Article to extensively analyze this paradigm, its constitutional validity is central to the proposal presented herein. If, as some scholars assert, this paradigm is nothing more than an improper vesting of significance derived from repetitive violations of the Constitution,[50] then notice to Congress alone could never be sufficient to justify presidential reliance on congressional acquiescence. If, however, this paradigm does in fact reflect a constitutional gloss indicating how this diffused war power is properly shared between the two political branches, then, as will be discussed below, an effective congressional notice provision can be viewed as a constitutional condition precedent to such reliance.

As I have asserted in prior articles, historical war powers practice has established a functional paradigm for the constitutional initiation of war.[51] This paradigm is defined by two premises. First, with the exception of the use of the armed forces to respond to a sudden attack, Congress is vested with the authority to authorize, and by implication prohibit, war.[52] Second, if Congress chooses to prohibit or terminate war, it must do so unequivocally and explicitly.[53] Derived from this second premise is a critical principle associated with this paradigm: Once Congress is on notice of a war-making initiative, the President is justified in relying on either implied support (such as through funding, raising forces, etc.) or even acquiescence in the form of congressional silence as an indication Congress does not oppose a war-making initiative.[54]

The foundation for this paradigm lies in the political nature of how Congress chooses to respond to presidential war-making initiatives. This became the central theme of a line of federal court decisions related to the war in Vietnam. Responding to service-member challenges to the

conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

[50] *See* Ides, *supra* note 45, at 626 n.92 ("Article V of the Constitution provides a method of amendment and so long as that method is not used, the Constitution remains unaltered regardless of any pattern of behavior undertaken by the President, the Congress or the Supreme Court. There is no doctrine of amendment by violation. Patterns of unconstitutional behavior call for one response—repudiation."); Corn, *supra* note 5, at 1162–63 ("'[S]o too can Congress and the president override quasi-constitutional custom by enacting a framework statute . . . which can in turn be invalidated or modified by a formal constitutional amendment or judicial decision construing the Constitution.'" (quoting HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 71 (1990))).

[51] *See generally* Corn, *supra* note 5; Corn, *War Power*, *supra* note 22.

[52] Corn, *War Power*, *supra* note 22, at 252 ("'Certainly the initiation of significant offensive hostilities is such a policy decision, which . . . should not be made without the approval of Congress.'" (quoting Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683, 696 (1984))).

[53] *Id.* ("[T]he history of war-making decisions . . . demonstrates that, so long as the actions of Congress reasonably suggest support for the President, the President may treat such support, even if implied, as authority to execute such decisions.").

[54] *Id.*

constitutionality of their deployment orders, courts during this era were forced to confront several constitutional war powers questions. First, did the President even need congressional support for carrying out the war in Vietnam?[55] Although courts initially avoided this question by characterizing the issue as non-justiciable,[56] as the war progressed a more refined application of the political question doctrine led other courts to conclude that determining whether the President was vested with unilateral war-making authority or whether Congress must participate in war authorization was not a political question, but instead a quintessential question of constitutional authority subject to judicial determination.[57] These courts uniformly concluded that the power to declare war implied a requirement that Congress participate in the decision to initiate and sustain war.[58] Any other conclusion, as these and later decisions noted,[59] would effectively render the Declaration Clause a functional nullity. In short, if the declaration clause meant nothing more than that Congress was vested with the authority to "legally perfect" wars

[55] *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1313–15 (2d Cir. 1973) (upholding veto over termination of funding for air operations over Southeast Asia); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Massachusetts v. Laird, 451 F.2d 26, 28–34 (1st Cir. 1971) (refusing to grant to Massachusetts an injunction against the Secretary of Defense from sending its citizens to Vietnam); DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971) (holding the repeal of the Tonkin Gulf Resolution was insufficient to show Congress no longer supported the war); Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970) (holding that the legislative and executive branches share the power to involve the United States in war), *remanded to* 317 F. Supp. 715 (E.D.N.Y. 1970), *aff'd sub nom.* Orlando v. Laird, 443 F.2d 1039, 1043–44 (2d Cir. 1971) (denying two U.S. Army soldiers injunctions against Vietnam deployment orders, holding that determining whether there has been a congressional declaration of war is justiciable, but not how Congress chose to carry that out); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972).

[56] *See* Baker v. Carr, 369 U.S. 186 (1962); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967) (per curiam); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968); Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969).

[57] Holtzman v. Schlesinger, 414 U.S. 1304, 1311 (1973) (In limiting justiciability over the war, the Court held that: "Although tactical decisions as to the conduct of an ongoing war may present political questions which the federal courts lack jurisdiction to decide, and although the courts may lack the power to dictate the form which congressional assent to warmaking must take, there is a respectable and growing body of lower court opinion holding that Art. I, § 8, cl. 11, imposes some judicially manageable standards as to congressional authorization for warmaking, and that these standards are sufficient to make controversies concerning them justiciable." (citations omitted)).

[58] *Id.* at 1311–12 ("[A]s a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval—except, perhaps, in the case of a pressing emergency or when the President is in the process of extricating himself from a war which Congress once authorized."); Corn, *War Power*, *supra* note 22, at 251–52.

[59] *Holtzman*, 414 U.S. at 1311–12.

initiated by the President, the President would have virtually unfettered authority to embroil the nation in war at his pleasure. Courts deciding these cases ultimately concluded that such plenary power was inconsistent with the intent of the Founders, which was to ensure that the body of government most responsive to the will of the people—Congress—has a meaningful voice[60] in the decision to unchain "the dogs of war."[61]

This conclusion led, however, to a subsequent question: What type of congressional participation was necessary to satisfy this constitutional requirement? Plaintiffs in these cases argued that only a formal declaration of war could satisfy this constitutional requirement, an argument rejected by the courts deciding their cases. Instead, these courts recognized that while congressional participation in war-making decisions was constitutionally required, *how* Congress chose to participate was entirely within its political discretion.[62] Accordingly, once *some* evidence of congressional support for a presidential war-making initiative was identified, further inquiry into the means chosen by Congress to provide such support was barred as a non-justiciable political question.[63]

This conception of shared war powers ceded to the President extensive authority to wage war without totally disabling Congress from the decision-making process.[64] By so doing, these courts acknowledged that Congress possessed ultimate authority to decide, on behalf of the nation, when, where, and for how long war should be waged. However, because Congress was fully capable of imposing its will through law, and in the extreme situation through impeachment and removal of the President, anything short of unambiguous opposition to war could not be interpreted as sufficient to create the type of constitutional impasse

[60] *See*, *e.g.*, Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970) ("The Constitution does not simply make the power to declare war a legislative power, it makes the related powers over the military, their provision and their governance equally matters of legislative concern . . . ."), *aff'd*, 443 F.2d 1039 (2d Cir. 1971).

[61] *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 1 (Marc Antony proclaiming, "Cry 'Havoc,' and let slip the dogs of war."). Thomas Jefferson probably had this in mind when writing about constitutional limitations on war, specifically those embodied by Congress. The document provides "one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958). For further discussion, see Prakash, *supra* note 45, at 46.

[62] *See*, *e.g.*, Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971) ("[I]n a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached. . . . [T]here is no necessity of determining boundaries.").

[63] The First Circuit concluded that "the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation." *Id.* at 33.

[64] *See generally* Corn, *supra* note 5; Corn, *War Power*, *supra* note 22.

necessary to justify judicial intervention.[65] Accordingly, Congress was free to support presidential war-making initiatives explicitly, implicitly, or not at all. Perhaps more importantly, the President was permitted to carry on with war-making execution so long as Congress provided the sinew of war and until Congress took a clear and unambiguous stand in opposition to the war. As Judge Dooling noted in his District Court opinion in the case of *Orlando v. Laird*:

> It is passionately argued that none of the acts of the Congress which have furnished forth the sinew of war in levying taxes, appropriating the nation's treasure and conscripting its manpower in order to continue the Vietnam conflict can amount to authorizing the combat activities because the Constitution contemplates express authorization taken without the coercions exerted by illicit seizures of the initiative by the presidency. But it is idle to suggest that the Congress is so little ingenious or so inappreciative of its powers, including the power of impeachment, that it cannot seize policy and action initiatives at will, and halt courses of action from which it wishes the national power to be withdrawn. Political expediency may have counseled the Congress's choice of the particular forms and modes by which it has united with the presidency in prosecuting the Vietnam combat activities, but the reality of the collaborative action of the executive and the legislative required by the Constitution has been present from the earliest stages.[66]

In practice, inter-branch war powers cooperation has been far more consistent with Judge Dooling's conception than with an inflexible textual interpretation of the Constitution. While there have, of course, been situations when Congress expressly supported war-making initiatives by passing either declarations of war or statutes authorizing the use of military force, there have also been dozens of uses of force that have been supported by more subtle means.[67]

However, this has not, as some scholars assert,[68] resulted in a divestment of congressional war powers authority. Congress has always

[65] LEON FRIEDMAN & BURT NEUBORNE, UNQUESTIONING OBEDIENCE TO THE PRESIDENT: THE ACLU CASE AGAINST THE LEGALITY OF THE WAR IN VIETNAM 274 (1972) ("[P]rimary congressional responsibility for war and peace was firmly embedded in the Constitution, and . . . Congress could not avoid its responsibilities simply by deferring to the Executive. . . . No longer could critics of a war be dissuaded . . . by assurances that paying the bills for a war did not constitute its approval.").

[66] 317 F. Supp. 1013, 1019 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir. 1971).

[67] Specific examples of combat operations carried out without express congressional authorization include the 1989 Invasion of Panama, rescuing the Iranian hostages, the invasion of Grenada in 1983, and Operation Provide Comfort (giving support and humanitarian aid to the Kurds fleeing northern Iraq after the first Persian Gulf War).

[68] *Cf.* Adler, *supra* note 45, at 127–28 ("The power of Congress to authorize a limited war is, of course, a necessary concomitant of its power to declare general war. As a consequence, the president has no authority to order minor acts of war, such as missile strikes. Otherwise, the president might eviscerate the constitutional grant of

preserved its ability to expressly oppose uses of force ordered by the President and has on several occasions flexed its proverbial muscle by requiring the termination of military operations.[69] But neither before nor after the enactment of the War Powers Resolution has congressional practice indicated that it understood express authorization for hostilities to be a constitutional requirement.[70] Instead, its practice has validated the exact flexibility in expressing support for presidential initiatives the War Powers Resolution sought to eliminate.

If the Vietnam era decisions reflect an accurate understanding of the constitutional war powers relationship between Congress and the President,[71] they suggest that the express authorization requirement established by the War Powers Resolution was an invalid attempt to alter this constitutional "gloss." However, it is equally clear that the viability of this theory of flexible war powers interaction is contingent on one critical factor: that Congress receive effective notice of anticipated military operations. This notice is essential to offer Congress the opportunity to express its opposition, perhaps even prohibit the anticipated operation. Perhaps more importantly, notice is the factual element that justifies the inference that an absence of such express opposition invites execution by the President. Unless Congress is provided with a meaningful opportunity to exercise its constitutional prerogative to deny authority to conduct a given military operation, implied consent is effectively transformed into almost involuntary acquiescence.

Accordingly, the most important aspect of any statute attempting to ensure compliance with the Constitution's shared war powers mandate is the provision that triggers notice to Congress of anticipated military action. This trigger must be comprehensive enough to ensure Congress is not routinely presented with the proverbial operational *fait accompli*, and therefore must leave as little room as possible for "interpretive avoidance" by the President.[72] However, unless such a trigger also acknowledges the situations in which the President may order military

the war power to Congress. It is a predicate of the separation of powers that a power granted to one department may not be exercised by another.").

[69] Doe I v. Bush, 323 F.3d 133, 134 (1st Cir. 2003) (challenging George W. Bush's invasion of Iraq); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 204 (D.C. Cir. 1985); Dellums v. Bush, 752 F. Supp. 1141, 1143 (D.D.C. 1990) (members of Congress suing to enjoin the 1990 invasion of Iraq absent a form of congressional approval or official declaration of war). Congress has also attempted to sue to enjoin unilateral withdrawal from the ABM treaty—a stated war-type power. Kucinich v. Bush, 236 F. Supp. 2d 1, 2 (D.D.C. 2002). *See generally*, Corn, *supra* note 5.

[70] *See* case cited *supra* note 62.

[71] *See* cases cited *supra* notes 55–56.

[72] I maintain that avoidance is triggered when the limiting statute refers to the military action as "war" but not "armed conflict" for the purposes of the Geneva Convention's protection of victims of war. The same analysis applies to the War Powers Resolution—what a military action is named determines the correct constitutional response and may not allow congressional action at all. *See* Geoffrey S. Corn, *Back to the Future: De Facto Hostilities, Transnational Terrorism, and the Purpose of the Law of Armed Conflict*, 30 U. PA. J. INT'L L. 1345, 1346 (2009).

action on his inherent constitutional authority, it is almost inevitable that the trigger will be attacked as impermissibly overbroad. Striking this balance is only possible by first defining the scope of this inherent authority and then translating that scope to operational reality. It is to this that the Article will now turn.

B. Response to Sudden Attack: Acknowledging the Defensive Power of the President

Complicating any effort to require the President to interact with Congress on war powers decisions is the almost universally accepted existence of exclusive executive authority to respond to attacks on the United States or its armed forces.[73] This authority is derived from the President's role as both Chief Executive and Commander-in-Chief, and was clearly acknowledged by the Supreme Court in the Civil War decisions, *The Prize Cases*.[74] In those cases, the Court was called upon to decide whether President Lincoln could invoke the *jus belli*[75] as a legal basis to sell captured Confederate shipping vessels as prize.[76] This required the Court to determine whether the military response to the southern rebellion was considered a war for legal purposes even though it had not been authorized by Congress. In affirming the legality of the disposition of the captured shipping vessels, the Court ruled that when war is thrust upon the nation, the President had not only the authority but the obligation to "resist force by force."[77] This authority was not dependent upon congressional authorization; instead, it was derived from the inherent Article II power of the President.[78] Accordingly, the President was constitutionally authorized to use all the measures permitted by the *jus belli*.

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[73] *See, e.g.*, Adler, *supra* note 45, at 134; MILLER REPORT, *supra* note 24, at 13; Turner, *supra* note 52, at 683–84 ("[M]any members of Congress—including some key sponsors of the War Powers Resolution—acknowledged that the President had independent constitutional authority as Commander-in-Chief[.] . . . [S]ection 2(c) of the Resolution asserts that this power is limited to 'a national emergency created by attack upon the United States . . . or its armed forces.'").

[74] *See* sources cited *supra* note 35.

[75] Defined as the "law of war" and "[t]he law of nations as applied during wartime, defining in particular the rights and duties of the belligerent powers and of neutral nations." BLACK'S LAW DICTIONARY 937 (9th ed. 2009).

[76] The Prize Cases, 67 U.S. (2 Black) 635, 666 (1862) ("To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.").

[77] *Id.* at 668.

[78] *Id.* at 666 ("That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification . . . cannot be disputed."); U.S. CONST. art. II, § 2, cl. 1.

If there was any doubt regarding the constitutional basis for this inherent presidential "defensive" or "responsive" war authority,[79] it was dispelled with the enactment of the War Powers Resolution. Even though the Resolution was the product of undoubtedly the most expansive assertion of congressional war powers in the history of the nation, it expressly acknowledged the President's authority to engage the armed forces for the limited purpose of responding to an attack being "thrust" upon the nation, and even expanded the reach of this authority to include attacks against U.S. armed forces stationed outside the nation. According to the purpose section of the statute:

> 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.*[80]

The consequence of this acknowledgment of authority is significant, for it suggests that congressional demands that the President follow certain procedures as a predicate requirement to the exercise of this authority intrudes upon this vested constitutional power.

Any notice or consulting provision must therefore be sufficiently tailored to avoid such intrusion. This is no easy feat. Drawing a line between defensive or responsive, and offensive or non-responsive uses of the armed forces is extremely complicated. This complication is exacerbated by the inevitable blurring of international legal authority to employ military force and domestic constitutional analysis. Because such uses of force implicate not only constitutional authority but also the international law that defines the right of a state to act in self-defense, there is a tendency to use the legal standards from one context as a basis for definition of the other. When this occurs, the *jus ad bellum* concept of "anticipatory" self-defense makes this line-drawing exponentially more

[79] *The Prize Cases*, 67 U.S. at 668. The Court fleshes out this distinction by drawing a line between what is defensive and what is not. "He has no power to initiate or declare a war . . . [b]ut . . . he is authorized to called [sic] out the militia and use the military . . . of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States." *Id.* Professors David J. Barron and Martin S. Lederman also provide persuasive arguments for the existence of substantive presidential war powers. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 730 (2008) ("[There exists] a long line of Supreme Court precedent recognizing a range of distinct substantive powers that the Commander in Chief may exercise in the absence of legislative authorization" including "the power 'to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.'" (citing Fleming v. Page, 50 U.S. 603, 615 (1850))).

[80] War Powers Resolution § 2(c), 50 U.S.C. § 1541(c) (2006) (emphasis added).

difficult because it suggests that the President is vested with inherent authority not only to respond to attacks "thrust" upon the nation, but also those that are *about* to be thrust upon the nation.[81] As will be discussed in more detail below, this blending of international and constitutional legal standards is both unjustified and detrimental to defining constitutional authorities.

III. STRIPPING AWAY THE GLOSS: HOW THE WAR POWERS RESOLUTION SOUGHT TO ALTER 190 YEARS OF HISTORY

The War Powers Resolution defines the purpose of the statute as follows:

> [T]o 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.[82]

In order to achieve this asserted purpose, Congress built the Resolution around a core principle: With the exception of a military response to an attack on the United States or its armed forces, the President was required to obtain express legislative authorization as a condition precedent to engaging the nation in conflict or in situations where conflict was imminent. This is reflected in § 2(c) of the Resolution, which establishes that express congressional authorization (either a declaration of war or a statute) is required in all situations other than responses to sudden attack.[83]

In addition, in order to dispel any doubt as to the exclusivity of these sources of authority, the Resolution also explicitly deprived the President of the ability to use sources of implied legislative support as constitutional authority for such commitments:

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[81] This argument is a critical component of the so-called "Bush Doctrine" which allows the United States to attack a country it believes will pose a danger to its interests in the future. *See* Stephen R. Ratner, Comment, Jus ad Bellum *and* Jus in Bello *After September 11*, 96 AM. J. INT'L L. 905, 920–21 (2002) (citing EXECUTIVE OFFICE OF THE PRESIDENT, NAT'L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf) (arguing that this concept of "anticipatory self-defense" can and has been posited against states the Executive believes are in possession of weapons of mass destruction). *Cf.* Barron & Lederman, *supra* note 79, at 712.

[82] 50 U.S.C. § 1541(a).

[83] *Id.* § 1541(c).

> 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.[84]

Even the ubiquitous "sixty-day clock"[85] was not, as is often erroneously asserted, a grant of limited commitment authority. The War Powers Resolution is explicit that neither that provision—nor any other provision in the statute—may be asserted as a source of constitutional or statutory authority for the use of the armed forces. As a result, the sixty-day clock is simply a recognition that situations may arise involving uncertainty as to the existence of sufficient constitutional war-making authority, and that while the President may act on a belief that such authority exists, the lack of express legislative confirmation would resolve such uncertainty in favor of no authority.

As I have asserted in prior articles, the irony in these provisions is profound. Under the guise of "fulfill[ing] the intent of the framers,"[86] Congress utterly eviscerated the war powers constitutional modus operandi that had by that time become historically validated by decades of flexible inter-branch war powers cooperation.[87] This is, of course, unsurprising, as Congress was reacting to the pervasive reliance on this historical model by the judiciary as the basis for rejecting every war powers constitutional challenge litigated during the Vietnam conflict.[88] However, irrespective of how dismayed Congress may have been that courts were unwilling to invalidate presidential orders to conduct that war in the absence of clear and express congressional opposition, those cases exposed the true merit of this historically validated constitutional war powers framework.[89]

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[84] *Id.* § 1547(a).

[85] *See supra* note 8 and accompanying text.

[86] 50 U.S.C. § 1541(a).

[87] *See generally* Corn, *supra* note 5; Corn, *War Power*, *supra* note 22.

[88] *See* cases cited *supra* note 55.

[89] Ronald J. Sievert, Campbell v. Clinton *and the Continuing Effort to Reassert Congress' Predominant Constitutional Authority to Commence, or Prevent, War*, 105 DICK. L. REV. 157, 164 (2001) ("It naturally followed from this logic that the solution to prevent future executive debacles would be a measure which would help reestablish the war power in the hands of the Congress where it originally had been placed by the Constitutional Convention of 1789. The result was the War Powers Act of 1973.").

As noted earlier in this Article, the great weight of scholarly opinion concludes that the Constitution diffuses war powers between the two political branches. Most scholars also conclude that the Declaration Clause, when coupled with the power of the purse and the Necessary and Proper Clause, vest in Congress the ultimate power to decide when the nation should initiate war, when the nation should not initiate war, and when war should be terminated.[90] However, as the Vietnam era war powers decisions revealed, this ultimate authority does not also include the exclusive authority to initiate war.[91] That authority, like the war powers themselves, is diffused between the President and Congress.

Throughout the nation's history, it has been more common for Presidents to initiate armed hostilities than Congress.[92] This does not, however, indicate that these hostilities have been authorized on the exclusive authority of the President. Instead, a careful balance has evolved between the two political branches, a balance that can generally be understood to reflect the legitimacy of presidential reliance on implied congressional support.[93] Pursuant to this paradigm—a paradigm consistent with Justice Jackson's three-tiered conception of the exercise of executive power in national security affairs[94]—the vagaries of foreign affairs coupled with the often ambivalent position of Congress on matters of hostilities almost invited executive initiative in this proverbial constitutional "twilight zone." When the President acts within this tier of authority, the key constitutional consideration becomes the nature of the congressional response.[95]

During the Vietnam era, congressional reaction to the conflict spanned a continuum from express statutory authorization, to expressions of opposition coupled with continued provision of the sinew of war, to an ultimate withdrawal of all legislative support. As Congress

[90] For an excellent discussion of theories regarding congressional war power authority, see J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991). *See also* Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander In Chief*, 80 VA. L. REV. 833, 835 (1994) ("The power of the purse supplemented the Declaration of War power by allowing Congress to control war powers by specifying spending objectives or otherwise restricting spending ex ante.").

[91] *Supra* notes 55, 57–58 and accompanying text.

[92] *See supra* note 67; Sievert, *supra* note 89, at 167 (describing armed hostilities entered into by President Reagan).

[93] *See, e.g.*, Campbell v. Clinton, 203 F.3d 19, 29, 38–41 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000) (Randolph, J., concurring) (Tatel, J., concurring) (holding, by two of the three circuit court judges, that Congress had no standing because they exercised their power to defeat a "specific legislative action" despite the fact that President Clinton still deployed troops to Yugoslavia); Corn, *supra* note 5, at 1179–80 ("[T]he congressmen lacked standing to challenge the war . . . because the lack of express opposition from the Congress meant that they could not assert that any of their votes had been nullified by the President.").

[94] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[95] *Id.* at 637; *cf. Campbell*, 203 F.3d at 31 (Randolph, J., concurring).

moved from the extreme of express support to express opposition,[96] the President was confronted with a dilemma: Was the continued execution of the war constitutionally authorized as the foundation of legislative support was gradually eroded? For President Nixon, the response was a clear determination to continue to execute the war so long as Congress continued to provide the sinew of war. Ultimately, however, even President Nixon acquiesced to the will of Congress once it had withdrawn both the authorization for the war and the funding for continued combat operations.[97]

On several occasions during this period, servicemen subject to orders to participate in the war requested judicial intervention to support their assertions that the President lacked constitutional authority to issue their orders.[98] The courts that ruled on these challenges almost unanimously reverted to the same fundamental principle: while Congress possesses the authority to require the President to terminate the war, it is the responsibility of Congress to exercise that authority *without* ambiguity.[99] For these courts, such ambiguity triggered invocation of the political question doctrine. Once the courts determined there was *some* form of cooperation between the two branches (a constitutional requirement due to the shared constitutional war powers), *how* Congress chose to support the conflict was a matter solely within its political discretion.[100] This *rational decidendi* led to dismissal of these challenges, but did so in a way that acknowledged the constitutional requirement of cooperation between the two political branches on the decision to wage war and preserved for Congress the potential to demand termination of the war.[101]

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[96] *See, e.g.*, Gary Minda, *Congressional Authorization and Deauthorization of War: Lessons from the Vietnam War*, 53 WAYNE L. REV. 943, 945 (2007).

[97] It has been suggested that Congress did not unequivocally revoke its support for the war, and that played the most significant part in continuing combat activities in Vietnam. Professor Minda concludes that: "The legislative experiences of Vietnam teach that a repeal of a war authorization must be unmistakable in establishing the intent of Congress to recapture its war power. Congressional intent must not be allowed to be muddied by offering the repeal measure as part of a package to accomplish other legislative objectives." *Id.* at 988.

[98] *See* cases cited *supra* note 55.

[99] Minda, *supra* note 96, at 988 ("Congress must establish its intent by a [sic] establishing a clear legislative record for 'de-authorizing' war and its legislation must be independent of any other legislative objectives and goals. Legislation to stop a war followed by legislation to fund a war sends conflicting signals.").

[100] Professor Jonathan L. Entin indicates that the political question doctrine is the superior avenue for resolving conflicts such as this. "[C]ourts have had difficulty rendering consistent or principled decisions on questions of legislative-executive relationships. [However], interbranch negotiations recognize the political contingencies of many military and diplomatic disputes." Jonathan L. Entin, *The Dog That Rarely Barks: Why the Courts Won't Resolve the War Powers Debate*, 47 CASE W. RES. L. REV. 1305, 1313–14 (1997). *See also supra* notes 62–63 and accompanying text.

[101] This is best articulated in Judge Anderson's opinion in *Orlando v. Laird*: "Beyond determining that there has been *some* mutual participation between the Congress and the President, which unquestionably exists here, with action by the

While the servicemen who brought these challenges ultimately failed to obtain the relief they desired,[102] the practical impact of this theory of cooperative constitutional war powers transcended the individual cases. What it suggests is that, unless and until Congress eliminates all indicia of legislative support for a conflict it once authorized or a conflict initiated by the President on the assumption of constitutional legitimacy, the President is entitled to continue to prosecute the war based on the aggregate of his power as Commander-in-Chief and the implied support of Congress evidenced by their unwillingness or inability to withdraw such support.[103] This is particularly significant in relation to funding military operations. As these courts noted, even when Congress expresses general opposition to the continuation of a war through a concurrent resolution, continuing to fund the war will effectively nullify this expression of opposition from a constitutional standpoint.[104]

There are scholars who reject this theory of cooperative war powers.[105] They assert alternative theories of plenary authority vested in the respective political branches.[106] But theories of plenary war powers vested in either the executive or legislative branches seem inconsistent with the aggregate impact of historical practice, war powers jurisprudence, and the influence of Justice Jackson's national security trilogy. All of these authorities point to the almost inescapable conclusion that, contrary to the content of the War Powers Resolution, it is the "implied consent" paradigm that reflects the true constitutional war powers balance.[107]

Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question." 443 F.2d 1039, 1043 (2d Cir. 1971). *See also supra* notes 62–63.

[102] *See* cases cited *supra* note 55.

[103] *See id.*; Minda, *supra* note 96, at 988.

[104] Minda, *supra* note 96, at 950 ("[T]he Vietnam War illustrates that even after the repeal of its war authorization, Congress was unwilling to end the hostility and was in fact willing to financially support the fighting so long as the President had the will and determination to 'stay the course.'"). *Cf. Orlando*, 443 F.2d at 1042–43 (holding that "[b]oth branches collaborated in [Vietnam], and neither could long maintain such a war without the concurrence and cooperation of the other").

[105] For further delineation between views, see MILLER REPORT, *supra* note 24, at 13. *See, e.g.*, John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 430–31 (2003). Professor Yoo states that "Congress has power over funding, and can thus deprive the president of any forces to command. . . . Congress can determine the type, place, and duration of conflicts that the executive can wage." *Id.* at 436.

[106] Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 48 (1993) ("[V]irtually every modern commentator acknowledges 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.'" (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936))).

[107] *See supra* note 13 and accompanying text.

This conclusion is bolstered substantially by the events surrounding the U.S. air war against Serbia in 1997. That conflict, unlike any other since the enactment of the War Powers Resolution, was conducted by the President in direct contravention of the express authorization provision of the Resolution and exceeded the sixty-day clock. In perhaps the most significant war powers decisions since that time, the District of Columbia district and appellate courts relied on a rationale similar to that reflected in the Vietnam era decisions (although at times cloaked in the doctrine of legislative standing) to dismiss a challenge by a group of legislators to the continued execution of the air campaign conducted by the United States against Serbia in 1997.[108] In *Campbell v. Clinton*,[109] the federal courts once again confronted a request to declare the President's orders to execute a conflict unconstitutional.[110] Like the Vietnam conflict itself—the conflict that provided the impetus for the War Powers Resolution—congressional reaction to President Clinton's decision to initiate and sustain the conflict was schizophrenic. Congress voted down both a declaration of war against Serbia and a statute prohibiting continuation of the conflict.[111] However, Congress also passed legislation providing supplemental appropriations to fund the conflict.[112]

Based on the War Powers Resolution, this record of congressional ambiguity should have been sufficient to conclude the President was required to terminate hostilities after sixty days.[113] However, like their Vietnam era predecessors, the congressional response to the conflict was not only inconsistent, it could be described as schizophrenic. Ultimately, just as their Vietnam era predecessors had refused to compel the President to terminate a war when Congress had failed to clearly and unequivocally demand the same, these courts refused to grant the requested relief based on the absence of a clear conflict between the will of Congress and the actions of the President.[114] The legislators' request for declaratory relief was also ultimately dismissed on justiciability

[108] Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (holding that members of Congress did not have standing to challenge this action), *cert. denied*, 531 U.S. 815 (2000).

[109] *Id.*

[110] *Id.*

[111] On April 28, 1999, Congress voted on four resolutions related to the Yugoslav conflict: it voted down a declaration of war (H.R.J. Res. 44, 106th Cong. (1999)) 427 to 2 ; the House failed to approve the Senate's "authorization" of the air strikes (S. Con. Res. 21, 106th Cong. (1999)) 213 to 213. 145 CONG REC. H2440, H2451 (daily ed. Apr. 28, 1999). Congress also voted against requiring the President to immediately end U.S. participation in the NATO operation (H.R. Con. Res. 82, 106th Cong. (1999)) and voted not to fund that involvement (Military Operations in the Federal Republic of Yugoslavia Limitation Act of 1999, H.R. 1569, 106th Cong. (1999)). *See Campbell*, 203 F.3d at 20.

[112] 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, 113 Stat. 57 (1999).

[113] War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2006).

[114] *Campbell*, 203 F.3d at 23–24.

grounds.[115] Thus, as a practical matter, the President's execution of the war remained constitutionally viable so long as there was some evidence of congressional support.[116]

While the courts never reached the substantive constitutional questions, the dismissal is telling, for it suggests that such a challenge will be justiciable only when Congress expressly opposes a conflict.[117] This essentially nullified the effect of the War Powers Resolution because it allows the President to continue to wage the conflict so long as there is some evidence of congressional support—the exact type of implied support the Resolution purports to prohibit.[118]

It is, of course, conceivable that a different type of plaintiff might force a court to reach this substantive question by overcoming justiciability barriers—most likely a serviceman. However, the fact that Congress took no action to condemn President Clinton[119] or to enforce the Resolution itself reinforces the conclusion of the Vietnam era courts that *how* Congress chooses to react to a presidential war-making initiative truly is inherently political,[120] therefore rendering the War Powers Resolution redundant with the power that Congress has possessed since the inception of the Republic: The power to stop war by taking the unequivocal action necessary to do so. Asking courts to exercise this critical and sensitive power on behalf of Congress, even with the additional impact of the Resolution, would produce a shift of political responsibility of profound proportions. In short, Congress bears the responsibility to act with the type of decisiveness to stop war that matches the decisiveness of the President to initiate or continue war, and the Resolution reflects one Congress's ill-conceived attempt to relieve future Congresses of this political responsibility.[121] What is even more problematic is that it deprives these future Congresses of the flexibility to determine how to support presidential war-making initiatives that their

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[115] *Id.* at 23.

[116] *Id.*

[117] *Id.*

[118] 50 U.S.C. § 1547(a) ("Authority to introduce United States Armed Forces into hostilities . . . shall not be inferred . . . from any provision of law . . . unless such provision specifically authorizes [it] . . . and states that it is intended to constitute specific statutory authorization.").

[119] *Campbell*, 203 F.3d at 23.

[120] Professor Entin argues this is the case because "reliance upon the political process to resolve questions about war powers and foreign affairs . . . requires a degree of interbranch comity that is inconsistent with frequent reliance upon the judiciary as referee." Entin, *supra* note 100, at 1314. Furthermore, a shared sense of limits between the branches exists because actors in the "political process tend to appreciate the desirability of avoiding internecine conflict and . . . both structural and institutional factors usually dampen the inevitable conflicts that do arise." *Id.*

[121] Professor Glennon indicates that, ironically, § (8)(a)(1) of the War Powers Resolution was codified in order to reject the idea that "passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war." Glennon, *supra* note 31, at 80 (citing S. REP. NO. 93-220, at 25 (1973)).

counterparts exercised since the inception of the Republic[122]—and indeed continued to exercise even after enactment of the Resolution.[123]

The constitutional viability of this flexible conception of shared war powers is contingent, however, on one critical component: A meaningful opportunity for Congress to express opposition to war-making initiatives *before* they are executed.[124] Unless Congress is provided such an opportunity to exercise its authority, implied consent begins to appear much more like compelled acquiescence.[125] Indeed, this was the underlying motivation for the notice and consultation provisions of the War Powers Resolution.[126] Because of this, these components of the Resolution have since its enactment possessed a substantially greater degree of constitutional credibility, a fact validated by the focus of the National War Powers Commission's proposed successor to the Resolution.[127] This credibility has been enhanced by the reality that, since its enactment, Presidents have treated notice and consultation "consistent with" the War Powers Resolution as an imperative.[128] This suggests that these Presidents have considered these provisions of the Resolution to be far less constitutionally intrusive than the express authorization requirements and arguably even beneficial.[129]

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[122] Specific examples include Congress giving James Madison the authorization to use the whole land and naval forces of the United States to fight the war of 1812 and when Presidents Wilson and Franklin Roosevelt "worked diligently with the Legislative Branch to resolve difficult issues and Congress ultimately declared war." MILLER REPORT, *supra* note 24, at 15.

[123] Since the Vietnam War, "Congress has set clearer parameters for a specific engagement. . . . [It] authorized the President to take military action against Iraq, but limited the authorization to enforcing existing U.N. Security Council Resolutions." *Id.* at 17. The Commission further explains that "Congress and . . . Reagan's Administration worked closely on the . . . peacekeeping mission in Lebanon. After negotiations between congressional leaders and the White House, Congress specifically authorized American troops to remain in Lebanon for 18 months." *Id.* at 17–18.

[124] *Id.* at 7 ("[O]ne common theme runs through most of these efforts at reform: the importance of getting the President and Congress to consult meaningfully and deliberate before committing the nation to war.").

[125] *Id.* ("No clear mechanism or requirement exists today for the President and Congress to consult. . . . This is not healthy. It does not promote the rule of law. It does not send the right message to our troops or to the public. And it does not encourage dialogue or cooperation between the two branches.").

[126] *See* source cited *supra* note 121.

[127] *Cf.* Glennon, *supra* note 31, at 80 ("[F]orcing 'Congress to have a timely up-or-down vote' is one of the panel's central objectives," but the Miller Report does not address the "possibility that the Constitution may have intended to permit the legislators purposefully to place a given presidential act within Justice Jackson's 'zone of twilight' and to leave legal evaluation to the courts of law or public opinion." (citing MILLER REPORT, *supra* note 24, at 39; Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring))).

[128] *See* sources cited *supra* note 6.

[129] *See id.*; MILLER REPORT, *supra* note 24, at 24 (indicating that Presidents believe that acting *consistently with* does not start the sixty-day clock but is sufficient to impart

That a President would consider the notice and consultation provisions potentially beneficial is unsurprising. Because the history of war powers indicates that a President is justified in relying on an absence of express congressional opposition to a war-making initiative as an invitation to press forward with that initiative, acting in accordance with these provisions strengthens the hand of a President by enhancing the value of both a lack of express congressional opposition and implied congressional support.[130] It is also an undeniable historical fact that the probability that notice and consultation will trigger vigorous congressional opposition to such an initiative is extremely remote.

All of this is obviously central to the proposed War Powers Consultation Act. As the Commission notes in its report, ensuring meaningful consultation between the President and Congress on war related initiatives is the ultimate means of fulfilling the intent of the Founders.[131] Accordingly, it has proposed a consultation trigger intended to be more effective than the current "hostilities or situations where hostilities are imminent" trigger of the Resolution.[132] This effort is logical, constitutionally sound, and laudable. What is questionable, however, is whether the "significant armed conflict" trigger of the proposal is indeed a substantial improvement over the current trigger. But even if this question is answered in the affirmative, it does not mean that the proposed trigger is as effective as it possibly could be.

It is essential that any substitute for the War Powers Resolution avoid the same defect that has plagued the Resolution consultation provision from its inception: uncertainty as to when it is triggered. By adopting the "hostilities or situations where hostilities are imminent" trigger, Congress fueled a semantic debate that continues to this day.[133] "Significant armed

notice to Congress under the War Powers Resolution, whereas acting *pursuant to* would start the clock and implicate § 5(b)).

[130] Corn, *War Power*, *supra* note 22, at 250 ("[A]s long as some plausible evidence of congressional support for the President exists, thereby placing the decision in the 'twilight zone' of the *Youngstown* template, presidential war power decisions should be considered to be constitutional." (citations omitted)).

[131] *Supra* note 124 and accompanying text.

[132] "Before ordering the deployment of United States armed forces into significant armed conflict, the President shall consult with the Joint Congressional Consultation Committee." This committee would be made up of: "i) The Speaker of the U.S. House of Representatives and the Majority Leader of the Senate; ii) The Minority Leaders of the House of Representatives and the Senate; iii) The Chairman and Ranking Minority Members of each of the following Committees of the House of Representatives: (a) The Committee on Foreign Affairs, (b) The Committee on Armed Services, (c) The Permanent Select Committee on Intelligence, and (d) The Committee on Appropriations[;] iv) The Chairman and Ranking Minority Members of each of the following Committees of the Senate: (a) The Committee on Foreign Relations, (b) The Committee on Armed Services, (c) The Select Committee on Intelligence, and (d) The Committee on Appropriations." MILLER REPORT, *supra* note 24, at 45–46.

[133] *See* sources cited *supra* note 5.

conflict"[134] creates the same inherent risk for one critical reason: it is not tethered to a military operational criterion. What is needed, therefore, is a trigger for notice and consultation that mirrors operational reality, ensuring that before a President orders initiation of hostilities Congress is offered a meaningful opportunity to exercise its war powers "veto," and offering the President the confidence that absence of such congressional action is sufficient to provide a solid constitutional basis for the anticipated military action. This trigger cannot be found in general terms of war and peace; it must be derived from the language of military operations themselves. Shifting the focus from a general concept like "significant combat" to an operational concept that functionally tracks the line between responsive versus proactive uses of combat power will more effectively align required consultation with the contours of constitutional war powers. That operational concept exists in the form of Rules of Engagement.

IV. RULES OF ENGAGEMENT: LETTING OPERATIONAL REALITY DRIVE POLITICAL DECISION MAKING[135]

All uses of military power share a common underlying operational purpose: mission accomplishment. When the President directs the military to engage in operations, it is the nature of the mission that will always dictate the authority for the employment of combat power. This authority will be translated from strategic to operational terms through the conduit of Standing Rules of Engagement (SROE). Once a mission is authorized by the President, these rules are issued by the Chairman of the Joint Chiefs of Staff pursuant to an instruction issued under the President's authority: Chairman of the Joint Chiefs of Staff Instruction 3121.01B: Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (CJCSI), as amended in 2005.[136]

The SROE "establish fundamental policies and procedures governing the actions to be taken by US commanders during all military operations and contingencies and routine Military Department functions."[137] This includes "Antiterrorism/Force Protection . . . duties,

[134] The Miller Report defines this phrase as "(i) any conflict expressly authorized by Congress, or (ii) any combat operation by U.S. armed forces lasting more than a week or expected by the President to last more than a week." MILLER REPORT, *supra* note 24, at 45.

[135] This Section is reproduced, with significant edits, from my prior article Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787 (2008).

[136] CJCSI 3121.01B, *supra* note 41. CJCSI 3121.01B is classified as "secret," but the basic instruction and Enclosure A, entitled "Standing Rules of Engagement for US Forces," are "unclassified." All references in this paper to the SROE will come from the basic instruction or the unclassified enclosure and will be from the 2005 edition, unless otherwise noted.

[137] *Id.* § 1(a) of Enclosure A.

but excludes law enforcement and security duties on [Department of Defense (DoD)] installations, and off-installation while conducting official DoD security functions, outside US territory and territorial seas."[138] The SROE also apply to "air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the [Secretary of Defense]"[139] and are standing instructions that are "in effect until rescinded."[140] Thus, the SROE are standing instructions regulating the use of destructive military power that apply to almost everything the military does outside the continental United States.[141] Unless otherwise directed, they apply to soldiers stationed in Germany, air crews providing disaster assistance in Pakistan after an earthquake, Marines on shore leave in Australia, and sailors cruising through the Mediterranean. And they certainly apply to members of the military patrolling neighborhoods on a United Nations peace enforcement mission or fighting in the streets against a counterinsurgency.

The SROE authorization process will be explained in more detail below. However, what is critical for purposes of this proposal is that all uses of combat power by the armed forces of the United States are regulated by this process. Analysis of the authority provided by the SROE for any given military mission will therefore in large measure reveal the national command perception of where the mission falls along the spectrum of defensive to offensive hostilities.

As defined in U.S. military doctrine, the SROE are "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."[142] In other words, the SROE serve two purposes. At the strategic level, they define the scope of authority for military forces to engage opponents. At the operational/tactical level, they also provide military leaders greater control over the execution of combat operations by subordinate forces. Though not historically designated in contemporary terms, the history of warfare is replete with examples of what have essentially been SROE. The Battle of Bunker Hill provides a more modern and perhaps quintessential example of such use. Captain William Prescott imposed a limitation on the use of combat power by his forces in the form of the directive "[d]on't one of you fire until you see the whites of their eyes"[143] in order to accomplish a tactical objective. Given his limited resources against a much larger and better equipped foe, he used this tactical

[138] *Id.*
[139] *Id.*
[140] *Id.* § 1(c) of Enclosure A.
[141] Grunawalt, *supra* note 40, at 247–48.
[142] DOD DICTIONARY, *supra* note 40, at 473.
[143] JOHN BARTLETT, FAMILIAR QUOTATIONS 446 (Emily Morison Beck ed., 14th ed., Little, Brown & Co. 1968) (1855), *quoted in* Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 34 (1994).

control measure to maximize the effect of his firepower.[144] This example, of what was in effect SROE, is remembered to this day for one primary reason—it enabled the American rebels to maximize enemy casualties.

Another modern example of what would today be characterized as SROE—one that illustrates the use of such controls to draw a line between defensive/responsive uses of force and offensive uses—is the Battle of Naco in the fall of 1914. The actual battle was between two Mexican factions, but it occurred on the U.S. border.[145] In response to the threat of cross-border incursions, the 9th and 10th Cavalry Regiments, stationed at Fort Huachuca, Arizona, were deployed to the U.S. side of the border to ensure that U.S. neutrality was strictly maintained. As part of the Cavalry mission, "[t]he men were under orders not to return fire,"[146] despite the fact that the U.S. forces were routinely fired upon and "[t]he provocation to return the fire was very great."[147] Because of the soldiers' tactical restraint and correct application of their orders, the strategic objective of maintaining U.S. neutrality was accomplished without provoking a conflict between the Mexican factions and the United States. The level of discipline reflected by the actions of these U.S. forces elicited a special letter of commendation from the President and the Chief of Staff of the Army.[148]

Despite these and numerous other historical examples of soldiers applying what would today be characterized as SROE, the actual term "rules of engagement" was not used in the United States until 1958 by the military's Joint Chiefs of Staff (JCS).[149] In 1981, the JCS produced a document titled the "JCS Peacetime ROE for Seaborne Forces," which was subsequently expanded in 1986 into the "JCS Peacetime ROE" for all U.S. forces.[150] Then, at the end of the Cold War, the JCS reconsidered their peacetime ROE and determined that the document should be amended to apply to all situations, including war and military operations

[144] The Battle of Bunker Hill was fought on June 17, 1775, at the beginning of the American Revolutionary War. The Colonists' 1,200 soldiers were pitted against over 6,000 British forces. Despite losing the battle, the Colonists gave the British their largest loss of soldiers (226 killed and over 800 wounded) from any battle during that war. RICHARD FROTHINGHAM, JR., HISTORY OF THE SIEGE OF BOSTON, AND OF THE BATTLE OF LEXINGTON, CONCORD, AND BUNKER HILL 190–91, 194 (1851).

[145] Corn & Jensen, *supra* note 135, at 804.

[146] JAMES P. FINLEY, HUACHUCA ILLUSTRATED: THE BUFFALO SOLDIERS AT HUACHUCA (1993), *available at* http://net.lib.byu.edu/estu/wwi/comment/huachuca/HI1-10.htm.

[147] *Id.*

[148] *Id.* The commendation letter stated, "These troops were constantly under fire and one was killed and 18 were wounded without a single case of return fire of retaliation. This is the hardest kind of service and only troops in the highest state of discipline would stand such a test." *Id.*

[149] Martins, *supra* note 143, at 36.

[150] *Id.* at 42.

other than war.[151] In 1994, they promulgated the "Chairman of the Joint Chiefs of Staff Standing Rules of Engagement,"[152] which were subsequently updated in 2000 and again in 2005. As will be discussed below in detail, it is the 2005 edition that governs the actions of U.S. military members today.

SROE have become key legal and policy aspects of modern warfare[153] and key components of mission planning for U.S. forces.[154] In preparation for military operations, the President and/or Secretary of Defense must personally review and approve the SROE, ensuring they meet military and political objectives.[155] Because of this SROE approval requirement, mission-specific SROE provide the ultimate insight into the President's perception of the nature of the mission and the use of military force required to accomplish the mission.

A. Organization

Understanding the organization of the SROE for U.S. forces provides insight into the principles they espouse. The basic instruction is only six pages long, unclassified, and provides only general guidelines concerning the use of force.[156] Most importantly, it discusses the general applicability of the document as discussed above, and then highlights the difference between the rules for self-defense and mission accomplishment.[157]

The CJCSI for the SROE is functionally divided between two broad categories of use-of-force authorizations. The first category, which is provided for in the unclassified Enclosure A of the CJCSI, provides constant authority for U.S. forces to employ force in self-defense or in defense of other U.S. forces.[158] This portion of the SROE is often referred

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[151] Faculty, The Judge Advocate General's School, *"Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement*, ARMY LAW., Dec. 1993, at 48–49.

[152] CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A: STANDING RULES OF ENGAGEMENT FOR US FORCES (Jan. 15, 2000), http://www.fas.org/man/dod-101/dod/docs/cjcs_sroe.pdf.

[153] *See* Sean McCormack, Spokesman, Daily Press Briefing, U.S. Department of State (Oct. 3, 2007), http://2001-2009.state.gov/r/pa/prs/dpb/2007/oct/93190.htm.

[154] *See* CTR. FOR LAW & MILITARY OPERATIONS, JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCHOOL, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2006, at 140 (2006), http://www.loc.gov/rr/frd/Military_Law/pdf/forged-in-the-fire.pdf.; *see also* INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 1-1 to -32 (2007), *available at* http://www.fas.org/irp/doddir/army/law2007.pdf [hereinafter OPERATIONAL LAW HANDBOOK].

[155] Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998).

[156] CJCSI 3121.01B, *supra* note 41.

[157] *Id.* § 6.

[158] *Id.* at Enclosure A. It has been said that these "rules of engagement insure that the President and his military commanders can have reasonable confidence that an

to as providing for the inherent right of self-defense. The authority provided by this enclosure is triggered only when U.S. forces come under attack or confront an imminent threat of attack. The second category is addressed through a number of classified enclosures. These enclosures provide the mechanism to authorize uses of force not triggered by the inherent right of self-defense. Accordingly, unless U.S. forces are *responding* to an attack or an imminent threat of attack, use-of-force measures must be authorized by the NCA.[159]

It is therefore clear that the foundation of the SROE is the bifurcation between the rules governing self-defense and those governing authorization to use force to accomplish missions that exceed self-defense authority—responsive versus proactive uses of combat power. This foundational principle is the key to a proper understanding and application of force by U.S. forces. As CJCSI 3121.01B indicates: "The purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense."[160] Throughout the CJCSI these two situations are treated as essentially mutually exclusive. By treating these two categories of authorization to employ combat power as distinct, the CJCSI provides a paradigm whereby each set of rules can be the subject of appropriate training to ensure that they are clearly understood and readily applicable. Accordingly, they facilitate the execution of missions, regardless of whether military members are employing force in self-defense or employing force without an immediate, imminent threat in order to accomplish a designated operational mission.

This division-of-force employment authority between mission accomplishment and traditional self-defense principles is indicative of both the nature of the mission as well as the nature of anticipated threats posed by different groups that might be encountered during such missions.[161]

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isolated individual or unit will employ force in harmony with the political objectives of the President and within the constraints of law, diplomacy, general policy, and available technology." William George Eckhardt, *Nuremburg—Fifty Years: Accountability and Responsibility*, 65 UMKC L. REV. 1, 10 (1996).

[159] CJCSI 3121.01B, *supra* note 41, § 6.

[160] *Id.* § 1(a) of Enclosure A.

[161] For example, when U.S. forces entered Iraq in March 2003, the Iraqi forces were presumably the "enemy" and could be attacked on sight irrespective of whether they were presenting U.S. forces with an actual imminent threat. Individuals in this category were expected to be identifiable because they were normally wearing Iraqi uniforms. They were also, of course, correspondingly able to engage U.S. forces on sight without waiting for any specific action or additional direction. However, there was no requirement that U.S. forces wait to allow such a threat to develop before engaging these individuals with destructive combat power. These engagements were governed by the mission accomplishment SROE and provided with robust authority (derived from the authority to engage any Iraqi soldier upon contact). *See* Grunawalt, *supra* note 40, at 255–56.

In contrast, once the Iraqi military was defeated and the U.S. forces established general control in areas throughout Iraq and began moving among the populace,

It is the thesis of this Article that this division between responsive and permissive use of force authority that lies at the core of the U.S. SROE provides an effective and pragmatic "trigger" for war powers notification and consultation. When operating under self-defense SROE, U.S. forces are acting within the realm of authority inherently vested in the President as Commander-in-Chief and Chief Executive of the nation.[162] Accordingly, no notification to Congress is constitutionally *required* when military force is used pursuant to this authority. However, when forces act beyond the scope of self-defense SROE, the permissive use-of-force authority that must be granted to facilitate mission accomplishment exceeds this inherent constitutional power and crosses

there was the additional risk that they would come under attack from time to time from members of this population. Such risk did not come from Iraqi forces or other lawful combatants under the definitions in the Geneva Conventions. *See* Convention (III) Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 355, 362–63 (Dietrich Schindler & Jirí Toman eds., 2d ed. 1981) (outlining the requirements to be considered a prisoner of war—a status reserved for lawful combatants). Instead, it came from Iraqi civilians who opposed the U.S. presence in Iraq. In these situations, U.S. forces responded not against declared or known hostile forces, but against an otherwise protected civilian who had decided to take up arms and act hostilely to U.S. forces. It is important to note that the Geneva Convention delineates between combatants and civilians. Thus, civilians who take up arms against a combatant may place them in an area not defined by international protocol. *See* Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 82.

In this situation, self-defense principles are implemented by the SROE, authorizing U.S. forces to employ necessary force in response to an imminent threat directed to them or other innocent individuals. When employing force against the Iraqi armed forces, it is their status as members of that group that subjects them to attack; whereas when employing force against hostile civilians, it is their conduct that subjects them to attack.

Though the SROE treat mission accomplishment and self-defense as almost mutually exclusive, there are situations where such bifurcation could be misleading. For example, if U.S. forces engage an opponent who launches an attack against them during combat or high intensity conflict situations, they are ostensibly defending themselves. In such situations, should the response be governed by the self-defense rules? The answer is no. Because they are in a combat environment and are engaged by declared hostile forces, their use of force is governed by mission accomplishment rules even though the nature of the response also implicates self-defense. This provides an operational advantage for U.S. forces because, as explained below, mission accomplishment rules are generally more permissive than self-defense rules. There are other similar examples on the fringes of the differentiation between self-defense and mission accomplishment, but for the majority of situations, this bifurcation is a great aid not only in applying force but also in the conduct of preparatory training for an assigned mission. *See* Grunawalt, *supra* note 40, at 255–56.

[162] *Cf.* OPERATIONAL LAW HANDBOOK, *supra* note 154, at 85 ("Authority to use force in mission accomplishment may be limited in light of political, military or legal concerns, but such limitations have NO impact on a commander's right and obligation of self-defense. Further, although commanders may limit individual self-defense, commanders will always retain the inherent right and obligation to exercise unit self-defense." (footnote omitted)).

into the realm of war powers shared between the President and Congress. Accordingly, the grant of such permissive authority serves as a viable trigger for mandatory congressional notification mirroring the contours of the division of constitutional war powers.

The quintessential example of such permissive authority granted pursuant to the SROE is a designation of an opponent as a "hostile force."[163] This designation is a functional necessity to authorize U.S. forces to initiate hostilities against an enemy. For example, in March of 2003, the Iraqi army was "the enemy" or the "declared hostile force." "Declared hostile force[s]" are defined in the SROE as "[a]ny civilian, paramilitary or military force or terrorist(s) that has been declared hostile by appropriate US authority."[164] Under the SROE, U.S. forces may always engage a declared hostile force, irrespective of their manifested conduct[165] (with the exception of conduct that clearly indicates such personnel are *hors de combat*).[166] It is their *status* as members of a declared hostile force which makes them subject to attack. It does not matter whether the declared hostile force is sleeping, taking a shower, eating a meal, or attacking U.S. forces. In all cases, they may be attacked. This is not to say that once identified as a member of a hostile group, U.S. forces *must* attack.[167] Ultimately, other tactical considerations will dictate the nature of the U.S. reaction. For example, if a U.S. soldier happens upon a sleeping Iraqi soldier, it may very well be tactically preferable to capture this enemy rather than kill him. But this merely illustrates that the authority granted by the SROE, which is in turn derived from the law of war principle of military objective, is just that—an authority, not an obligation. It is the authority to engage an opponent as a measure of first resort irrespective of the actual threat manifested by that opponent that indicates a shift from responsive to permissive use of military power by the nation.[168]

In contrast, when responding to a threat pursuant to self-defense authority, two SROE definitions are determinative: hostile act and hostile

[163] CJCSI 3121.01B, *supra* note 41, § 2(b) of Enclosure A.

[164] *Id.* § 3(d) of Enclosure A.

[165] *Id.* § 2(b) of Enclosure A.

[166] This includes "those individuals who are 'out of the fight' such as sick or wounded combatants, non-aggressive aircrews descending by parachute after the destruction of their aircraft, shipwrecked combatants, interned battlefield detainees, POWs and other captured combatants." Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 8 (2004) (citing *Ex parte* Quirin, 317 U.S. 1, 30–31 (1942)).

[167] CJCSI 3121.01B, *supra* note 41, § 3(a) of Enclosure A ("Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent.").

[168] Professor Grunawalt indicates this is the crux of the SROE. Grunawalt, *supra* note 40, at 253.

intent.[169] A hostile act is defined as "[a]n attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property."[170] This is the easier of the two principles to understand and apply. In the above Iraq hypothetical, it occurs when the civilian shoots at U.S. forces. By attacking U.S. forces, he has committed a hostile act to which U.S. forces may respond with proportionate force,[171] including deadly force if necessary.

Hostile intent is "[t]he threat or imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property."[172] Determining a "threat" or "imminent use of force" necessarily injects increased subjectivity into the analysis. Application of this principle is dictated by the actions prior to firing at U.S. forces, such as when the prospective attacker establishes a firing position, raises his rifle or puts the U.S. forces in his weapon sight. Once the prospective attacker's intent is discernible and his capability evident, U.S. forces may respond with proportionate force, including deadly force.[173]

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[169] *But see* Stephens, *supra* note 155, at 142 (arguing that the definitions of "hostile act" and "hostile intent" are overly broad to comply with international law).

[170] CJCSI 3121.01B, *supra* note 41, § 3(a) of Enclosure A.

[171] The SROE use the term "proportionality" instead of "proportionate force." However, to avoid confusion with the law-of-war term "proportionality," this Article will use the term "proportionate force." In describing a proportionate response, the SROE state "[t]he use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required." *Id.* § 4(a)(3) of Enclosure A.

[172] *Id.* § 3(f) of Enclosure A. "The determination of whether the use of force against US forces is imminent will be based on an assessment of all facts and circumstances know to US forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous." *Id.* § 3(g) of Enclosure A.

[173] The need for military members to be able to respond to hostile acts and hostile intent is amply illustrated by unfortunate past experience. In 1982, U.S. military units deployed to Beirut as part of a multinational force comprised of U.S., British, French, and Italian forces. (For an excellent analysis of the events in Beirut, see Martins, *supra* note 143, at 10–12.) Their mission was to facilitate the withdrawal of non-Lebanese forces from the country. There was no "enemy" or declared hostile force. As the mission continued into 1983, relations between the local population and the multinational forces deteriorated. On October 23, 1983, a suicide bomber drove a truck loaded with explosives containing the equivalent of over 12,000 tons of TNT past several guard stations and crashed into the Marine barracks, detonating the explosives and killing 241 Marines. Stephens, *supra* note 155, at 128; *see also* U.S. DEP'T OF DEF., REPORT OF THE DOD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983, at 1 (1983), *available at* http://www.dod.mil/pubs/foi/reading_room/142.pdf.

As a result of the attack, the Secretary of Defense convened a commission to "examine the rules of engagement in force and the security measures in place at the

Engagement authorization provided by the self-defense prong of the SROE, unlike use of force conducted pursuant to a designation of a hostile force, is fundamentally responsive. It is triggered only when hostility, using the terminology of the *Prize Cases*, is thrust upon U.S. forces.[174] At an operational level, it essentially extends traditional criminal self-defense and defense of others principles to the military environment. Hostile intent and hostile acts serve as triggers for proportionate actions in self-defense or defense of others. But at both the strategic and operational levels, this is a true necessity-based authority, permitting only that amount of responsive force necessary to terminate the threat, and extant for only so long as the threat exists. Because of the necessity basis for this authority, the SROE permit the use of force pursuant to this prong of authority at all times and during all missions.[175] This authority never changes in relation to the nature of the operational mission and even applies when functioning under operational SROE different from those in the SROE, such as when U.S. forces operate under the command and control of a multinational force such as NATO.[176]

While the SROE principles for self-defense are constant, the use of force to initiate hostilities or in other proactive contexts requires authorization by mission-specific SROE. If the military mission is to destroy, defeat, or neutralize a designated enemy force or organization,

time of the attack." *Id.* at 19. While the commission concluded that the "ROE used by the Embassy security detail were designed to counter the terrorist threat posed by both vehicles and personnel," it also concluded that "Marines on similar duty at [Beirut International Airport], however, did not have the same ROE to provide them specific guidance and authority to respond to a vehicle or person moving through a perimeter." *Id.* at 50. One of the contributing factors that the Commission based its conclusion on was that the SROE "underscored the need to fire only if fired upon, to avoid harming innocent civilians, to respect civilian property, and to share security and self-defense efforts with the [Lebanese Armed Forces]." *Id.* at 51. Had the Marines been functioning under the hostile intent and hostile act rules that U.S. service members currently function under, their permissible actions in self-defense would have been clear and a tragedy potentially averted. *See id.* at 50–51.

[174] *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862).

[175] There has been some discussion amongst military personnel about the "inherent right of self-defense" and allegations that the principles of self-defense are insufficient to protect individual soldiers. *See generally* David Bolgiano et al., *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense*, 31 U. BALT. L. REV. 157 (2002). This right of self-defense is vested in the commander of the unit rather than individual members of the unit. The SROE state: "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. *As such, unit commanders may limit individual self-defense by members of their unit.* Both unit and individual self-defense includes defense of other US military forces in the vicinity." CJCSI 3121.01B, *supra* note 41, § 3(a) of Enclosure A (emphasis added).

[176] CJCSI 3121.01B, *supra* note 41, § 1(f) of Enclosure A.

such as the Iraqi Army in 2003, personnel associated with that force will be declared hostile pursuant to the SROE.[177] The consequence of this designation is that once individuals are identified as a member of such a group or organization—a designation based on relevant criteria established through the intelligence preparation process—U.S. forces have the authority (but, as noted above, not necessarily the obligation) to immediately attack these "targets." Thus, it is the "status" of being associated with the declared hostile organization that triggers the use of force authority. Threat identification allows a group of individuals, as a result of their status, i.e. membership of a specific organization such as an army, to be attacked. As the SROE state, "[o]nce a force is declared hostile by appropriate authority, US forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force."[178]

Underlying all SROE measures for mission accomplishment is the assumption that the operation requires more robust and permissive use of force authorization than that provided by the self-defense prong of the SROE. Such additional measures may only be authorized by operational commanders after the NCA, the President or his civilian designee, have approved mission related SROE and delegated to subordinate commanders the authority to further define SROE for such proactive/permissive uses of force.[179] Once this has occurred, operational commanders may approve additional measures, including the authority to employ force against individuals or groups based on their status. Because these measures are not constant and change for each mission (and often change during missions) they are precisely tailored for each mission, providing clear directives for the use of force related to specific operations.[180] However, because they must be predicated on a grant of proactive/permissive use of force authority by the NCA, they reflect a fundamentally different invocation of national power than self-defense SROE.

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[177] "The [Combined Forces Land Component Command (CFLCC)] ROE identified Iraqi military and paramilitary forces as 'declared hostile forces' that could be attacked until such time as they were wounded or surrendered." Colin H. Kahl, *In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq*, 32 INT'L SECURITY 7, 18–19 (2007) (citing CFLCC ROE card (unclassified) and CFLCC ROE Vignettes).

[178] CJCSI 3121.01B, *supra* note 41, § 2(b) of Enclosure A. The necessity of this rule is obvious. Determining hostile acts or hostile intent is a difficult task and requires constant watchfulness. Such action is not required when facing a declared enemy who is equally free to attack U.S. forces and is willing to demonstrate that by wearing a uniform and carrying its arms openly.

[179] OPERATIONAL LAW HANDBOOK, *supra* note 154, at 84; Stephens, *supra* note 155, at 126.

[180] *See* OPERATIONAL LAW HANDBOOK, *supra* note 154, at 84; *see also* CTR. FOR LAW & MILITARY OPERATIONS, JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCHOOL, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 1-1 to -32 (2000).

B. Operational Rules of Engagement: The Ultimate De Facto Indicator of Responsive Versus Proactive Employment of National Combat Power

As explained above, SROE fall into two broad categories of use-of-force authorization: self-defense and proactive. It is this dichotomy that provides a truly de facto indication of the nature of the exercise of national power associated with an employment of the armed forces.[181] Because self-defense SROE are inherently responsive in nature, they indicate that the use of force is within the scope of the inherent authority of the President to meet force with force when war is thrust upon the nation. However, SROE authorizing the engagement of an opponent not in response to a threat but based on a designation of hostile status exceed this responsive authority. Because of this, they reveal the demarcation line between responsive uses of military force and proactive uses of such force—a line that has profound constitutional significance. Authorizing employment of the armed forces under such proactive use of force authority implicates the constitutional role of Congress in war-making decisions. Because the approval of SROE measures beyond the standing authority for self-defense implicitly invokes proactive war powers, such approval offers a logical de facto indication of a use of military force beyond the scope of the President's inherent defensive war powers. When the fact that such approval requires action by the President or Secretary of Defense is added to this equation, it becomes clear that the SROE authorization process offers a truly effective *operationally* based trigger for war powers notification.

The efficacy of this proposed SROE-linked notification and consultation trigger can be illustrated by considering how it would operate in relation to a variety of uses of military force. Examples of such use from recent history span the spectrum of military operations, from peacekeeping missions to high intensity conflict. Any proposed trigger must ultimately be responsive to the unique constitutional authorities related to this spectrum of military operations. Considering application of an SROE-linked notification trigger to these operations demonstrates the benefit of linking notification to the operational characteristics of military operations.

Peacekeeping operations dominated the military operational landscape throughout the 1990's.[182] These operations are defined by their non-conflict character.[183] Military forces participating in such

[181] *Infra* notes 184–85 and accompanying text; *see also* Barron & Lederman, *supra* note 79, at 745.

[182] Several examples of this include the conflicts in the Former Republic of Yugoslavia (Bosnia-Herzegovina), Rwanda, East Timor, the Democratic Republic of the Congo, Sierra Leone, and about ten others. For a full list, see Honouring 60 Years of United Nations Peacekeeping, *1990–1999: United Nations Peacekeeping Operations*, http://www.un.org/events/peacekeeping60/1990s.shtml.

[183] The United Nations indicates, for example, that the first peacekeeping mission in Somalia was to uphold the ceasefire, coordinate humanitarian assistance, and ensure the security of relief supplies to the war-ravaged population. *Id.*

missions normally operate under self-defense SROE.[184] This provides them with ample authority to defend themselves from hostility or imminent hostility, but is also consistent with the expectation that such threats will be the exception and not the rule. Even a large and robust deployment for such operations—such as the U.S. deployment into Bosnia in 1995—does not alter this basic use-of-force expectation.[185] This is because the military interventions associated with peacekeeping missions are fundamentally permissive in nature and former warring factions have consented to the presence of peacekeeping forces.[186] Accordingly, while there is always a substantial risk that U.S. forces will encounter groups or individuals who defy this expectation and present the forces with a threat, responsive use-of-force authority is sufficient to meet this contingency.

Operating under such authority is not analogous to participating in or initiating armed conflict. Indeed, the purpose of such operations is to diffuse or prevent conflict. As a result, these missions are best understood as exercises of what might best be characterized as "military diplomacy" falling within the inherent authority of the President.[187] While Congress certainly retains authority to influence the initiation or continuation of such operations through its fiscal power, the non-conflict nature of such operations indicates that they do not implicate the war powers of

[184] Joseph P. "Dutch" Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 12 (2001) (citing Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What Are the Applicable Norms*, 27 REVUE BELGE DE DROIT INTERNATIONAL 559, 561 (1994)). But note that Bialke explains that in a practical sense, these "peacekeeping operations generally do not involve peacekeeping forces entering into a state of armed conflict with the actual parties to the conflict." *Id.* at 21.

[185] To be specific, the SROE for American peacekeepers in Bosnia authorized "shoot[ing] to wound." Bolgiano et al., *supra* note 175, at 158–59 (citing Thomas E. Ricks, *U.S. Military Police Embrace Kosovo Role; Mission of Stability Is a Good Fit for Peacekeeping Tasks in Volatile Region*, WASH. POST, Mar. 25, 2001, at A21). The peacekeepers were also told that if they had to fire, they must: "'[f]ire only aimed shots, and fire no more rounds than necessary and . . . stop firing as soon as the situation permits.' Further, warning shots were permitted, even encouraged, and the use of deadly force against assailants fleeing an attack was not even covered." *Id.* (citation omitted).

[186] The UN charter indicates that it is unable to violate the sovereignty of member nations. U.N. Charter art. 2, para. 1, *available at* http://www.un.org/en/documents/charter/chapter1.shtml. In cases where peacekeeping forces are involved, if a country consents, there is no violation of national sovereignty. *See* Bialke, *supra* note 184, at 13–14. The problems arise when the host nation revokes its support. See *id.* for an explanation of how a Status of Forces Agreement cements this consent and the rights and obligations of troops stationed in the host country.

[187] When viewed through this lens of diplomacy, it necessarily follows that these types of operations fall under the purview of the President as chief diplomat. *See* Roy E. Brownell II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgement of "National Security Rescission,"* 47 AM. U. L. REV. 1273, 1277 n.7, 1305–06 (1998) (citing the Vesting Clause, the Treaty Clause, and the Appointments Clause of the Constitution to support this view (U.S. CONST. art. II, § 2, cl. 1–2)).

Congress. Therefore, subjecting these operations to a mandatory pre-execution congressional notification requirement is inconsistent with the division of war powers between the political branches.[188]

An SROE-linked war powers notification provision would accommodate this constitutional distribution of power. These operations are conducted pursuant to the standing "self-defense" SROE. Because they are permissive in nature, they do not normally involve the requirement to designate a "hostile force" and approve additional SROE measures authorizing the initiation of combat between United States and local forces or factions. Therefore, the order to execute such operations would not trigger the proposed SROE-linked war powers notification.

As noted above, another category of use of armed force that falls within the inherent authority of the President is response to sudden attack on the United States or its armed forces.[189] Like peacekeeping operations, the fact that use of force for this purpose is within the vested authority of the President indicates that requiring the President to provide war powers notice to Congress in relation to such uses of force would be constitutionally overbroad. However, unlike peacekeeping operations, an exercise of authority to respond to sudden attack certainly involves the use of combat power—a use that could easily fall into the definition of "significant armed conflict" for purposes of the National War Powers Commission's proposed legislation.[190]

Responding to sudden attack has been considered an inherent power of the President since the Supreme Court's decision in the *Prize Cases*.[191] According to the Court, the President is not only authorized but obligated to "resist force by force" when war is thrust upon the nation.[192] Accordingly, it would be constitutionally overbroad to require the President to notify Congress prior to the use of the armed forces in such a defensive capacity, a conclusion validated by the War Powers Resolution itself.[193] An SROE-linked war powers notification trigger is responsive to this presidential power. The SROE authority for the armed forces to act pursuant to the inherent right of self-defense is thoroughly sufficient to allow the armed forces to resist force by force when war is thrust upon the nation. No additional SROE measures are necessary for the armed forces to act in response to such a challenge. In fact, these forces need not wait to become the victims of such attack, as the authority provided

[188] *Supra* notes 77–79 and accompanying text.

[189] *Id.*

[190] MILLER REPORT, *supra* note 24, at 45.

[191] The Prize Cases, 67 U.S. (2 Black) 635 (1862).

[192] *Id.* at 668.

[193] The War Powers Resolution indicates that the President may only send armed forces into combat in three situations, two of which require congressional action of varying degrees ("a declaration of war" or "specific statutory authorization"), but the third requires only "a national emergency created by attack upon the United States. . . ." War Powers Resolution § 2(c), 50 U.S.C. § 1541(c) (2006).

by the SROE allows preemptive action in response to imminent threats of such attack.

Linking war powers notification to SROE authorization will synchronize war powers notification obligations with the scope of the President's well-defined and accepted inherent power to repel sudden attack[194] and the requirement to provide notification related to a use of military force. When forces are acting in response to a genuine threat "thrust" upon them, no prior notification will be required because they may act pursuant to standing self-defense ROE authority. However, if the President determines that an emerging or "brewing" threat requires the initiation of hostilities, notification would be required because addressing such a threat will require the authorization of SROE measures providing authority to initiate hostilities beyond the limited "imminent threat" response authority.[195]

In contrast to the employment of armed force in response to a sudden attack, the President holds no monopoly on the authority to initiate armed hostilities. Instead, the *choice* to take the nation to war is a decision requiring the joint will of both the President and Congress.[196] Perhaps more importantly, because of constitutional gloss that supports the conclusion that virtually any congressional action short of express opposition to such an initiation can be interpreted as "implied" support,[197] Congress must be provided a meaningful opportunity to express such opposition prior to the initiation of hostilities. It is in this realm of military operations that pre-hostility notification becomes so critical.

Employment of the armed forces to engage in hostilities beyond a response to an attack will almost always require authorization of what are best described as status-based ROE.[198] These ROE provide the necessary authority to engage a designated opponent with combat power as a measure of first resort based on a determination that the object of attack falls within a defined "status" (such as enemy armed forces, terrorist personnel, etc.). As noted above, unlike the standing self-defense ROE, employment of combat power pursuant to status-based ROE is not contingent on the opponent manifesting an actual threat to U.S.

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[194] *Supra* notes 73–79 and accompanying text.

[195] This conception of defensive versus offensive operations is based on constitutional jurisprudence and not on international legal principles related to the inherent right of self-defense. Because of this, actions initiated by U.S. armed forces pursuant to an assertion of "preventive" or "preemptive" self-defense justification would not be considered to fall within the notification exemption for the simple reason that they would not be responsive to an "attack thrust upon the nation." While such theories of international legality may indeed have merit, from a constitutional standpoint they should not be permitted to exclude Congress from its vested role in participating in decisions by the nation to initiate armed hostilities.

[196] *See*, U.S. CONST. art. I, § 8, cl. 11; *supra* notes 57–58, 69, 101 and accompanying text.

[197] *Supra* notes 16–27 and accompanying text.

[198] *See, e.g.*, *supra* notes 177–78 and accompanying text.

forces.[199] Such ROE would be required for the initiation of hostilities against a designated opponent and, therefore, reflect a fundamental dichotomy from responsive uses of force.

Linking congressional war powers notification to the approval of status-based ROE, or any supplemental ROE measures that provide the armed forces with the authority to *initiate* armed hostilities, will ensure Congress is offered an opportunity to exercise its constitutional authority.[200] After receiving notification of a pending military operation that requires the approval of status-based ROE, Congress is then in a position to choose among various responses. Congress can, of course, expressly authorize the operation or expressly oppose the operation. In either case, there is a compelling argument that the express will of Congress should prevail over the President's policy decisions. However, history has shown that express authorizations by Congress for pending military actions are not common,[201] with express opposition almost unheard of.[202] Instead, Presidents have and will likely continue to confront inconsistent or ambivalent congressional reactions to their decisions to initiate hostilities to achieve a national strategic objective.

It is precisely because of this that a meaningful and operationally pragmatic notification trigger is so important. Because any initiation of hostilities beyond the limited scope of responsive/defensive actions will require authorization of supplemental ROE measures, a coextensive congressional notification requirement triggered by ROE approval will provide Congress the opportunity to exercise its constitutional role. Perhaps more importantly, subsequent congressional ambivalence or inconsistent action will validate the assumption by the President that Congress does not oppose initiation of hostilities. Notification is, therefore, constitutionally significant, for it gives constitutional meaning

[199] *See, e.g.*, CJCSI 3121.01B, *supra* note 41, § 6(b)(2) (indicating that these mission-specific ROE are linked to mission accomplishment "during the conduct of [Department of Defense] operations."). Contrast this with the section describing self-defense under the standing ROE. "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent." *Id.* § 2(a) of Enclosure A.

[200] U.S. CONST. art. I, § 8, cl. 11.

[201] *See, e.g.*, *supra* note 67.

[202] The repeal of the Gulf of Tonkin Resolution, ironically passed in the first place as authorization to send troops to Vietnam in 1971, was found insufficient by the court in *DaCosta v. Laird* to constitute express opposition to the war because other bills authorizing military spending had become law during the same congressional session. 448 F.2d 1368, 1369 (2d Cir. 1971); *see also* John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 905 (1990). "Congress repealed the Tonkin Gulf Resolution on January 12, 1971. Some observers concluded that it had thereby withdrawn the authority for the American war in Indochina. You will not be surprised to learn that it was not that simple. Congress threw so many anchors to windward, leeward, and every other whichward that by the time it got through, it was difficult to determine which, if any, course it intended to chart." *Id.* (footnote omitted).

to such ambivalence or inconsistency, transforming it from the President's perspective to implied support for his initiative.

Examples of operations that would have triggered this notification requirement based on ROE authorization are numerous, but two prominent military actions are worth noting: Operations Enduring Freedom and Iraqi Freedom. Operation Enduring Freedom involved initiation of combat operations against the Taliban and al-Qaeda forces in Afghanistan in 2001.[203] Operation Iraqi Freedom involved the initiation of combat operations to oust the Saddam Hussein regime.[204] Both operations involved assertions of national self-defense authority by the United States.[205] While the self-defense justification was considered more legitimate in relation to Operation Enduring Freedom,[206] neither situation could reasonably be characterized as analogous to a response to a sudden attack thrust upon the nation. Accordingly, both operations

[203] This is more commonly referred to as "The War in Afghanistan," which began with aerial bombing campaigns on October 7, 2001, and whose purpose was to take out al-Qaeda and Taliban members. Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 2 (2003).

[204] The War in Iraq began on March 18, 2003, with President George W. Bush's stated goal of disarming Iraq, freeing its people, and defending the world from the grave danger posed by Iraq. Address to the Nation on Iraq, 1 PUB. PAPERS 281, 281 (Mar. 19, 2003).

[205] This claim was actually invoked three years earlier. When describing previous al-Qaeda attacks against American interests, including the bombing of U.S. Embassies in Dar-Es-Salaam, Tanzania, and Nairobi, Kenya, the United States ambassador to the United Nations made it a point to articulate the war as a response to al-Qaeda's "blatant warnings that 'strikes will continue from everywhere' against American targets," and as a result, the United States "had no choice but to use armed force to prevent these attacks from continuing." Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/244/60/PDF/N9824460.pdf?OpenElement. When it came time to invade Afghanistan, other countries were willing to concede that invading Afghanistan was within the self-defense right of the United States. *See, e.g.*, Charles Bremner, *Europeans Support 'Legitimate' US Action*, TIMES (London), Sept. 22, 2001, at 2 ("European leaders gave unequivocal backing to American military action last night . . . . Tony Blair and the other 14 leaders pledged 'total solidarity' with Washington in the fight against terrorism . . . ."); Dagens Nyheter, *Swedish Premier Reiterates Support for US Military Response*, BBC INT'L REPORTS, Sept. 25, 2001 ("Prime Minister Persson reiterated his support for a US military response . . . . 'The USA has the right to defend itself against terrorism and to bring those responsible for the attack to justice,' Persson said."). *See also* Ratner, *supra* note 81, at 906–07. For Operation Iraqi freedom, see Address to the Nation on Iraq, 1 PUB. PAPERS 277 (Mar. 17, 2003). President Bush told the nation in a televised address that: "We are now acting because the risks of inaction would be far greater. In 1 year, or 5 years, the power of Iraq to inflict harm on all free nations would be multiplied many times over. With these capabilities, Saddam Hussein and his terrorist allies could choose the moment of deadly conflict when they are strongest. We choose to meet that threat now, where it arises, before it can appear suddenly in our skies and cities." *Id.* at 279.

[206] *Supra* note 204.

presumably involved a grant of ROE authority to the armed forces that went well beyond the inherent right of self-defense.

These operations reveal that asserting a right of self-defense pursuant to international legal justification is not synonymous with the inherent constitutional authority of the President to respond to sudden attack. While it is true that a response to a sudden attack will inevitably qualify as a legitimate act of self-defense from an international law perspective,[207] the international right of self-defense is arguably broader in scope than the response-to-sudden-attack authority. From a constitutional perspective, it seems apparent from *The Prize Cases*—the seminal opinion addressing the President's constitutional obligation to "resist force by force"—that the key element triggering that authority is the fact that hostilities have been thrust upon the nation.[208] While the international law based right of self-defense arguably contemplates an invocation in the face of an imminent threat of attack (a theory that was stretched to new lengths by the Bush Administration's concept of preventive self-defense),[209] the constitutional authority contemplated by *The Prize Cases* court seems premised on the temporal urgency for the President to react to a threat without first consulting with Congress. Accordingly, although defending the nation from a looming threat may be a *causus belli* motivating the initiation of hostilities, as was the case in both Afghanistan and Iraq,[210] the fact that the United States *initiated* the hostilities[211] indicates that, from a constitutional perspective, the decision to do so implicates the war powers of both the President and Congress.[212]

One type of somewhat routine, but normally small scale, military operation that presents particular difficulty in relation to determining when congressional war powers notification is triggered are "rescue"

[207] The core of this concept of a "just war" is found in international law, specifically "that states' initiation of coercion against other states is generally limited to self-defense or cases of United Nations authorization." Ratner, *supra* note 81, at 906.

[208] The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862).

[209] "Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime. . . . We will take defensive measures against terrorism to protect Americans." Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1142 (Sept. 20, 2001).

[210] *Supra* notes 203–05.

[211] *Id.*

[212] On September 18, 2001, Congress passed what is now known as the "Authorization for Use of Military Force" (Pub L. No. 107-40, 115 Stat. 224 (2001)) by almost unanimous votes in both the House and the Senate of 420-1 and 98-0, respectively. RICHARD F. GRIMMETT, CONG. RES. SERV., AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 3 (2006), *available at* http://www.fas.org/sgp/crs/natsec/RS22357.pdf. This authorization for use of U.S. military force through the AUMF was "limited . . . to military actions against only those international terrorists and other parties directly involved in aiding or materially supporting the September 11, 2001 attacks . . . ." *Id.*

missions. Throughout the nation's history, there have been situations that have required the use of force to rescue Americans from an external threat.[213] Such uses are generally considered to fall within the "rescue power" of the President—a power considered inherent in the executive branch. While the authority for this power is sparse at best,[214] the historic exercise of rescue authority by Presidents appears to have elevated this power to a level of constitutional custom.

[213] Possibly the most prominent example of this was Operation Eagle Claw, better known as the attempted rescue of Americans during the 1980 Iranian Hostage Crisis, where President Carter was unsuccessful in rescuing 52 hostages from the U.S. Embassy in Tehran at the tail end of the Iranian Revolution.

[214] Judge Mikva, previously presiding on the Court of Appeals for the D.C. Circuit, and his former law clerk argue persuasively that a law passed in 1868, referred to as the "Hostage Act," gives the Executive the authority to carry out rescue missions on foreign soil. This statute states: "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." Act of July 27, 1868, ch. 249, § 3, 15 Stat. 224 (codified as amended at 22 U.S.C. § 1732 (2006)). Relying on this act, Judge Mikva and Mr. Neuman conclude this rescue power is part of the inherent powers of the executive. "The President is given broad discretion in choosing among diplomatic, military, and economic means of bringing pressure or influence to bear on a foreign state that has imprisoned American citizens unlawfully. His response must be within constitutional bounds, must not amount to an act of war, and must be a direct means for affecting the conduct of the foreign state rather than a scheme of domestic regulation intended ultimately to make release of American citizens more likely." Abner J. Mikva & Gerald L. Neuman, *The Hostage Crisis and the "Hostage Act,"* 49 U. CHI. L. REV. 292, 344 (1982).

Other academics find this "rescue power" to be a logical execution of promises made in the Oath clause. *Cf.* Barron & Lederman, *supra* note 79, at 746. This argument is usually articulated as "extreme threats to the nation might sometimes dictate that the President act extraconstitutionally and therefore publicly confess such civil disobedience and throw himself on the mercy of the legislature and the public" because the "plain terms of the Oath Clause indicate that the duty . . . requires the President to take such measures 'indispensible to the preservation of the constitution, through the preservation of the nation.'" *Id.* (citing Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 585 (Roy P. Basler ed., Abraham Lincoln Ass'n 1953 & Rutgers University Press 1974) (1989)). The authors clarify, however, that no President "has ever actually acted on Lincoln's suggestion that a single law must be violated in order that all others . . . be preserved." *Id.* at 747. In actuality, they maintain, there have been cases where "the Executive has claimed that the exigencies of the moment—short of national preservation—required a deviation from extant law because Congress was simply unavailable in the short term to consider the emergency needs." *Id.*

Perhaps the most compelling articulation of this constitutional authority came in relation to the mission authorized by President Carter to rescue the U.S. hostages held in Iran in 1979. In his capacity as White House Counsel, Lloyd Cutler relied on historical precedent and several decisions of lower federal courts to conclude that the mission could be ordered based solely on the inherent power of the President. According to Cutler:

> I was called in two or three days before it happened to advise on whether or not the mission would trigger the War Powers Resolution. I was told, "You can't talk to anyone about this. You can't even talk to the attorney general." So I went over to the law library in the Executive Office Building and looked up what law there was myself. I concluded that because this was a rescue mission it did not require prior consultation with Congress. The mission would have been compromised if the element of surprise was lost. Nobody on the Hill ever challenged their interpretation.[215]

Unlike Cutler, the drafters of the War Powers Resolution did not acknowledge the existence of such authority. The absence of any reference to an inherent rescue power was one of the justifications cited by President Nixon for his veto of the Resolution:

> [The WPR] would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis. . . .
>
> . . . .
>
> It would, for example, strike from the President's hand a wide range of important peace-keeping tools by eliminating his ability to exercise quiet diplomacy backed by subtle shifts in our military deployments. It would also cast into doubt authorities which Presidents have used to undertake certain humanitarian relief missions in conflict areas, to protect fishing boats from seizure, to deal with ship or aircraft hijackings, and to respond to threats of attack.[216]

There is general consensus among constitutional scholars that President Nixon's concerns were in fact justified and that the President is vested with some inherent rescue power.[217] The challenge, however, comes in drawing the line between a legitimate rescue mission and the use of rescue authority as a subterfuge for initiating hostilities with another state or entity. Because of this, it is useful to consider the scope of rescue power through the lens of military operations.

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[215] *Legends in the Law: A Conversation with Lloyd N. Cutler*, BAR REPORT (1997), *available at* http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/cutler.cfm.

[216] Veto of the War Powers Resolution, *supra* note 2, at 893–94.

[217] *Supra* note 214.

In the lexicon of military terminology, rescue missions are characterized as NEOs: Non-Combatant Evacuation Operations.[218] This category of operations is further divided into two types: permissive and non-permissive. A "permissive" NEO is an evacuation/rescue operation conducted with the consent—or at least without interference from—the state where the evacuees are located.[219] An example of a permissive NEO would be the evacuation mission conducted by the armed forces during the 2006 conflict between Israel and Hezbollah in Lebanon. Thousands of U.S. and third country nationals were evacuated from Lebanon, but the evacuation operation was conducted without interference from Lebanese authorities or forces.[220] A non-permissive NEO is, in contrast, an evacuation/rescue conducted in the face of armed opposition in the place where the evacuees are located.[221] Such opposition can come from the armed forces of the state in whose territory the evacuation is conducted, or from rogue or non-state groups within the state's territory. Examples of non-permissive NEOs include the rescue of the U.S.S. Mayaguez from Cambodian forces in 1975,[222] and the evacuation of U.S. personnel from the Embassy in Somalia in 1991.[223]

The SROE inherent right of self-defense provides sufficient operational authority to conduct permissive NEO operations.[224] Forces conducting these operations are prepared to employ force in self-defense or defense of others if confronted with an actual or imminent threat.[225] However, the permissive nature of these operations indicates that employment of combat power is not considered necessary to set the

[218] JOINT CHIEFS OF STAFF, JOINT PUBL'N 3-07.5, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR NONCOMBATANT EVACUATION OPERATIONS I-1 (1997), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_07_5.pdf [hereinafter NEOs] ("Noncombatant evacuation operations (NEOs) are conducted to assist the Department of State (DOS) in evacuating noncombatants and nonessential military personnel from locations in a foreign nation to an appropriate safe haven in the United States or overseas.").

[219] *Id.* at I-3.

[220] Josh White, *U.S. Prepares Huge Lebanon Evacuation*, WASH. POST, July 18, 2006, at A12.

[221] OPERATIONAL LAW HANDBOOK, *supra* note 154, at 495. The Guidebook for NEOs, however, articulates two separate operational environments when conducting a non-permissive NEO. The first is known as an "uncertain environment" where "government forces [where the NEO is being conducted], whether opposed or receptive to the NEO, do not have total effective control of the territory and population in the intended area or country of operations." NEOs, *supra* note 218, at I-3. The second type is that of a hostile environment. The guide indicates this NEO is applicable so that "[p]ersonnel may be evacuated under conditions ranging from civil disorder or terrorist action to full-scale combat." *Id.*

[222] *See supra* note 20.

[223] Neil Henry, *U.S., Italian Aircraft Evacuate Foreigners From Somali Capital*, WASH. POST, Jan. 6, 1991, at A14.

[224] *Cf.* CJCSI 3121.01B, *supra* note 41, at Enclosure A. The classified version of the SROE contains specific rules of engagement regarding permissive NEOs, and it is found in Appendix G of the CJCSI 3121.01B.

[225] *Id.*

conditions for evacuation.[226] This limited-force employment reality is demonstrated by the numerous examples of permissive NEOs executed by the armed forces in the past thirty years.[227]

The authority to employ force for the execution of non-permissive NEOs—forcible entry operations—is obviously more complicated. The essence of such operations is that force must be employed not only responsively to protect the rescue forces and the rescued individuals from actual or imminent threat, but also proactively to set the conditions for an effective rescue.[228] Accordingly, mission accomplishment ROE for such operations must authorize the employment of combat power beyond the limited self-defense/defense of others scope of authority.[229] Such authorization is therefore not "standing," but would require NCA approval prior to mission initiation.[230]

Rescue operations, therefore, truly straddle the line between the inherent authority of the President and war powers shared with Congress. Permissive NEOs seem to fall clearly within the realm of inherent executive power.[231] These operations reflect a blend of the inherent authority to act to protect Americans who are threatened abroad and the inherent authority to resist force by force. This is because these operations are executed under the presumption that force will only be employed as a measure of necessity in response to interference with the effort to extract Americans from danger.

Non-permissive NEOs are more complex from a constitutional authority perspective precisely because they are conducted based on an assumption that force must be employed proactively to set the conditions for evacuation.[232] However, because such use of force is merely presumptive and not conclusive, there is a strong argument that these

[226] NEOs, *supra* note 218, at I-3 ("The JTF's primary concerns may be logistic functions involving emergency medical treatment, transportation, administrative processing, and coordination with the DOS and other agencies involved in the evacuation. A minimum number of security forces should be used during the NEO.").

[227] Most of these permissive NEOs are triggered due to civil war or civil unrest in the country where American civilians are stationed, usually in an embassy or consulate. The most prevalent examples include the evacuation of all non-military personnel from Yemen in 1994 after the outbreak of civil war, from Liberia in 1991 due to civil unrest, from both the Central African Republic and the Ivory Coast in 2002, and, of course, Lebanon in 2006. *See, e.g.*, OPERATIONAL LAW HANDBOOK, *supra* note 154, at 493–94.

[228] *Cf. supra* note 221.

[229] CJCSI 3121.01B, *supra* note 41, at Enclosure I.

[230] *Id.*

[231] This becomes merely a codification of the executive power to conduct rescue missions, like the one attempted in Iran during the hostage crisis, which would except the President from obtaining congressional approval.

[232] OPERATIONAL LAW HANDBOOK, *supra* note 154, at 495 ("The non-permissive . . . categor[y] raise[s] the majority of legal issues because 'use of force' becomes a factor.").

operations remain within the realm of inherent executive power.[233] Planning for such operations involves preparation for the contingency that what should be a permissive evacuation may have to be executed forcefully.[234] These operations should involve the proactive use of force only in response to opposition encountered during the operation. In this regard, the only real distinction between non-permissive and permissive NEOs is the level of expectation of opposition to the evacuation.[235] When intelligence indicates a high probability of such opposition, the ROE must provide the commander with a scope of authority sufficient to facilitate the evacuation through proactive employment of combat power.[236] However, such employment can still be considered responsive in the sense that it is responding to efforts to prevent the execution of the rescue mission. Perhaps more importantly, even when mission accomplishment ROE are approved for the execution of a NEO mission, employment of combat power will normally not occur unless and until the expectation of opposition is operationally confirmed.[237]

Authorization of mission accomplishment ROE for NEO should therefore be exempted from the trigger for mandated congressional war powers notification. Requiring notification based on the approval of NEO ROE would be inconsistent with the conclusion that these operations fall within the inherent power of the President to employ armed forces to rescue Americans abroad. Although such operations may necessitate the approval of ROE permitting employment of force beyond the scope of the inherent right of self-defense, the assumption that such

[233] This is perhaps best understood in the context of the Iran Hostage Crisis, where the outcome was far from determined when the operation was authorized. Former Carter White House Counsel Lloyd Cutler explains that "after the [Iranian hostage rescue] attempt was made, *no one* criticized the President for having made the attempt. And once we had gotten it out of our system that we had to make a response, no one advocated more strenuous military measures thereafter." Interview by Charles O. Jones et al. with Lloyd Cutler (Oct. 23, 1982), *transcribed by* JANE RAFAL WILSON, UNIV. OF VA., MILLER CTR. OF PUB. AFF., CARTER PRESIDENCY PROJECT: FINAL EDITED TRANSCRIPT INTERVIEW WITH LLOYD CUTLER 22 (2006), http://web1.millercenter.org/poh/transcripts/ohp_1982_1023_cutler.pdf (emphasis added). *See also supra* note 213 and accompanying text.

[234] This is addressed by the NEO handbook when it indicates that a joint task force "can expect host nation concurrence and possible support. . . . Nonetheless, discreet, prudent preparations should be in place to enable the force conducting the NEO to respond to threats to the evacuees." NEOs, *supra* note 218, at I-3.

[235] Which helps explain the need for three categories of "operational environments" stated in the NEOs Handbook. *Id.*

[236] The government also indicates that because non-permissive NEOs almost always necessitate an invasion into the sovereign territory of another nation state, the applicable ROE is based on mission accomplishment but, more importantly, a sound legal basis. OPERATIONAL LAW HANDBOOK, *supra* note 154, at 495.

[237] The *Operational Law Handbook* explains the legal issues involved in NEOs by addressing, amongst other issues, personnel status, combatants, the use of force, and law of war consideration. *Id.* at 495–98. This all seems to indicate that considerations of dealing with operational realities puts soldiers and JAG officers on notice regarding their roles in non-permissive NEOs.

approval is strictly linked to accomplishment of the mission—namely the evacuation of U.S. personnel—indicates that the temporal element of such use of force authorizations does not implicate the shared war powers of Congress. Therefore, notification is not constitutionally required. The proposal below will therefore provide an exemption to the notification trigger for ROE authorizations related to NEOs.

There is, of course, always a risk that the rescue power will be invoked for the execution of a military operation that seems to exceed this justification. Two examples of such uses of force in recent history were the U.S. invasions of Grenada and Panama. Both situations involved elements of the classic rescue justification but also involved strategic objectives beyond rescue. In Grenada, the purported trigger for Operation Urgent Fury was the need to protect and evacuate U.S. medical students in danger due to the political unrest associated with the seizure of power by a leftist regime.[238] However, another clear objective of the operation was to oust that leftist regime to prevent the expansion of Cuban and Soviet power in the Caribbean. Operation Just Cause—the 1989 invasion of Panama—was also motivated in part by the need to protect the thousands of American citizens living in Panama from potential harm at the hands of the Panamanian armed forces commanded by General Manuel Noriega.[239] However, like Grenada, another clear objective was to oust the Noriega regime to facilitate the transition to a democratically elected government more favorable to U.S. interests.[240]

These "mixed motive" operations are problematic from a congressional notification perspective because of the legitimacy of the objective to rescue Americans.[241] However, because virtually any non-permissive entry into a territory where Americans are at risk includes as *an* objective the protection of Americans, failing to place some rational limits on a rescue power notification exemption would effectively swallow any notification requirement. It is because of this that any rescue notification exemption would be limited to mission-specific ROE

[238] For an in-depth discussion of the events leading up to Operations Urgent Fury and specific details of the operation itself, see RONALD H. COLE, OPERATION URGENT FURY: GRENADA 9 (1997), *available at* http://www.dtic.mil/doctrine/doctrine/history/urgfury.pdf.

[239] Special to The New York Times, *A Transcript of Bush's Address on the Decision to Use Force in Panama*, N.Y. TIMES, Dec. 21, 1989, at A19 ("General Noriega's reckless threats and attacks upon Americans in Panama created an eminent danger to the 35,000 American citizens in Panama."). President George H.W. Bush further proclaimed that "[a]s President, I have no higher obligation than to safeguard the lives of American citizens. And that is why I directed our armed force to protect the lives of American citizens in Panama, and to bring General Noriega to justice in the United States." *Id.*

[240] *Cf. id.* ("The Panamanian people want democracy, peace, and the chance for a better life in dignity and freedom. The people of the United States seek only to support them in pursuit of these noble goals.").

[241] *Supra* notes 213–14.

authorized only for NEO missions. This would limit the exemption to only those operations that are limited to the exclusive purpose of rescue. Other non-permissive interventions into the territory of another state, even when rescue of Americans is a secondary objective, would not benefit from the notification exemption. For example, while protection of Americans was a significant objective of Operation Just Cause in Panama, because the mission was not for the exclusive purpose of rescuing Americans, but instead to also oust the Noriega regime and destroy the Panamanian Defense Forces (PDF),[242] notification would have been triggered when the ROE declaring the PDF a "hostile force" was approved by the NCA.

V. PROPOSING A ROE-LINKED NOTIFICATION PROVISION

This Article is premised on the conclusion that express congressional authorization is not a constitutionally required predicate for the initiation of armed hostilities by the United States. However, it is also premised on the equally important conclusion that this lack of an express approval requirement—perhaps the ultimate overreach of the War Powers Resolution—cannot properly be interpreted as authorizing the President to initiate all hostilities based on an assertion of inherent executive power. Instead, with the limited exceptions of response to sudden attack and genuine rescue operations, Congress retains the ultimate "check" on the assertion of executive war-making initiatives.[243] Accordingly, the essential element of the effective execution of the Constitution's shared war powers framework is providing Congress with a meaningful opportunity to exercise its constitutional role.[244] "Meaningful" is the key qualifier, for it indicates that Congress must be afforded the opportunity to check an executive war-making initiative before it is presented with a *fait accompli* as the result of pre-notice initiation of combat.

It therefore becomes clear that pre-execution notification of a planned initiation of hostilities is essential to satisfy this constitutional imperative.[245] This conclusion was central to the congressional effort to re-establish its role in the war-making process when it passed the War Powers Resolution and is equally central to the recent Miller Report proposal to amend that law.[246] While the Resolution is generally regarded as ineffective,[247] it is not necessarily the notification provision that led to this conclusion. In fact, that provision is perhaps the one component of

[242] *Supra* notes 239–40.

[243] *Supra* note 43; *Cf.* War Powers Resolution § 2(a), 50 U.S.C. § 1541(a) (2006).

[244] MILLER REPORT, *supra* note 24, at 7 ("[O]ne common theme runs through most of these efforts at reform: the importance of getting the President and Congress to consult meaningfully and deliberate[ly] before committing the nation to war.").

[245] 50 U.S.C. § 1541(c).

[246] MILLER REPORT, *supra* note 24, at 7.

[247] *See, e.g.*, *id.* at 23–25; Glennon, *supra* note 31.

the Resolution that has proved relatively successful. However, as the Miller Report's proposal recognizes, uncertainty as to when notification is triggered has and will continue to compromise the efficacy of even that component of the Resolution.[248] Unfortunately, while the Miller Report's proposal of a "significant armed conflict" trigger[249] is less susceptible to interpretive avoidance than the current Resolution notification trigger, it nonetheless fails to link notification to a military operational criteria for distinguishing responsive uses of force from initiations of hostilities.

Linking notification to the authorization of ROE measures beyond the standing "inherent" right of self-defense cures this defect. Because NCA approval is necessary for ROE measures that permit the application of combat power in a manner necessary to initiate hostilities with another state or even a non-state entity,[250] a contemporaneous notification trigger provides the most effective method of ensuring notification is provided to Congress based on an operational standard for conflict initiation. In addition, required notification will be triggered by the decision-making process of the President, and not on an interpretation of the term "hostilities." Perhaps most importantly, it will ensure notification occurs no later than the point in time when the authorization necessary to employ force for mission accomplishment is granted to the operational commander, thereby mitigating the risk of presenting Congress with a proverbial *fait accompli*, a result essentially conceded as acceptable by the Miller Report proposal.[251]

It is the opinion of this author that incorporating such a notification trigger into the proposed War Powers Consultation Act of 2009 would result in a significant improvement to that exceptionally well-conceived legislation. This improvement would result in the elimination of the one remaining source of uncertainty inherent in the proposal. To accomplish this, the definition provision of that law[252] should be amended as follows:

> 3(A). For purposes of this Act, "significant armed conflict" means (i) any conflict expressly authorized by Congress, or (ii) any *mission conducted by the U.S. armed forces pursuant to Rules of Engagement authorizing the use of force beyond the scope of authority provided by the inherent right of self-defense permitting those forces to initiate hostilities with any state or non-state opponent.*

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[248] MILLER REPORT, *supra* note 24, at 24 ("[N]o President has ever filed a report 'pursuant to' Section 4(a)(1). One obvious reason not to file such reports is to avoid triggering the 60- to 90-day clock in Section 5(b), and the legal and constitutional fight that breaching this provision might provoke." (emphasis removed)).

[249] *Id.* at 45.

[250] These ROE "are not limited to peacetime application, but are designed to remain effective in prolonged conflict as well. There are no 'wartime' ROE awaiting implementation at the first outbreak of hostilities. . . . The basic Chairman's Instruction notes that the NCA approves ROE for U.S. forces . . . ." Grunawalt, *supra* note 40, at 248.

[251] MILLER REPORT, *supra* note 24, at 37.

[252] *Id.* at 45.

Based on this revised definition, the notification/consultation trigger of the proposed law[253] should be amended as follows:

> 4(B). Before ordering the deployment of United States armed forces into significant armed conflict, the President shall consult with the Joint Congressional Consultation Committee. To "consult," for purposes of this Act, the President shall provide an opportunity for the timely exchange of views regarding whether to engage in the significant armed conflict, and not merely notify the Joint Congressional Consultation Committee that the significant armed conflict is about to be initiated. *In order to ensure this constitutionally meaningful consultation, the President shall engage in such consultation no later than that point in time when the President or the Secretary of Defense authorizes mission accomplishment supplement Rules of Engagement for the purpose of providing U.S. armed forces with the use of force authority necessary to accomplish the anticipated military mission.* If one of the military actions described in Section 3(B) of this Act becomes a significant armed conflict as defined in Section 3(A), the President shall similarly initiate consultation with the Joint Congressional Consultation Committee.

Providing for such an operationally grounded trigger will ensure the full effectiveness of the remainder of the proposed statute with no further modifications. Even the three-day "exigency" exception will operate consistently with this amendment, for it will limit late notification to causes beyond the control of the President, namely an inability to communicate with the designated legislators. However, this ROE trigger will eliminate, or at least greatly mitigate, the risk that a President might attempt to exploit this exemption in the same way that past Presidents have exploited the current sixty-day clock.[254]

Enacting the War Powers Consultation Act of 2009[255] with this limited but important modification holds the greatest promise of finally achieving the objective that the drafters of the War Powers Resolution sought to achieve thirty-six years ago: 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"[256] apply to the decision to initiate armed hostilities.

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[253] *Id.* at 46.

[254] Damrosch, *supra* note 6, at 128; MILLER REPORT, *supra* note 24, at 24.

[255] MILLER REPORT, *supra* note 24, at 44–48.

[256] War Powers Resolution § 2(a), 50 U.S.C. § 1541(a) (2006).