**Plan**

**The United States Federal Government should establish by statute a permanent war powers consultation committee, requiring the President to engage in binding consultation with the committee over introduction of United States Armed Forces into significant armed conflict, and require a Congressional authorization vote following consultation. The statute should define ‘significant armed conflict’ as any conflict expressly authorized by Congress, or any mission conducted by United States Armed Forces pursuant to Rules of Engagement authorizing use of force. The statute should include an explicit point-of order mechanism.**

### Preemption

**Contention 1 is pre-emption**

**Authority is modeled globally – causes preemptive conflict**

**Sloane, 8** [Associate Professor of Law, Boston University School of Law, Robert, Boston University Law Review, April, 88 B.U.L. Rev. 341, p. lexis]

There is a great deal more constitutional history that arguably bears on the scope of the executive power in the twenty-first century. But it is vital to appreciate that the **scope** of the executive power, particularly in the twenty-first century, is not only a constitutional or historical issue. As an international lawyer rather than a constitutionalist, I want to stress briefly that these debates and their concrete manifestations in U.S. law and policy potentially exert a profound effect on the shape of international law. Justice Sutherland's sweeping dicta in United States v. Curtiss-Wright Export Corp., that the President enjoys a "very delicate, plenary and exclusive power ... 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**," n52 has been (correctly, in my view) criticized on a host of grounds. n53 But in practice, in part for institutional and structural reasons, n54 it accurately reflects the general **preeminence of the President** in the realm of U.S. foreign affairs. Because of the nature of the international legal and political system, what U.S. Presidents do and say **often establish precedents** that **strongly influence** what other states do and say - with potentially dramatic consequences for the shape of customary international law. The paradigmatic example is the establishment of customary international law on the continental shelf following the Truman Proclamation of September 28, 1945, n55 which produced an echo of similar claims and counterclaims, culminating in a whole new corpus of the international law of the sea for what had previously been understood only as a geological term of art. n56 Many states took note, for example, when in the 2002 National Security Strategy of the United States ("NSS"), President Bush asserted that the United States had the right under international law to engage in preventive wars of [\*350] self-defense. n57 While, contrary to popular belief, the United States never in fact formally relied on that doctrine in practice, many would argue that President Bush de facto exercised this purported right when he initiated an armed conflict with Iraq based on claims, which have since proved unfounded, about its incipient programs to develop catastrophic weapons. The 2006 NSS notably retreats from the 2002 NSS's robust claims of a right to engage in preventive wars of self-defense. n58 Yet even within this brief, four-year period, an **astonishing number** of other states have asserted a comparable right to engage in preventive self-defense. These include not only states that the United States has described as "rogue states," such as North Korea and Iran, but Australia, Japan, the United Kingdom, China, India, Iran, Israel, Russia, and (though technically not a state) Taiwan. n59 I doubt we will welcome the consequences of this pattern for the evolving jus ad bellum of the twenty-first century. Equally, after President Bush's decision to declare a global war on terror or terrorism - rather than, for example, the Taliban, al-Qaeda, and their immediate allies - virtually every insurgency or disaffected minority around the world, including peoples suffering under repressive regimes and seeking to assert legitimate rights to liberty and self-determination, has been recharacterized by opportunistic state elites as part of the enemy in this global war. n60 The techniques employed and justified by the United States, including the resurrection of rationalized torture as an "enhanced interrogation technique," n61 likewise have emerged - and will continue to emerge - in the [\*351] practice of **other states**. Because of customary international law's **acute sensitivity** to authoritative assertions of power, the widespread repetition **of claims and practices** initiated by the U.S. executive may well shape international law in ways the United States ultimately finds disagreeable in the future. So as we debate the scope of the executive power in the twenty-first century, the stakes, as several panelists point out, could not be higher. They include more than national issues such as the potential for executive branch officials to be prosecuted or impeached for exceeding the legal scope of their authority or violating valid statutes. n62 They also include international issues like the potential **use of** catastrophic **weapons** by a rogue regime asserting a right to engage in preventive war; **the deterioration of international human rights norms** against practices like torture, norms which took years to establish; and **the atrophy of genuine U.S. power in the international arena**, which, as diplomats, statesmen, and international relations theorists of all political persuasions appreciate, demands far more than the largest and most technologically advanced military arsenal. In short, what Presidents do, internationally as well as domestically - the precedents they establish - may affect not only the technical scope of the executive power, as a matter of constitutional law, but the practical ability of **future** **Presidents** to exercise that power both at home and abroad. We should candidly debate whether terrorism or other perceived crises require an expanded scope of executive power in the twenty-first century. But it is dangerous to cloak the true stakes of that debate with the expedient of a new - and, in the view of most, indefensible - "monarchical executive" theory, which claims to be coextensive with the defensible, if controversial, original Unitary Executive theory. n63 We should also weigh the costs and benefits of an expanded scope of executive power. But it is vital to appreciate that there are costs. They include not only short-term, acute consequences but long-term, systemic consequences that may not become fully apparent for years. In fact, the exorbitant exercise of broad, supposedly inherent, executive powers may well - as in the aftermath of the Nixon administration - culminate in precisely the sort of reactive statutory constraints and de facto diplomatic obstacles that proponents of a robust executive regard as misguided and a threat to U.S. national security in the twenty-first century.

**Escalates globally—US precedent key**

**Rehman, 12** [9/13/12, Fehzan, International Relations at the University of Westminster, "Analyzing America’s National Security Strategy", e-International Relations, http://www.e-ir.info/2012/09/13/analyzing-americas-national-security-strategy/]

Another implication on sovereignty, due to the NSS, was, yet again, demonstrated by the killing of Osama Bin Laden in Pakistan. Some academics have argued that it impeded national sovereignty. Pakistan’s foreign secretary Salman Bashir asserted that this “violation of sovereignty, and the modalities for combating terrorism, raises certain legal and moral issues which fall … in the domain of the international community” (Bowcott, 2011). Others have claimed that America sees itself as above international law and feels that they are able to take actions for which a smaller sovereign state would have received major international repercussions. Many academics believe that what America is doing is **setting a new precedent**, as it “continues to confuse preemption with preventive war” (Korb & Wadhams, 2006, p.1). This could lead to **the demise of** the international laws and **norms** that **prohibit** the offensive attacks by one state against another for simply self-gain (Korb & Wadhams, 2006, p.2). Other academics have accused the Bush Doctrine of “legitimating a doctrine of anticipatory war” (Wheeler, 2003, p.199). Senator Edward M. Kennedy assured that the Bush Doctrine “would also **send a signal** to governments the world over that the rules of aggression **have changed** for them too, which **could increase the risk of conflict** between countries” (Kennedy, The Bush Doctrine of Pre-Emption). The criticism of the NSS’s advancement of pre-emptive strike has been reverberated in foreign ministries **across the world.** Secretary General Kofi Annan, in his speech to the General Assembly in September 2003, articulated his deep restlessness with a policy that: “represents a fundamental challenge to the principles on which, however imperfectly, world peace and **stability** have rested for the last fifty eight years… if it were to be adopted, it could **set precedents that resulted in a proliferation of the unilateral** and lawless **use of force**” (Annan, 2003). “The Bush administration has stubbornly resisted these warnings about the dangers of the preemptive policy set out in the NSS” (Wheeler, 2003, p.199). Kaufman agrees with the international stance that the NSS has set a dangerous precedent (Kaufman, 2007. P142). The NSS has devised other states, like **India-Pakistan**, **Russia-Georgia**, and **China-Taiwan**, legitimate rationales of unilateral military force for its own gains. This has already happen with the Russia-Georgia crisis of August 2008, where Russia used military intervention in South Ossetia against Georgia. Who is to say that India may use this precedent to use military force against Pakistan, asserting that it believes that Pakistan is a threat to India’s national security? Similarly, China, as an emerging super power, may want to compete with or follow American democracy promotion through **pre-emption** and preventive wars **against Taiwan** for the promotion of its Chinese values.

**These conflicts go nuclear**

**Arbatov, 13** [Military Power in World Politics in the 21st Century Alexei Arbatov is Director of the International Security Center at the Institute of World Economy and International Relations; Full Member of the Russian Academy of Sciences, Real and Imaginary Threats, http://eng.globalaffairs.ru/number/Real-and-Imaginary-Threats-15925]

At the same time, there is an **ongoing rivalry** between them, involving **indirect means** and **local conflicts**, for economic, political and military influence in the post-Soviet space and in some regions (especially rich in raw materials) in Asia, Africa and Latin America. In addition, they are seeking to gain military and technological advantages over rivals to exert political and psychological pressure on them (missile defense, and high-precision conventional weapons, including suborbital and hypersonic ones). Military force is used to stake one’s claim to control over important geographical areas and lines of communication (the Eastern Mediterranean, the Black Sea, the Hormuz and Taiwan Straits, the Strait of Malacca, the South China Sea, shipping lanes in the Indian Ocean, extensions of the continental shelf and communications in the Arctic, etc.). Intense rivalry is going on in arms markets (especially in countries of the Middle East, Asia, Latin America, and North Africa). This rivalry involves political leverage and has political consequences. Of all hypothetical conflicts among the great powers, a conflict between China and the U.S. over Taiwan would be of the greatest danger. There is a possibility of an aggravation of the crisis over South China Sea islands, in which Southeast Asian countries will support the U.S. against China. Generally, U.S.-Chinese rivalry for domination in the Asia-Pacific region is becoming the epicenter of global military-political confrontation and competition. Failure of cooperation among the **great powers** and alliances against common security threats (terrorism, the proliferation of WMD and their delivery systems) **is** quite **imaginable**, which would bring about inability to counter new challenges and threats and an **increas**ing **chaos in the world economy** and politics. **More likely are conflicts between major regional powers**: India and Pakistan, Israel (together with or without the United States) and Iran, and North and South Korea. The danger of these conflicts is exacerbated by their **possible escalation to a nuclear war**. The greatest threat in this regard is posed by military-political confrontation in South Asia.

**Binding Congressional role signals measured restraint and checks escalation**

**Damrosch, 97** [Lori Fisler Damrosch, Professor of Law at the Columbia University School of Law, “Use of Force and Constitutionalism”, Columbia Journal of Transnational Law, 36 Colum. J. Transnat'l L. 449, Lexis]

Structural-institutional explanations, on the other hand, point to features of liberal-democratic systems that could **act as brakes on conflict-initiation**, as the American framers and Kant in Perpetual Peace had long ago suggested. n27 To the extent that executive military powers are subject to checks and balances--for example, **by accountability to the legislature**--war (or at least war-initiation) ought to become **less likely** under the structural-institutional view. Latter-day exponents of [\*457] the Kantian claim have thus hypothesized that structural constraints on executive military powers belong among the factors that may well explain (or help explain) **the peace among democracies**. n28 For this reason, democracy-and-peace research has pointed to the extent of constraints on the chief executive as one of the components of democracy which ought to be measured and studied in relation to the war-involvement of democratic regimes; n29 but the role of such constraints in keeping democratic polities from becoming involved in wars (or certain wars) is still only imperfectly understood. n30 The **perception** that one's adversary is (or is not) constrained **may be just as important as actual constraints**: "the presence of democratic **institutions** provides a **visible** and generally **correct signal** of "practical dovishness'--restraints on war **in the form of institutional constraint** if not of inherent disposition." n31

**[TO FOOTNOTE]** n31. Russett, supra note 23, at 39 (citing War and Reason, supra note 23, at 157-58) (the "presence of democratic institutions provides a basis for rivals to have an above-average prior belief that the potential foe is **restrained from using force too readily**. When this restraint exists for both sides, **amicable settlements of disputes are more likely**." ). See also War and Reason, supra note 23, at 272 ("When both sides are democracies, each actor is likely to be dovish, to see the other as dovish, and to be encouraged to pursue negotiated solutions to differences."); Russett, supra note 23, at 141 n.17 (tracing precursors of "the insight that forms of government **signal a state's likely** international **behavior**"). Conversely, where one or both sides do not perceive the other as possessing democratic institutions (e.g., U.S. perception of Spain in 1898), **the restraint may fail to take effect.**

**Those constraints decrease prevalence of war and strengthen global norms**

**Martin, 11** [ Copyright (c) 2011 Brooklyn Law Review Brooklyn Law Review Winter, 2011 Brooklyn Law Review 76 Brooklyn L. Rev. 611LENGTH: 52175 words ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law NAME: Craig Martin+ BIO: + Visiting Assistant Professor, University of Baltimore School of Law]

Conclusion The prevention of armed conflict is central to modern international law, and reducing the prevalence of war one of the enduring philosophical problems with which man has grappled. The causes of war are understood to operate at three levels--that of the individual, the state, and the international system. It follows that we need mechanisms that are capable of addressing causes within all three levels. In legal terms, that requires legal constraints at both the domestic and the international level. Yet in the twentieth century, we have left the legal **constraint** of armed conflict entirely to a positivist international legal system, one with thin theoretical and philosophical foundations, and without any of the **domestic implementation** that is **necessary to improve compliance** with international law regimes. The proposed Model would be a **significant step towards** the development of more **robust** and multi-dimensional legal constraints on the use of armed force, thereby **reducing** the prevalence of **war**. The domestic implementation of the international law principles on the use of force would be consistent with the ever increasing penetration of international law into domestic legal systems, and the use of domestic law mechanisms to enforce and enhance compliance with the international law regimes. This incorporation of international law principles would not only operate to ameliorate the permissiveness of the international system, **the primary cause of war** at the international level, but it would also engage significant domestic causes of war as well. The move is consistent with and supported by international law compliance [\*729] theory and constitutional law theory, operating to realize both international law and constitutional law objectives. The **requirement** for legislative approval of government decisions to use armed force would **amplify** and **strengthen** the operation of the first provision. Such legislative involvement would also **enhance democratic** **accountability** and bring to bear the deliberative and oversight functions of the legislature on the decision-making process, making it both more transparent and **subject to diverse perspectives** and arguments. It would more fully realize the structure originally thought to make republics less likely to wage war, and would engage the domestic causes of war in important ways. Subjecting the entire process to a limited form of judicial review would place a further check on the system, helping to ensure that the decision-making process was conducted as required, and genuinely based on the mandated considerations. Together, the separation of powers elements of the Model would operate to resolve aspects of the Kantian dilemma, reducing the tendency of democracies to engage in armed conflict with illiberal states, while strengthening the features of democracies that help **explain** the **democratic peace**. This would not only be a benefit to the international society more generally, but it would fundamentally benefit the states that adopt the Model, not only by increasing democratic accountability and strengthening the rule of law, but ultimately by protecting them from involvement in illegitimate and unwise military adventures.

**Executive restraint fails and now is key**

**Daskal and Vladeck 14** (Jennifer, Assistant Professor of Law – American University Washington College of Law, “After the AUMF,” Harvard National Security Journal, Vol. 5, January, <http://harvardnsj.org/wp-content/uploads/2014/01/Daskal-Vladeck-Final1.pdf>)

Thus, while certain entities and individuals clearly fall outside of the Administration’s definition of “associated forces” (for example, a group of two or more terrorists with no direct affiliation with al Qaeda, such as the two brothers responsible for the 2013 Boston Marathon bombing; or entities that share ideological affinities with al Qaeda but do not engage in any hostilities against the United States or its coalition partners), there is a **total lack of transparency** as to who is covered. Even with respect to al Qaeda in the Arabian Peninsula (“AQAP”), the government has never clarified whether operations against its members are covered by the AUMF because they are deemed to be “part of” al Qaeda or because the group qualifies as an “associated force.” 35 **Public statements by DoD officials have only served to confuse matters more**, suggesting that there may be a long list of covered groups— while remaining unclear as to whether such references are to “associates” covered by the AUMF or “affiliates” that fall under a separate (heretofore non-public) definition that have ties with al Qaeda, but are not in fact subsumed under the 2001 AUMF. 36 As a result, there is **no clarity** as to which, if any, of the many groups operating in the tribal areas of Northwest Pakistan qualify, or whether and under what circumstances entities such as al Shabaab, 37 al Qaeda in the Islamic Maghreb (“AQIM”), or the Nusra Front—or parts of such groups—might also be encompassed within the definition of “associated forces.” The **pervasive secrecy** surrounding the government’s application of that concept has led some to speculate that the Executive Branch will simply subsume “extra-AUMF” cases within the existing AUMF framework, shoehorning emerging threats into the increasingly outdated ambit of the original statute simply by labeling the groups that pose them as “associated forces.” 38 Were this to happen, the government could—despite the incapacitation of those responsible for the September 11 attacks and the pending withdrawal of all U.S. ground troops from Afghanistan—seek to rely on the AUMF as authority for **offensive military operations in Mali, Syria, or Somalia**, even if the targets were not also deemed members of al Qaeda, to say nothing of operations in **other corners of the globe** with loose affiliations with al Qaeda and little to no connection to the September 11 attackers. 39 To be clear, we are not suggesting that this shift has already taken place. Indeed, we do not and would not know if it did, as the list of covered groups remains classified. 40 There is, however, relatively widespread agreement that such a shift would be unsatisfactory. 41 The more that the AUMF is used to justify the use of military force against those with no connection to the September 11 attacks and the ensuing armed conflict, the more it becomes an essentially **limitless authorization**, allowing the President to use force as a matter of first resort in a wide range of conflicts, untethered to the self-defense justification for the post-9/11 use of force, and irrespective of constitutional limits that give Congress, not the Executive, the authority to declare war.42 As we explain in Part II below, this is not an appropriate interpretation of the statute, and it is not an appropriate exercise of presidential power. If new groups emerge that pose a threat sufficient to warrant independent use-of-force authority, the government should affirmatively and publicly identify them and **obtain from Congress specific authorization** to use force against those groups. If, in contrast, no special use-of-force authority is needed to respond to these groups, then this only underscores our more fundamental point: that a new, expanded AUMF is unnecessary. The proponents of the Hoover proposal, however, have seized upon an alternative possibility: in their view, the government will seek to use force against so-called “extra-AUMF” threats regardless of the underlying statutory authorization. They rely upon this presumed fact, coupled with a concern about the lack of transparency as to which groups fall within the AUMF, to justify a new approach presented as a moderate solution: Congress delegates to the President the power to identify those groups against which military force is necessary pursuant to specific statutory criteria. In other words, Congress delegates its war-declaration authority to the Executive Branch, subject to specified criteria. The proposal further requires such delegations to be public—with ex post auditing and reporting to address the current transparency deficit. As the Hoover proposal concludes: a listing system modeled on this approach best cabins presidential power while at the same time giving the president the flexibility he needs to address emerging threats. Such a listing scheme will also render more transparent and regularized the now very murky process by which organizations and their members are deemed to fall within the September 2001 AUMF. 43 The Hoover proposal thus rests on a view—which we share—of the insufficient transparency of the identification of “associated forces.” Its solution, however, is a new use-of-force regime in which Congress enacts a wholesale delegation to the President of the power to identify the groups against which armed conflict is authorized, **rather than case-by-case authorizations of such force by Congress**. Although we agree that greater transparency and accountability are necessary limitations on the government’s scope of authority to use force against “associated forces” under the AUMF, we fail to see how the transparency concern justifies the type of open-ended or broad force authorizations that the Hoover paper advocates. 44 To the contrary, as we explain below, such an approach rests on two assumptions that we vigorously dispute: that an expansive and expanding war is inevitable and that no alternative means exist for achieving a comparable result. Indeed, not only do such alternatives exist, but **an ever-expanding armed conflict** paradoxically threatens to make the nation less safe in the long term.

### Mission Failure

**Contention 2 is mission failure**

**War decisions are insulated from Congressional will, resulting in lack of unity and foreign policy coherence**

**Gallagher, 11** [Lieutenant Colonel Joseph V. Gallagher III, United States Marine Corps, “Unconstitutional War: Strategic Risk in the Age of Congressional Abdication”, Parameters, summer, http://strategicstudiesinstitute.army.mil/pubs/parameters/articles/2011summer/gallagher.pdf]

Understanding the Gap Since World War II, a **wide gap** has developed between Congress and the executive branch with respect to the critical issue of war powers. Like a black hole, this gap draws in the roles and abilities of the branches to execute foreign policy. Ostensibly, this gap has resulted from two symbiotic behaviors: executive aggressiveness and **congressional abdication.** The historical record reveals the evolution of this phenomenon. But history does not clearly reveal the structural and political dimensions of this phenomenon. The Constitution grants most foreign policy prerogative to Congress in Article I. Article II grants the president very limited authority in the foreign policy arena.49 This results in a structural dichotomy because the executive branch is better positioned to lead and execute, but congressional actions are more indirect and diffuse. Congress’s bicameral design and widely dispersed support base do not optimize the expeditious exercise of its power. Consequently, considerable power has flowed from Congress to the president.50 Execution of US foreign policy is fraught with political uncertainty and vulnerability. Compared to domestic issues, foreign policy decisions and initiatives are susceptible to greater unpredictability.51 Therefore, when dealing with high levels of uncertainty, Congress often finds it easier to defer to the executive branch, thereby reducing congressional members’ exposure or liability.52 Because most Americans elect their congressional representatives based on domestic issues, they tend to pay little attention to foreign policy; members of Congress often defer acting on foreign policy matters as a safer political option.53 This political safe haven of indecision, however, does not serve the nation well because it encourages concentrating power in the executive branch. Likewise, it severs the link between the electorate, the constitutionally intended legislative process, and the executor. Matters of war, however, **require** the **collective involvement** of the people. Militaries fight wars, but nations go to war. In the final analysis, **congressional abdication** of its Article I **authority to oversee** the nation’s foreign **policy has exposed America to unacceptable strategic risk.** War, Strategy, and the Constitution One of Clausewitz’ greatest contributions to the study of war is his emphasis on the conceptual link between politics and war. “War is never a separate phenomenon,” Clausewitz wrote, “but the continuation of politics by other means.”54 Behind this proposition is a deeply textured argument about the intrinsic political purpose of war. This political purpose encompasses the components comprising war: societal disposition, economic capability, and strategy. Clausewitz advised leaders to thoroughly consider any use of violence. So the link between war and politics “should never be overlooked.”55 Even in the 21st century, war retains this political dimension despite the recent emergence of nonstate actors and transnational groups.56 In other words, success at **the tactical level** of war first **requires careful preparations** at the political and strategic levels. The enabling institutions for success in war—Congress, the president, the cabinet, and other advisors—**all need to be fully** **engaged in the development of** feasible, suitable, and acceptable **strategy**.57 And this carefully crafted strategy needs to include legitimate justification for violence, rigorous calculation and valuation of political objectives, and commitment of resources sufficient to achieve strategic objectives.58 Since 1945, the United States has built the world’s most capable war-fighting machine. So why, then, have most of the nation’s large military interventions since World War II ended in defeat or, at best, stalemate? Political leaders should attend more to what Clausewitz calls the political dimensions of war—national unity and the political value of the objective—as inseparable from national and military strategy. War theorists have long emphasized the importance of national unity and the political value of the war objective. Thousands of years ago, Sun Tzu identified the necessary pre-condition of national unity for successful war strategy.59 National unity enables political leaders to **muster resources needed to win wars** and to amass the human capital that makes an army. Clausewitz advised, “to discover how much of our resources must be mobilized for war, we must first examine our own political aim.”60 National unity underwrites the commitment the nation needs to successfully prosecute war, provided the war has political value commensurate to the effort expended.61 The founders directed this nation to use a collaborative process to assess the political value of a war. So the Constitution requires Congress to deliberate on the decision to go to war and, when it so decides, to declare war. Therefore, the Constitution serves as the guarantor of **ensuring** national **unity** and a legitimate valuation of the war’s political objective—provided through the mechanism of the war declaration. Consider the language of the 1941 war declaration against Japan. It captures the national unity, the political value of the objective, and the will and support of Congress to support the war.62 A Risk to Strategy As the practice of declaring war has become passé, American strategy has likewise become **disjointed** and disconnected from national security objectives. Following World War II, an acquiescent Congress and an aggressive presidency have, for decades, fostered a strategic climate that failed to maintain the links between the political dimensions of the state and its strategy. The predominant “NSC-68 thinking,” largely a product of executive national security panels that administrations have embraced and Congress has blithely followed, provided **inadequate guidance** on how objectives and capabilities should be joined to produce **coherent overall strategy**.63 This connection, Clausewitz observed, is **necessary** for success in war. For example, US strategy following World War II ironically came to resemble the German strategy of the early 20th century, relying heavily on military ways and means that failed to address the political and economic components of warfare.64 Historians are quick to extol the superiority of the German military machine, but Germany lost two world wars. Similarly, the United States has pursued a strategy built on loosely linked operational and tactical successes. Unfortunately, without concretely defined end states specified in a coherent all-encompassing strategy, these successes have not achieved national strategic ends. In Vietnam, Afghanistan, and Iraq, our leaders failed to properly define the national strategic ends, so the attendant strategies have been inchoate. Leaders’ attempts to match ways and means to fluctuating or poorly defined ends resulted in unacceptable levels of uncertainty and risk. These protracted and strategically uncertain conflicts are alien to America’s strategic culture, which has little tolerance for long, risky, or uncertain conflicts.65 More recently, as the executive branch exercises greater authority in directing military interventions, the gap between risk and strategy becomes wider. Theater commanders charged with developing adequate or complete strategies with sound ends and feasible ways to achieve them **lack confidence in congressional support to provide the means necessary to achieve** **these** strategic **objectives**.66 As the world’s only superpower, the United States can expect asymmetrical conflict as the norm. Future adversaries will increasingly focus on the strategic target of the American people’s collective will in their efforts to subvert our national strategy.67 Vietnam Strategy The tragic military and political experience of Vietnam was spawned by an aggressive president promoting foreign policy absent congressional and public blessings.68 Vietnam War strategy affirms how congressional abdication on war matters resulted in protracted disaster. As historian George Herring points out, “America’s failure in Vietnam and the tragedy that resulted also make clear what can happen when major decisions are made without debate or discussion.”69 After Congress passed the Gulf of Tonkin Resolution, the strategy formulation and decision process operated vacuously, failing to determine strategic objectives and the means to obtain them.70 President Johnson made numerous decisions concerning the strategy and operations of the war, resulting in a strategy of incremental gradualism. Despite some tactical successes, Vietnam strategy never developed sufficient coherence nor the sustained support of the American people. Through executive design, Congress and the people never fully vetted the value of the political objective in the context of large-scale military intervention before President Johnson committed forces to combat.71 As a result, President Johnson lacked the top cover of a war declaration. This prevented him from unleashing the nation’s enormous military capability to achieve full, quick military success. Instead, he implemented a strategy that he thought was least likely to jeopardize his legislative agenda, upset the domestic apple cart, or threaten his reelection.72 In retrospect, the incoherence of the Vietnam strategy reflected the real value of the political objective in the eyes of the American people; they could not have cared less about Vietnam.73 Afghanistan and Iraq Strategies The strategies for the ongoing conflicts in Iraq and Afghanistan have both failed to properly incorporate national strategic ends, ways, and means in a consistent manner **across the whole of government**. In the absence of a national consensus on strategic ends, Congressman James Marshall (D-GA) not surprisingly identified: The mismatches among the needs of post-conflict stability operations in Afghanistan and Iraq, the size and the types of military forces available, and the pitiful scarcity of capability in the civilian branches of our government to effect nation-building efforts, as well as, our utter incompetence as a government in strategic communications.74 US Afghanistan strategy has continually morphed from 2001 to the present. The sweeping language in the September 2001 congressional resolution did little to shape the effort and focus the nation on acceptable long-term national ends.75 A careful analysis of coalition command and control structures indicates how the United States, partners, and allies prosecuted any number of operational strategies.76 Strategic priorities changed from counterterrorism to counterinsurgency, to nation building, back to counterterrorism, then eventually to a combination of all of them. During the lead-up to Operation Iraqi Freedom, significant executive power may have subjected the strategy to unnecessary risk. Indeed, failure of Congress to deliberate a declaration of war may have resulted in poorly defined national objectives and shoddy strategy.77 Significant executive powers facilitated side-stepping full disclosure of policy risk. The president’s obsession with regime change subordinated other key elements crucial to a comprehensive strategy, particularly with respect to clear strategic ends. This obsession obscured full debate and railroaded the nation into a course of action fraught with unexamined risk. Additionally, it masked the real cost of the strategy in terms of lives and dollars and inevitably compromised support for the effort when the strategy did not unfold as planned.78 Eventually, the wars in Iraq and Afghanistan and their strategies became focal points in the 2008 presidential campaign. Similar to President Johnson on Vietnam, candidate Obama politicized the Iraq and Afghanistan conflicts, promising on the campaign trail that, if elected, he would redeploy US combat forces out of Iraq and refocus on Afghanistan as the central front on the war against extremism. This politicalization of the war efforts may have removed strategic considerations from decisionmaking, exposing the strategies to additional, unnecessary risk at a crucial time.79 Another Cry for Reform In 2009, The National War Powers Commission, a bipartisan group commissioned under the auspices of the University of Virginia’s Miller Center for Public Affairs, reviewed the existing WPR and addressed executive overreach with respect to military intervention. Chaired by Warren Christopher and James Baker, the 2009 War Powers Commission concluded that the 1973 WPR does not function as intended and **needs replacement**.80 Commission members testified before the House Foreign Affairs Committee and Senate Foreign Relations Committee recommending a policy to restore the constitutional grounding for mandatory congressional war declaration for “large” force deployments and “significant armed conflict.”81 The Commission recommended replacing the 1973 WPR with the **War Powers Consultation Act of 2009** that adds fidelity to the size, scope, and types of conflict subject to the Act. Most significantly, it directs the president to consult with Congress before introducing troops into “significant armed conflict.”82 Despite the bipartisan clout of former Secretaries of State Warren Christopher and James Baker, the Commission’s recommendations still lacked the necessary political power to prevent the president from deploying forces into significant armed conflict without the full blessing of Congress.83 Conclusion Reminiscent of the 1973 WPR, the National War Powers Commission’s effort to redress war power authority hoists another warning flag about war power overreach and executive presumption of constitutional power. But it is **insufficient** to have an academic debate over the constitutionality of war authority. Since the end of World War II, an **assertive executive** branch has run roughshod over an abdicating Congress, which **has compromised US military efficacy**. It has repeatedly resulted in the expenditure of national blood and treasure for strategically hollow ends. The Constitution is, in itself, a strategic national security document. The founders’ wisdom imbued within Articles I and II capture, in the Clausewitzian sense, the necessary prerequisites for successful prosecution of war. As the executive and congressional branches deviate from US constitutional foundations with respect to war authority, they increasingly leave the military—and the nation—vulnerable to unacceptable strategic risk. The current interpretations or disregard for war power authority, as practiced today, no longer maintain the necessary connective tissue between political and military muscle movements. As a result, US national and military strategy has become disjoined from legitimate political will. American military operations are hampered by the leadership’s inability to harness the national will. If this nation declared war when it engaged in war, as the Constitution requires, the United States **would wage fewer of them**—and **be far better positioned to win them.**

**Effective use of force stops hotspot escalation to nuclear war**

**O’Hanlon, 07** [Michael O’Hanlon, Senior Fellow and Sydney Stein Jr. Chair in Foreign Policy Studies at the Brookings Institution and Frederick Kagan, Resident Scholar at the American Enterprise Institute, and “The Case for Larger Ground Forces”, Stanley Foundation Report, April, http://stanleyfoundation.org/publications/other/Kagan\_OHanlon\_07.pdf]

We live at a time when wars not only rage in nearly every region but threaten to **erupt** in many places where the current relative calm is tenuous. To view this as a strategic military challenge for the United States is not to espouse a specific theory of America’s role in the world or a certain political philosophy. Such an assessment flows directly from the basic bipartisan view of American foreign policy makers since World War II that overseas threats must be countered before they can directly threaten this country’s shores, that the basic stability of the international system is essential to American peace and prosperity, and that no country besides the **U**nited **S**tates is in a position to lead the way in countering major challenges to the **global order**. Let us highlight the threats and their consequences with a few concrete examples, emphasizing those that involve key strategic regions of the world such as the **Persian Gulf** and **East Asia**, or key potential threats to American security, such as the spread of **nuclear weapons** and the strengthening of the global Al Qaeda/jihadist movement. The Iranian government has rejected a series of international demands to halt its efforts at enriching uranium and submit to international inspections. What will happen if the US—or Israeli—government becomes convinced that Tehran is on the verge of fielding a nuclear weapon? North Korea, of course, has already done so, and the ripple effects are beginning to spread. Japan’s recent election to supreme power of a leader who has promised to rewrite that country’s constitution to support increased armed forces—and, possibly, even nuclear weapons— may well alter the delicate balance of fear in Northeast Asia fundamentally and rapidly. Also, in the background, at least for now, **Sino- Taiwanese tensions** continue to flare, as do tensions between **India and Pakistan**, Pakistan and Afghanistan, Venezuela and the United States, and so on. Meanwhile, the world’s nonintervention in Darfur troubles consciences from Europe to America’s Bible Belt to its bastions of liberalism, yet with no serious international forces on offer, the bloodletting will probably, tragically, continue unabated. And as bad as things are in **Iraq** today, they could get worse. What would happen if the key Shiite figure, Ali al Sistani, were to die? If another major attack on the scale of the Golden Mosque bombing hit either side (or, perhaps, both sides at the same time)? Such deterioration might convince many Americans that the war there truly was lost—but the costs of reaching such a conclusion would be enormous. Afghanistan is somewhat more stable for the moment, although a major Taliban offensive appears to be in the offing. Sound US grand strategy must proceed from the recognition that, over the next few years and decades, the world is going to be a very unsettled and quite dangerous place, with Al Qaeda and its associated groups as a subset of a much larger set of worries. The only serious response to this international environment is to develop **armed forces** capable of protecting America’s vital interests throughout this dangerous time. Doing so requires a military capable of a wide range of missions—including not only deterrence of **great power conflict** in dealing with potential hotspots in **Korea**, the **Taiwan** Strait, and the Persian **Gulf** but also associated with a variety of Special Forces activities and stabilization operations. For today’s US military, which already excels at high technology and is increasingly focused on re-learning the lost art of counterinsurgency, this is first and foremost a question of finding the resources to field a large-enough standing Army and Marine Corps to handle personnelintensive missions such as the ones now under way in Iraq and Afghanistan. Let us hope there will be no such large-scale missions for a while. But preparing for the possibility, while doing whatever we can at this late hour to relieve the pressure on our soldiers and Marines in ongoing operations, is prudent. At worst, the only potential downside to a major program to strengthen the military is the possibility of spending a bit too much money. Recent history shows no link between having a larger military and its overuse; indeed, Ronald Reagan’s time in office was characterized by higher defense budgets and yet much less use of the military, an outcome for which we can hope in the coming years, but hardly guarantee. While the authors disagree between ourselves about proper increases in the size and cost of the military (with O’Hanlon preferring to hold defense to roughly 4 percent of GDP and seeing ground forces increase by a total of perhaps 100,000, and Kagan willing to devote at least 5 percent of GDP to defense as in the Reagan years and increase the Army by at least 250,000), we agree on the need to start expanding ground force capabilities by at least 25,000 a year immediately. Such a measure is not only prudent, it is also badly overdue.

**Conflicts are likely – the plan maintains the basis for US leadership**

**Kaine and McCain, 14** [Senator Kaine From West Virginia and John McCain, Senator from Arizona, “STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS”, http://beta.congress.gov/congressional-record/2014/1/16/senate-section/article/S441-1]

Mr. McCAIN. Mr. President, I am pleased today to join my colleague, the junior Senator from Virginia, as we introduce **the War Powers Consultation Act of 2014.**  This legislation is the final product of the National War Powers Commission, which was a bipartisan effort co-led by former Secretary of State Jim Baker and former Secretary of State Warren Christopher. The commission was set up by the Miller Center at the University of Virginia to devise a modern and workable war powers consultation mechanism for the executive and legislative branches. It included some of our Nation's most distinguished and respected thinkers and practitioners of national security policy and law. In 2008, after more than a year of hard work, the commission released the final product--an actual legislative proposal to repeal and **replace the War Powers Resolution of 1973,** which no American President has ever accepted as constitutional. As does my colleague, I view our introduction of this legislation today as the start of an important congressional and national debate, not the final word in that debate. We wish to pick up where the National War Powers Commission left off 6 years ago, and we do so fully understanding and hopeful that **this legislation should be considered** and debated and **amended** and improved through regular order. My colleague from Virginia has done a great job on this legislation, and I am proud to join him. I wish to expand a bit on why updating the War Powers Resolution is such a worthwhile endeavor for the Senate to consider right now. The Constitution gives the power to declare war to the Congress, but Congress has not formally declared war since June of 1942 even though our Nation has been involved in dozens of military actions of one scale or another since that time. There is a reason for this. The nature of war is changing. It is increasingly unlikely that the combat operations our Nation will be involved in will resemble those of World War II, where the standing armies and navies of nation states squared off against those of rival nation states on clearly defined fields of battle. Rather, **the conflicts in which increasingly we find ourselves** and for which we must prepare will be **murkier**, harder to reconcile with the traditional notions of warfare; they may be more limited in their objectives, their scope, and their duration; and they likely will not conclude with a **formal** surrender ceremony on the deck of a battleship. The challenge for all of us serving in Congress is this: How do we reconcile the changing nature of war with Congress's proper role in the declaration of war? It is not exactly a new question, but it is a profound one, for unless we in Congress are prepared to cede our constitutional authority over matters of war to the executive, we need a more workable arrangement for consultation and decisionmaking between the executive and legislative branches. We have seen **several manifestations** of this challenge in recent years. In 2011 President Obama committed U.S. military forces to combat operations in Libya to protect civilian populations from imminent slaughter by a brutal, anti-American tyrant. I, for one, believe he was right to do so. But 6 months later, when our armed services were still involved in kinetic actions in Libya--not just supporting our NATO allies but conducting air-to-ground operations and targeted strikes from armed, unmanned aerial vehicles--the administration claimed, as other administrations would, that it **had no obligations to Congress under the W**ar **P**owers **R**esolution because our Armed Forces were not involved in combat operations. That struck many Members of Congress, including me, as fundamentally at odds with reality, and unfortunately it pushed more Members of Congress into opposition against the mission itself. More recently, we saw the opposite problem manifested **with regard to Syria**. Perhaps due to the backlash in Congress that the administration's handling of the Libya conflict engendered, President Obama decided to seek congressional authorization for limited airstrikes against the Assad regime after it slaughtered more than 1,400 of its own citizens with chemical weapons last August. An operation that likely would have lasted a few days and thus been fully consistent with the President's authority under the existing War Powers Resolution had he decided to act decisively and take limited military action instead devolved into a stinging legislative repudiation of executive action. The tragic result was that the Assad regime was spared any meaningful consequences for its use of a weapon of mass destruction against innocent men, women, and children, and, as with Libya, the forces that want to turn America away from the world were **not checked but empowered**. Some of us may see the problem in these two instances as a failure of Presidential leadership, and I would agree, but I also believe the examples of Libya and Syria represent the broader problem we as a nation face: What is the proper war power authority of the executive and legislative branches when it comes to limited conflicts, which are **increasingly the kinds of conflicts with which we are faced?**  It is essential for the Congress and the President to work together to define a new war powers consultative agreement that reflects the nature of conflict in the 21st century and is in line with our Constitution. Our Nation does not have 535 commanders in chief. We have one--the President--and that role as established by our Constitution must be respected. Our Nation is poorly served when Members of Congress try to micromanage the Commander in Chief in matters of war. At the same time, now more than ever, we need to create a broader and more durable national consensus on foreign policy and national security, especially when it comes to matters of war and armed conflict. We need to find ways to make internationalist policies more politically sustainable. After the September 11 attack, we embarked on an expansive foreign policy. Spending on defense and foreign assistance went up, and energy shifted to the executive. Now things are changing. Americans want to pull back from the world. Our foreign assistance and defense budgets are **declining**. The desire to curb Presidential power across the board is growing, and the political momentum is shifting toward the Congress. America has gone through this kind of political rebalancing before, and much of the time we have gotten it wrong. That is how we got **isolationism and disarmament** after World War I, that is how we got a **hollow army** after Vietnam, and that is how we weakened our national security after the Cold War in the misplaced hope of cashing in on a peace dividend. **We can't afford to repeat these mistakes.** A new war powers resolution--one that is recognized as both constitutional and workable in practice--can be an important contribution to this effort. It can more effectively invest in the Congress the critical decisions that impact our national security. It can help build a more durable consensus in favor of the kinds of policies **we need to sustain our global leadership** and protect our Nation. In short, the legislation we are introducing today **can restore a better balance to the way national security decisionmaking should** **work in a great democracy such as ours.**  Let me say again. Neither the Senator from Virginia nor I believe the legislation we are introducing today answers all of the monumental and difficult questions surrounding the issue of war powers. We believe this is a matter of transcendent importance to our Nation, and we as a deliberative body of our government should debate this issue, and we look forward to that debate. This legislation should be seen as a way of starting that discussion both here in the Congress and across our Nation. We owe that to ourselves and our constituents. Most of all, we owe that to the brave men and women who serve our Nation in uniform and are called to risk their lives in harm's way for the sake of our Nation's national defense. Before I yield to my tardy colleague from Virginia, I wish to mention again another reason why I think this legislation should be the beginning of a serious debate which we should bring to some conclusion. The fact is that no President of the United States has recognized the constitutionality of the War Powers Act. That is a problem in itself. That is a perversion, frankly, of the Constitution of the United States of America. That is one reason, but the most important reason is that I believe we are living in incredibly dangerous times. When we look across the Middle East, when we look at Asia and the rise in the tensions in that part of the world and we look at the conflicts that are becoming regional--and whose fault they are is a subject for another debate and discussion, but **the fact is that we are in the path of some kind of conflict in which**--whether the United States of America wants to or not--we may have to be involved in some ways. We still have vital national security interests in the Middle East. It is evolving into a chaotic situation, and one can look from the Mediterranean all the way to the Strait of Hormuz, the Gulf of Aqaba, and throughout the region. So I believe the likelihood of us being involved in some way or another in some conflict is greater than it has been since the end of the Cold War, and I believe the American people deserve legislation and **a clear definition of the responsibilities of** **the Congress** of the United States and that of the President of the United States. Again, I thank my colleague from Virginia, whose idea this is, who took a great proposal that was developed at the University of Virginia and was kind enough to involve me in this effort. I thank him for it. I thank him for his very hard work on it, despite the fact that, as the Chair will recognize, he was late for this discussion. I yield the floor. The PRESIDING OFFICER. The Senator from Virginia. Mr. KAINE. Mr. President, I thank my colleague from Arizona for pointing out to all in the Chamber my tardiness, and I should not have been tardy because I do not like to follow the Senator from Arizona. I would rather begin before him. But I want to thank him for his work with me, together, on this important issue and amplify on a few of the comments he has made. Today, together, as cosponsors we are introducing the War Powers Consultation Act of 2014, which would repeal the 1973 War Powers Resolution and replace it. I could not have a better cosponsor than Senator McCain and appreciate all the work he and his staff have done over the last months with us. I gave a floor speech about this issue in this Chamber in July of 2013, almost to the day, 40 years after the Senate passed the War Powers Resolution of 1973. Many of you remember the context of that passage. When it was passed in the summer of 1973, it was in the midst of the end of the Vietnam war. President Nixon had expanded the Vietnam war into Cambodia and Laos without explicit congressional approval, and the Congress reacted very negatively and passed this act to try to curtail executive powers in terms of the initiation of military hostilities. It was a very controversial bill. When it was passed, President Nixon vetoed it. Congress overrode the veto at the end of 1973. But as Senator McCain indicated, no President has conceded the constitutionality of the 1973 act, and most constitutional scholars who have written about the question have found at least a few of what they believe would be fatal infirmities in that 1973 resolution. It was a hyperpartisan time, maybe not unlike some aspects of the present, and in trying to find that right balance in this critical question of when the Nation goes to war or initiates military action, Congress and the President did not reach an accord. I came to the Senate with a number of passions and things I hoped to do. But I think I came with only one obsession, and this is that obsession. Virginia is a State that is most connected to the military of any State in the country. Our map is a map of American military history--from Yorktown, where the Revolutionary War ended, to Appomattox, where the Civil War ended, to the Pentagon, where 9/11 happened. That is who we are. One in nine Virginians is a veteran. If you add our Active Duty, our Guard and Reserve, our military families, our DOD civilians, our DOD contractors, you are basically talking about one in three Virginians. These issues of war and peace matter so deeply to us, as they do all Americans. The particular passion I had in coming to this body around war powers was because of kind of a disturbing thought, which is, if the President and Congress do not work together and find consensus in matters around war, we might be asking our men and women to fight and potentially give their lives without **a clear political consensus** and agreement **behind the mission.**  I do not think there is anything more important that the Senate and the Congress can do than to be on board on decisions about whether we initiate military action, because if we do not, we are asking young men and women to fight and potentially give their lives, with us not having done the hard work of creating the political consensus to support them. That is why I have worked hard to bring this to the attention of this body with Senator McCain. The Constitution actually sets up a fairly clear framework. The President is the Commander in Chief, not 535 commanders-in-chief, as Senator McCain indicated. But Congress is the body that has the power both to declare war and then to fund military action. In dividing the responsibilities in this way, the Framers were pretty clear. James Madison, who worked on the Constitution, especially the Bill of Rights, wrote a letter to Thomas Jefferson and said: The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It [[Page S443]] has accordingly with studied care vested the question of war in the Legislature. Despite that original constitutional understanding, our history has not matched the notion that Congress would always be the initiator of military action. Congress has only declared war five times in the history of the United States, while Presidents have initiated military action prior to any congressional approval more than 120 times. In some of these instances where the President has initiated war, Congress has come back and either subsequently ratified Presidential action--sometimes by a formal approval or sometimes by informal approval such as budgetary allocation--but in other instances, including recently, Presidents have acted and committed American military forces to military action without any congressional approval. The Senator from Arizona mentioned the most recent one. President Obama committed military force to NATO, action against Libya in 2011, without any congressional approval, and he was formally censured by the House of Representatives for doing so. The current context that requires a reanalysis of this thorny question, after 40 years of the War Powers Resolution, was well stated by the Senator from Arizona. Wars are different. They start differently. They are not necessarily nation state against nation state. They could be limited in time or, as of now, we are still pursuing a military force that was authorized on September 18, 2001, 12 or 13 years later. Wars are of different duration, different scope, different geography. Nation states are no longer the only entities that are engaged in war. These new developments that are challenging--what do we do about drones in countries far afield from where battles were originally waged--raise the issue of the need to go back into this War Powers Resolution and update it for the current times. As the Senator from Arizona mentioned, this has been a question that Members of Congress have grappled with and thought about, as have diplomats and scholars and administration officials and Members of Congress for some time. In 2007, the Miller Center for the study of the presidency at the University of Virginia convened a National War Powers Commission under the chairmanships of two esteemable and bipartisan leaders--former Secretaries of State Warren Christopher and James Baker. The remaining members of the Commission were a complete A list of thinkers in this area--Slade Gorton, Abner Mikva, Ed Meese, Lee Hamilton. The Commission's historian was no less than Doris Kearns Goodwin, who looked at the entire scope of this problem in American history and what the role of Congress and the President should be. The Commission issued a unanimous report, proposing an act to replace the War Powers Act of 1973, briefed Congress and incoming President Obama on the particular act in 2007 and 2008, but at that time, the time was not yet ripe for consideration of this bill. But now that we are 40 years into an unworkable War Powers Resolution and now, as the Senator indicated, we have had a string of Presidents-- both Democratic Presidents and Republican Presidents--who have maintained that the act is unconstitutional and now that we have had a 40-year history of Congress often exceeding to the claim of unconstitutionality by not following the War Powers Resolution itself, we do think it is time to revisit. Let me just state two fundamental, substantive issues that this bill presents in the War Powers Consultation Act of 2014. First, **there is a set of definitions**. What is war? The bill defines significant military action as any action where involvement of U.S. troops would be expected to be in combat for at least a week or longer. Under those circumstances, the provisions of the act would be triggered. There are some exceptions in the act. The act would not cover defined covert action operations. But once a combat operation was expected to last for more than 7 days, the act would be triggered. The act basically sets up two important substantive improvements on the War Powers Resolution. First, a **permanent consultation committee is established** in Congress, with the majority and minority leaders of both Houses and the chairs and ranking members of the four key committees in both Houses that deal with war issues--Intel, Armed Services, Foreign Relations, and Appropriations. That permanent consultation committee is a venue for discussion between the executive and legislative branches--permanent and continuous--over matters in the world that may require the use of American military force. Because the question comes up often: What did the President do to consult with Congress? Is it enough to call a few leaders or call a few committee chairs? This act would normalize and regularize what consultation with Congress means by establishing a permanent consultation committee and requiring ongoing dialogue between the Executive and that committee. The second requirement of this bill is that once military action is commenced that would take more than 7 days, there is a requirement for a vote in both Houses of Congress. The consultation committee itself would put a resolution on the table in both Houses to approve or disapprove of military action. It would be a privileged motion with expedited requirements for debate, amendment, and vote, and that would ensure that we do not reach a situation where action is being taken at the instance of one branch with the other branch not in agreement, because to do that would put our men and women who are fighting and in harm's way at the risk of sacrificing their lives when we in the political leadership have not done the job of reaching a consensus behind the mission. To conclude, I will acknowledge what the Senator from Arizona said. This is a very thorny and difficult question that has created challenges and differences of interpretation since the Constitution was written in 1787. Despite the fact that the Framers who wrote the Constitution actually had a pretty clear idea about how it should operate, it has never operated that way. Forty years of a failed War Powers Resolution in today's dangerous world suggests that it is time now to get back in and to do some careful deliberation to update and normalize the appropriate level of consultation between a President and the legislature. The recent events as cited by the Senator--whatever you think about the merits or the equities, whether it is Libya, whether it is Syria, whether it is the discussions we are having now with respect to Iran or **any other of a number of potential spots around the world that could lead to conflict**--suggest that while decisions about war and initiation of military action will never be easy, they get harder if we do not have an agreed-upon process for coming to understand each other's points of view and then acting **in the best interest of the Nation to forge a consensus.**

**Leadership failure causes extinction**

**Brzezinski, 12** [1/24/12, Zbigniew, Former National Security Advisor to President of the Great United States Jimmy Carter, Professor of American Foreign Policyat Johns Hopkins University's [School of Advanced International Studies](http://en.wikipedia.org/wiki/Johns_Hopkins_SAIS), scholar at the Center for Strategic and International Studies, Strategic Vision: America and the Crisis of Global Power (Kindle Locations 1476-1485). Perseus Books Group. Kindle Edition]

An American decline would impact the nuclear domain most profoundly by inciting a **crisis of confidence** in the credibility of the American nuclear umbrella. Countries like South Korea, Taiwan, Japan, Turkey, and even Israel, among others, rely on the United States’ extended nuclear deterrence for security. If they were to see the United States slowly retreat from certain regions, forced by circumstances to pull back its guarantees, or even if they were to lose confidence in standing US guarantees, because of the financial, political, military, and diplomatic consequences of an American decline, then they will have to seek security elsewhere. That “elsewhere” security could originate from only two sources: from nuclear weapons of one’s own or from the extended deterrence of another power—most likely Russia, China, or India. It is possible that countries that feel threatened by the ambition of existing nuclear weapon states, the addition of new nuclear weapon states, or the decline in the reliability of American power would develop their own nuclear capabilities. For crypto-nuclear powers like Germany and Japan, the path to nuclear weapons would be easy and fairly quick, given their extensive civilian nuclear industry, their financial success, and their technological acumen. Furthermore, the continued existence of nuclear weapons in North Korea and the potentiality of a nuclear-capable Iran could prompt American allies in the Persian Gulf or East Asia to build their own nuclear deterrents. Given North Korea’s increasingly aggressive and erratic behavior, the failure of the six-party talks, and the widely held distrust of Iran’s megalomaniacal leadership, the guarantees offered by a declining America’s nuclear umbrella might not stave off a regional nuclear arms race among smaller powers. Last but not least, even though China and India today maintain a responsible nuclear posture of minimal deterrence and “no first use,” the uncertainty of an increasingly nuclear world could force both states to reevaluate and escalate their nuclear posture. Indeed, they as well as Russia might even become inclined to extend nuclear assurances to their respective client states. Not only could this signal a renewed regional nuclear arms race between these three aspiring powers but it could also create new and antagonistic **spheres of influence** in Eurasia driven by competitive nuclear deterrence. The decline of the United States would thus precipitate drastic changes to the nuclear domain. An increase in proliferation among insecure American allies and/or an arms race between the emerging Asian powers are among the more likely outcomes. This ripple effect of proliferation would undermine the transparent management of the nuclear domain and increase the likelihood of **interstate rivalry, miscalc**ulation, and eventually even perhaps of international **nuclear terror**. In addition to the foregoing, in the course of this century the world will face a series of novel geopolitical challenges brought about by significant changes in the physical environment. The management of those changing environmental commons—the growing scarcity of fresh water, the opening of the Arctic, and global warming—will require global consensus and mutual sacrifice. American leadership alone is not enough to secure cooperation on all these issues, but a decline in American influence would reduce the likelihood of achieving cooperative agreements on environmental and resource management. America’s retirement from its role of global policeman could create greater opportunities for emerging powers to further exploit the environmental commons for their own economic gain, **increasing the chances of resource-driven conflict**, particularly in Asia. The latter is likely to be the case especially in regard to the increasingly scarce water resources in many countries. According to the United States Agency for International Development (USAID), by 2025 more than 2.8 billion people will be living in either water-scarce or water-stressed regions, as global demand for

water will double every twenty years.9 While much of the Southern Hemisphere is threatened by potential water scarcity, interstate conflicts—the geopolitical consequences of cross-border water scarcity—are most likely to occur in Central and South Asia, the Middle East, and northeastern Africa, regions where limited water resources are shared across borders and political stability is transient. The combination of political insecurity and resource scarcity is a menacing geopolitical combination. The threat of water conflicts is likely to intensify as the economic growth and increasing demand for water in emerging powers like Turkey and India collides with instability and resource scarcity in rival countries like Iraq and Pakistan. Water scarcity will also test China’s internal stability as its burgeoning population and growing industrial complex combine to increase demand for and decrease supply of usable water. In South Asia, the never-ending political tension between India and Pakistan combined with overcrowding and Pakistan’s heightening internal crises may put the Indus Water Treaty at risk, especially because the river basin originates in the long-disputed territory of Jammu and Kashmir, an area of ever-increasing political and military volatility. The lingering dispute between India and China over the status of Northeast India, an area through which the vital Brahmaputra River flows, also remains a serious concern. As American hegemony disappears and **regional competition intensifies**, disputes over natural resources like water have the potential to develop into **full-scale conflicts**. The slow thawing of the Arctic will also change the face of the international competition for important resources. With the Arctic becoming increasingly accessible to human endeavor, the five Arctic littoral states—the United States, Canada, Russia, Denmark, and Norway—may rush to lay claim to its bounty of oil, gas, and metals. This run on the Arctic has the potential to cause severe shifts in the geopolitical landscape, particularly to Russia’s advantage. As Vladimir Radyuhin points out in his article entitled “The Arctic’s Strategic Value for Russia,” Russia has the most to gain from access to the Arctic while simultaneously being the target of far north containment by the other four Arctic states, all of which are members of NATO. In many respects this new great game will be determined by who moves first with the most legitimacy, since very few agreements on the Arctic exist. The first Russian supertanker sailed from Europe to Asia via the North Sea in the summer of 2010.10 Russia has an immense amount of land and resource potential in the Arctic. Its territory within the Arctic Circle is 3.1 million square kilometers—around the size of India—and the Arctic accounts for 91% of Russia’s natural gas production, 80% of its explored natural gas reserves, 90% of its offshore hydrocarbon reserves, and a large store of metals.11 Russia is also attempting to increase its claim on the territory by asserting that its continental shelf continues deeper into the Arctic, which could qualify Russia for a 150-mile extension of its Exclusive Economic Zone and add another 1.2 million square kilometers of resource-rich territory. Its first attempt at this extension was denied by the UN Commission on the Continental Shelf, but it is planning to reapply in 2013. Russia considers the Arctic a true extension of its northern border and in a 2008 strategy paper President Medvedev stated that the Arctic would become Russia’s “main strategic resource base” by 2020.12 Despite recent conciliatory summits between Europe and Russia over European security architecture, a large amount of uncertainty and distrust stains the West’s relationship with Russia. The United States itself has always maintained a strong claim on the Arctic and has continued patrolling the area since the end of the Cold War. This was reinforced during the last month of President Bush’s second term when he released a national security directive stipulating that America should “preserve the global mobility of the United States military and civilian vessels and aircraft throughout the Arctic region.” The potentiality of an American decline could embolden Russia to more forcefully assert its control of the Arctic and over Europe via energy politics; though much depends on Russia’s political orientation after the 2012 presidential elections. All five Arctic littoral states will benefit from a peaceful and cooperative agreement on the Arctic—similar to Norway’s and Russia’s 2010 agreement over the Barents Strait—and the geopolitical stability it would provide. Nevertheless, political circumstances could rapidly change in an environment where control over energy remains Russia’s single greatest priority. Global climate change is the final component of the environmental commons and the one with the greatest potential geopolitical impact. Scientists and policy makers alike have projected catastrophic consequences for mankind and **the planet** if the world average temperature rises by more than two degrees over the next century. Plant and animal **species could grow extinct** at a rapid pace, large-scale **ecosystems** **could** **collapse**, human **migration** could increase to untenable levels, and global **economic development could be** categorically **reversed**. Changes in geography, forced migration, and global economic contraction layered on top of the perennial regional security challenges could create a geopolitical reality of **unmanageable** complexity and **conflict**, especially in the densely populated and politically unstable areas of Asia such as the Northeast and South. Furthermore, any legitimate action inhibiting global climate change will require unprecedented levels of self-sacrifice and international cooperation. The United States does consider climate change a serious concern, but its lack of both long-term strategy and political commitment, evidenced in its refusal to ratify the Kyoto Protocol of 1997 and the repeated defeat of climate-change legislation in Congress, deters other countries from participating in a global agreement. The United States is the second-largest global emitter of carbon dioxide, after China, with 20% of the world’s share. The United States is the number one per capita emitter of carbon dioxide and the global leader in per capita energy demand. Therefore, US leadership is essential in not only **getting other** countrie**s** to cooperate, but also in actually inhibiting climate change. Others around the world, including the European Union and Brazil, have attempted their own domestic reforms on carbon emissions and energy use, and committed themselves to pursuing renewable energy. Even China has made reducing emissions a goal, a fact it refuses to let the United States ignore. But none of those nations currently has the ability to lead a global initiative. President Obama committed the United States to energy and carbon reform at the Copenhagen Summit in 2009, but the increasingly polarized domestic political environment and the truculent American economic recovery are unlikely to inspire progress on costly energy issues. China is also critically important to any discussion of the management of climate change as it produces 21% of the world’s total carbon emissions, a percentage that will only increase as China develops the western regions of its territory and as its citizens experience a growth in their standard of living. China, however, has refused to take on a leadership role in climate change, as it has also done in the maritime, space, and cyberspace domains. China uses its designation as a developing country to shield itself from the demands of global stewardship. China’s tough stance at the 2009 Copenhagen Summit underscores the potential dangers of an American decline: no other country has the capacity and the desire to accept global stewardship over the environmental commons. Only a vigorous Unites States could lead on climate change, given Russia’s dependence on carbon-based energies for economic growth, India’s relatively low emissions rate, and China’s current reluctance to assume global responsibility. The protection and good faith management of the global commons—**sea**, **space**, **cyberspace**, nuclear **prolif**eration, **water** security, **the Arctic**, and **the environment** itself—**are imperative to** the long-term growth of **the global economy** and **the continuation of** basic geopolitical **stability**. But in almost every case, the potential absence of constructive and influential US leadership would fatally **undermine the** essential **communality of the** global **commons**.     The argument that America’s decline would generate global insecurity, endanger some vulnerable states, produce a more troubled North American neighborhood, and make cooperative management of the global commons more difficult is not an argument for US global supremacy. In fact, the strategic complexities of the world in the twenty-first century—resulting from the rise of a politically self-assertive global population and from the dispersal of global power—make such supremacy unattainable. But in this increasingly complicated geopolitical environment, an America in pursuit of a new, timely strategic vision is crucial to helping the world avoid a dangerous slide into international turmoil.

**Solvency**

**Contention 3 is Solvency**

**Our WPCA modifications avoid circumvention and solidify congressional role**

**Corn, 09** [Geoffrey S. Corn, “Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality”, Professor of Law and Presidential Research Professor, p. online]

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 its primary product.16 In a recently published report,17 the National 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 (WPCA**) **as a replacement for the War Powers Resolution**.18 This Commission performed its work at the Miller Center of the University of Virginia, and its report articulates in compelling terms why the WPR has failed19, 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: urge 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. 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.”20 The proposals focus on “meaningful” consultation is unsurprising. Indeed, this was a key concern of the drafters of the WPR. As is noted throughout the Report, consultation must be meaningful in order to ensure the cooperative decision-making process essential to constitutionally valid war powers decisions21. This in turn leads to the core of the Commission’s proposal: that consultation occurs prior to, or immediately after a use of the armed forces in a “significant armed conflict.” This term is defined 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 7 days It is clear from the Commission Report that the **key** objective of this proposal is to not only **ensure cooperation** between the political branches of government in relation to the decision to engage in the nation in hostilities, but perhaps more importantly to define with greater precision than the WPR 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. 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 WPR, **namely a twilight zone surrounding the trigger** for such notification and consultation. Like the failed concept of “hostilities or where imminent hostilities are present24”, the concept of “armed conflict25” will almost inevitably be susceptible to interpretive debate. In addition, the 7 day trigger, like the ubiquitous 60 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 any President will acquiesce to mandated consultation obligations for armed conflicts “thrust” upon the nation, irrespective of their duration. Instead, it is much more likely that they will assert such military operations are conducted pursuant to their exclusive authority to respond to sudden attacks by “meeting force with force26.” There is, however, simply no question that the effort to eliminate the WPR’s express authorization requirement – the provision of the Resolution most inconsistent with the history of constitutional war powers – and **the effort to define a more effective** **triggering event for consultation, 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. Such a trigger, if properly tailored, **would facilitate the ability of Congress to “take a stand” on 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 replacement for the WPR provides the **start point** for ensuring “meaningful” consultation. However, the efficacy of this proposal will remain compromised until uncertainty as to when such consultation is constitutionally required is resolved. Enhancing this proposal with a more **precisely** **tailored** and operationally grounded “**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 indicated27” language of the WPR – terms that to this day remain undefined, or the proposed “significant armed conflict28” trigger of the WPCA. In addition, the trigger must be tailored to exempt from such mandated notification uses of the armed forces falling under the inherent and exclusive authority of the President – namely responses to sudden attacks. This article will propose such a trigger. **Instead of using general terms subject to divergent definition**s (**and therefore evasion**), it will propose a trigger derived from the principles of military operations. This trigger will be **linked to the nature of the Rules of Engagement proposed for National Command Authority approval in relation to a given military operations**29. These rules reflect the fundamental nature of the authority granted to the armed forces by the President as an aspect of all military operations, and therefore 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 notification should be required. Linking such notification to the authorization of “mission specific” Rules of Engagement – a concept that will be explained below – **will substantially contribute to the efficacy of the historically validated war making balance** between the President and Congress.

**This avoids presidential powers – maintains the right to self-defense, but creates a binding requirement impervious to circumvention**

**Corn, 09** [Geoffrey S. Corn, “Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality”, Professor of Law and Presidential Research Professor, p. online]

Proposing an ROE Linked Notification Provision. This article is premised on the conclusion that express congressional approval 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 initiatives225. 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 role226. **Meaningful is the** **key** qualifier, for it indicates that Congress must be afforded the opportunity to check executive war making initiative **before** they are presented with a fait accompli as the result of initiation of combat operations prior. It therefore becomes clear that pre-execution notification of a planned initiation of hostilities is essential to satisfy this constitutional imperative227. 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 Center proposal to amend that law.228 While the Resolution is generally regarded as **ineffective**,229 it is not necessarily the notification provision that led to this conclusion. In fact, that provision is perhaps the one component of the Resolution that has proved relatively successful. However, as the Miller Center proposal recognizes, uncertainty as to when notification is triggered has and will continue to compromise the efficacy of even that component of the Resolution230. Unfortunately, while the MillerCenter Proposal of a “significant armed conflict” trigger231 is less susceptible to interpretive avoidance than the current Resolution notification provision, 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 National Command Authority 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,232 a contemporaneous notification provision 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 provided, thereby mitigating the risk of presenting Congress with a proverbial fait accompli, a result essentially conceded as acceptable by the Miller Center proposal.233 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 be the result of the elimination of **the one remaining source of uncertainty** inherent in the proposal. To accomplish this, the definition provision of that law 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 ue of force beyond the scope of authority provided by the inherent rightof self-defense permitting those forces to initiate hostilities with any state or non-state opponent. Based on this revised definition, the notification/consultation trigger of the proposed law235 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 he or the Secretary of Defense authorize 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 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.236 Enacting the War Powers Consultation Act of 2009237 with this limited but important modification holds the greatest promise of finally achieving the objective of the drafters of the War Powers Resolution sought to achieve 36 year ago: to “fulfill the intent of the framers of the Constitution of the United Statesand insure that the collective judgment of both the Congress and the President238” apply to the decision to initiate armed hostilities.

**The aff spurs inter-branch debate and builds strategic coherence in foreign policy despite circumvention risks**

**Smidt, 9 –** LIEUTENANT COLONEL MICHAEL L. SMIDT, US Army. Paper submitted in fulfillment of a Masters in Strategic Studies degree at the US Army War College (“THE PROPOSED 2009 WAR POWERS CONSULTATION ACT” dtic.mil)

Although the primary benefit from a joint Congressional and Presidential decision to commit the armed forces into armed conflict, it turns out, over the long run, there are significant strategic benefits in complying with the shared power construct laid out in the Constitution. Certainly Clausewitz never formally supported the ideals of the United States Constitution. However, his writings regarding the importance of government in warfare ironically do suggest there are strategic advantages for a government to follow its political principles. While certainly no two wars are alike, there are, according to Carl von Clausewitz, three common components present in all armed conflicts. This “paradoxical trinity,” as he describes it, is “composed of primordial violence, hatred and enmity. . . .”82 The first of these three aspects is generally associated with the “people,” the second, “with the commander and his army,” and the third with “the government.”83 Clausewitz goes on to explain that a successful military policy or strategy will be one that considers each leg of the trinity and balances the relationship between them like “an object suspended between three magnets.”84 Clausewitz explains that any successful wartime strategy must include participation by the political arm. In the final analysis, the use of military force is nothing more than the clear manifestation and forceful exercise of state policy by violent or potentially violent means.85 Therefore, the state political arm must clearly articulate to the military the underlying political objective sought and how the government defines success.86 Strategy is neither a purely political creation, nor a military one;87 however, “strategy ultimately derives its significance from the realm of politics. . .”88 and “the political dimension of strategy is the one that gives it meaning.”89 The governing body, not just its military forces, must participate in the making of strategy. When a decision is made to apply military force to a problem, the body politic must determine the scope, magnitude and duration of its commitment. The state must decide what it is willing to spend in terms of lives and treasure. The state must calculate what risks it is willing to assume regarding its own national security and that of its allies and the international community. 90 Failure of the government to participate in the making of strategy can lead to potentially **catastrophic results on the battlefield**.91 Achieving the political object underlying the decision to use military power determines the degree of effort and commitment required of the military.92 Success on the battlefield may be as much about the quality, clarity, and suitability of a state’s political objectives as it is about the relative military vitality, strength and tactical superiority of the various opponents in the conflict. When the government fails to fulfill its responsibility to set and clearly articulate policy, it **creates strategic uncertainty** within its own population, its armed forces and allies. Moreover, absent clearly articulated state policy, the military element of power will not enjoy its **full deterrent potential** against the enemy.93 As discussed above, the Framers created a system that requires the participation of both branches of government in national security decisions. Unless both branches participate, the President is acting without congressional power and he is therefore only exercising half of the available war making power of the US government. Moreover, where the President fails to consult with Congress and seek concurrence for any significant commitment of forces in hostilities, or where Congress chooses to **avoid participating** in any such decision, **strategic uncertainty may be the result**. Unless both Congress and the President clearly articulate their objectives through a declaration of war or similar legislative or regulatory equivalent, US armed forces, US allies, and perhaps most importantly, the enemy, will not be certain of America’s resolve and determination. Allies might question whether the United States **has the stomach** to continue for a lengthy period. Commanders will be **uncertain** as to the funding available and the degree to which the country will mobilize. Where both political branches participate in any significant commitment of the armed forces of the United States, constitutional principles are preserved and there are strategic benefits as well. First, adherence to these priciples demonstrates to the world that as a democratic institution, built on the rule of law, the United States remains faithful to the principles and checks and balances established in the Constitution. Second, the government leg of Clausewitz’s trinity is strengthened where both branches are involved. Any failure to include both political branches means that only half of the power available to the government is employed. Purposes and Problems Associated With The 1973 War Powers Resolution The stated purpose of the 1973 War Powers Resolution (Resolution),94 is to “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 such situations.”95 The Resolution limits a President’s power to introduce troops into hostilities where there is (1) a congressional declaration of war, (2) a specific congressional statutory authorization, or (3) a “national emergency created by attack upon the United States, its territories or possessions or its armed forces.”96 Presidents of both political parties have argued that their power to deploy troops exceeds these three limited circumstances. For example, Presidents have asserted the power to “rescue Americans abroad, rescue foreign nationals where such action facilitates the rescue of U.S. citizens, protect U.S. Embassies and legations, suppress civil insurrection, implement the terms of an armistice or cease-fire involving the United States, and carry out the terms of security commitments contained in treaties.”97 Just to name a few, examples where Presidents have deployed military forces which exceed the authority of the Resolution include Grenada, Yugoslavia and Haiti.98 Even many strong supporters of congressional power agree that the Resolution overly restricts the President in the types of situations he may send armed forces.99 The Resolution contains requirements relating to consulting with, and reporting to, Congress. However, because of poor drafting, these otherwise justifiable requirements create issues. Presidents are to “consult” with Congress “before” introducing forces into “hostilities or into situations where imminent involvement in hostilities is clearly indicated.”100 The President must continue to consult with Congress regularly until the forces are removed from the situation.101 However, the Resolution does not explain with whom among the 535 members of Congress the President is required to consult.102 The President is required to provide a written report to Congress whenever he introduces forces into hostilities or when hostilities are imminent. He must report deploying troops to a foreign country “equipped for combat” unless those troops are involved in training exercises.103 Unless the President is granted a 30 day extension, 60 days after such a report is provided to Congress, the President must remove the forces if Congress does not affirmatively declare war or provide a statutory equivalent.104 No President has ever filed a report as required by this section.105 Many law scholars agree that Section 5(c),106 which requires the President to withdraw troops from hostile areas where Congress issues a “concurrent” resolution to withdraw troops, is unconstitutional. Only one branch of government is required to participate in a concurrent resolution. In INS v. Chadha, 107 a case decided by the Supreme Court subsequent to the 1973 War Powers Resolution, the Court struck down the practice of using one-house legislative vetoes.108 The Supreme Court has never decided a case on the constitutionality of the War Powers Resolution. Over the course of its existence, over 100 individual members of Congress, acting alone or in small contingents, have petitioned the courts in order to challenge the legality of presidential decisions to deploy American forces. However, Congress as a whole has never sought to compel the President to comply with the Resolution, and therefore, the Supreme Court has avoided considering the issue.109 For example, individual members of Congress have redressed the courts for actions in El Salvador, Nicaragua, Grenada, tanker escort duty in the Persian Gulf, the first Iraq war, and Kosovo. In each case, the judicial branch managed to avoid making a determination on the constitutionality of the Resolution due to the courts’ determination to leave issues of national security to the political branches.110 In addition to its apparent constitutional defects, from a policy standpoint, some have argued the Resolution is detrimental to the operational effectiveness of U.S. forces. The Resolution places troops and civilians abroad at greater risk and has the potential to negatively affect a strategy based partially on deterrence.111 Critics of the Resolution point out that in 1983 members of Congress cited the Resolution and insisted on specifically knowing how long the Marines would be stationed in Lebanon. A precise timetable would certainly have benefited terrorist groups in terms of their own strategy and whether they could simply outlast the United States.112 When the U.S. agreed to reflag ships traveling through the Persian Gulf in the late 80’s, there was some concern that this reflagging action required the President to report to Congress the possibility of hostilities. Some in the international community may have been concerned that the notice to Congress of possible hostilities could have been a masked indication of the real U.S. intent to use the reflagging operations as a pretext introduce combat forces in the area for follow on combat activities in the region.113 Cirtics point out that the Resolution places citizens abroad at greater risk because the Resolution does not permit the President to send troops to rescue Americans overseas.114 Americans overseas may have been placed at greater risk in Vietnam had the President sought congressional authority to conduct a rescue when Vietnam collapsed, in Grenada when Cubans took control of that county, and in Panama when Americans were subject to attack prior to the removal of Noriega. Certainly Congress would have granted authority to rescue in these cases; however, having to seek permission takes time where time is often of the essence. Where secrecy is paramount, having to go to Congress would threaten compromise. Although Presidents have asserted the Resolution is unconstitutional, various Presidents have made decisions in order to avoid triggering certain provisions of the Resolution and thereby placing troops at risk. For example, US soldiers in El Salvador were not allowed to carry M16s in order to avoid triggering the “equipped for combat” provisions. 115 Marines in Lebanon were not permitted to carry loaded weapons and were under a very defensive ROE so that the President would not have to report to Congress that the Marines were facing “imminent involvement in hostilities.”116 As with the creation of many laws, there are potential unintended consequences. The timetables in the Resolution grant the President the ability to operate up to 90 days in certain cases without reporting to Congress. Critics of the Resolution have argued that a President may elect to bring far greater military force to bear on an opponent than is reasonable in order to ensure any military action would be complete prior to exceeding the time limits listed in the Resolution.117 Conversely, these same time tables might give strength to an enemy trying to hold on for 90 days and incite the enemy to surge and to create maximum U.S. casualties in during that same 90 day period.118 Finally, the Resolution seeks to limit a President’s authority to introduce forces into hostilities based on a mutual defense treaty unless Congress specifically grants the executive the power to deploy forces into hostilities as part of congressional implementation of such a treaty.119 These means that in a regional arrangement such as NATO, where an attack on one is considered an attack on all, the President could not come to the defense of the relevant ally without first getting a green light from Congress. This might give potential treaty partners cause for concern because although the President is promising support, his promise is contingent on congressional support and the time it takes to secure that support. Defects Cured in the Proposed 2009 War Powers Consultation Act Although the War Powers Commission concluded that the 1973 War Powers Resolution is unworkable, the Commission concurs that creating an effective legislative framework **requiring both** **branches to participate** in any decision to commit U.S. armed forces is worth pursuing. The Commission has proposed a statute that addresses the shortcomings of the 1973 War Powers Resolution by “eliminating aspects of the War Powers Resolution of 1973 that have opened it to constitutional challenge,” and by “. . . promoting meaningful consultation between the branches without tying the President’s hands.” The Act also focuses on “providing a heightened degree of clarity and striking a realistic balance that both advocates of the Executive and Legislative Branches should want.”120 If the proposed 2009 War Powers Consultation Act (Act) is enacted, it will repeal the 1973 War Powers Resolution.121 It does not seek to “define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative Branches of government. . . .”122 Its primary purpose is to require the participation of both political branches of government when American armed forces are involved in “significant armed conflict.”123 The proposed Act defines “significant armed conflict” as any conflict “expressly authorized by Congress,” or “any combat operation by U.S. armed forces lasting more than a week or expected by the President to last more than a week.”124 The drafters of the proposed Act wanted to involve Congress “only where consultation seems essential.”125 As an example of the application of the definition of significant armed conflict, the Commission points out that President Reagan’s “limited air strikes against Libya would not be considered ‘significant armed conflicts’”, but conversely, the “two Iraq Wars clearly would be . . .” the later would require consultation, the former would not.126 Certain types of combat or combat like operations are specifically exempted from coverage by the statute. For example, the Act would not be triggered when the President is acting to “repel attacks, or prevent imminent attacks” against the “United States, its territorial possessions, its embassies, its consulates, or its armed forces abroad.”127 The Act also exempts “limited acts of reprisal against terrorists or states that sponsor terrorism.”128 Other types of troop deployments expressly exempt from the coverage of the statute include foreign disaster relief,129 “acts to prevent criminal activity abroad,”130 covert operations,131 training exercises,132 and rescuing U.S. citizens abroad.”133 Therefore, the Act would not apply in a Grenada-like rescue of American citizens. Unlike the War Powers Resolution of 1973, the proposed Act clearly lays out with whom in Congress the President must consult when the statute is applicable.134 The Act further requires the President to consult with the listed members of Congress, “Before ordering the deployment of United States armed forces into significant armed conflict . . . .”135 However, where the “need for secrecy or other emergent circumstances precludes consultation. . .” prior to deploying forces, the President must consult with the members of Congress listed in the Act within “three calendar days after the beginning of the significant armed conflict.”136 The President is required to consult with Congress on matters of national security and foreign policy “regularly.”137 Where a “significant armed conflict” is involved, the statute requires continued consultation every two months.138 In addition to consultation with Congress, the Act requires the President to submit a written “classified” report to Congress “setting forth the circumstances necessitating the significant armed conflict, the objectives, and the estimated scope and duration of the conflict.”139 The President must submit the report prior to ordering or approving sending of troops into significant armed conflict.140 Where however, there is a need for “secrecy” or where “emergent circumstance” exists, he must submit the report within three calendar days after the beginning of any significant armed conflict.141 The Act also creates an annual written reporting requirement for the President “due each first Monday of April each year” regarding all ongoing operations.142 Section 5 has been described as “the heart” of the Proposed War Powers Consultation Act of 2009.143 If Congress has not authorized the commitment of U.S. forces in a “significant armed conflict” after receiving presidential notice, then the Act states that the, “Joint Consultation Committee shall introduce an identical concurrent resolution in the Senate and House of Representatives calling for [its] approval.”144 If a concurrent resolution supporting the action is defeated, then any Senator or Representative may file a joint resolution of disapproval which “shall” be voted on within five calendar days.145 The joint resolution will have the force of law only if signed by the President, or if approved by Congress over the President’s veto.146 Section 5 recognizes that the framers of the Constitution intended Congress to play a role in foreign affairs and to influence the use of military force abroad. This Act requires Congress to vote up or down on a President’s decision to commit military forces in a significant armed conflict. Unlike the 1973 War Powers Resolution, the Act does require the President to remove forces from hostilities where Congress fails to act. Forcing those in Congress to vote early either places the entire strength of the government behind the action,

 or, in the alternative, **may require the removal of troops** where the entire body politic, and by extension, the American people do not support the effort. While the Act does not delineate which branch has primacy in war making decisions, or who ultimately has the responsibility to decide, , or exactly what roles the respective branches are to play; it does establish a framework requiring each branch is required to participate and work together in a cooperative and deliberative fashion when deciding whether to employ military force.147 Conclusion It is in the United States’ best interests to enact the proposed 2009 War Powers Consultation Act on the grounds that it will encourage shared decision making for any significant use of the armed forces. Joint, rather than unilateral, congressional and presidential foreign policy decisions to use the military are more consistent with the national security framework in the Constitution. The Framers intentionally built a framework which would prevent an overly aggressive government from engaging military forces without deliberate and thoughtful consideration,148 but one which would also be able to take resolute action and defend itself and its interests when necessary.149 Both branches of government have certain indispensable keys relating to the effective use of the military as an instrument of power.150 The constitutional requirement for near simultaneous use of these keys creates a shared power framework. However, Presidents have often been willing to commit troops without first consulting with Congress and Congress has simply gone along. This phenomenon has been described by one scholar as, “Executive custom and Congressional acquiescence.”151 The proposed 2009 War Powers Consultation Act preserves the spirit and objectives of the 1973 War Powers Resolution. The Act facilitates the participation of both political branches of government in any decision to commit forces in any significant operation, while addressing the constitutional and policy defects associated with the Resolution. Passage of the Act should not only serve to protect the American people from an adventurous President, but citizens will also benefit because the Act seeks to **force a reluctant Congress to debate and participate** in these most important governmental decisions. The Act will go a long way toward restoring the balance of power established by the Framers in the Constitution. In a democracy built on the rule of law, it is imperative that the government comply with the ideals enunciated in the Constitution even though this might, on occasion, mean more time and debate. As discussed above, the Act carves out exceptions to the consultation and voting requirements for emergency situations where time is of the essence. Congress is the peoples’ branch of government and the people need to be heard when their sons and daughters are sent into harms way.152 Moreover, when the government adheres to constitutional provisions in matters of national security, strategic advantages will follow. First, in the general sense, **the government will appear strong when in compliance with its own rules**. The government will not appear panicked or stressed. Second, with regard to the specific conflict involved, when both branches of government support a military action, it will be clear to allies, neutrals and enemies alike the United States means business and is willing to use its military element of power to resolve the issue. Third, a declaration of war or similar statutory pronouncement would have the pragmatic advantage of legal sanction and all that that entails. A declaration of war or similar vote **as required** by the 2009 War Powers Consultation Act would serve to mobilize the American public.153 And finally, U.S. commanders and soldiers on the ground we be in a better position to plan and execute military operations on the ground. The political objectives established by the policy makers will be more clear. Commanders will have a better idea of how the civilian leadership defines success when national interest are at stake. Where the entire government supports a military action, commanders and soldiers will have reason for faith that the government will provide the resources and personnel required. As has been said, Unless Congress has un-equivocally authorized a war at the outset, it is a good deal more likely to undercut the effort, leaving it in a condition that satisfies neither the allies we induced to rely on us, our troops who fought and sometimes died, nor for that matter anyone else except, conceivably the enemy.154 Congress can **easily strangle** any war effort where it has not been consulted in advance.155 Of course there are potential risks involved with any attempt to shore up the Constitution with **statutory law**. First, any legislative framework carries with it the possibility of creating new and unforeseen problems. An overly ambitious attempt to create a more shared balance of power between the Executive and the Legislature, could cause the system to take on the nature of a more parliamentary form of government, which, when viewing the European experience since 9/11, and our own experience during the Revolutionary War, may not be in the United States’ best security interests. Others may argue that we do not need a legislative solution which attempts to mandate exactly how the two branches are to balance the war making power. What we currently have works. Our current system, as flawed as it may be, is one born both of constitutional theory and the “gloss” of historical practice. As Justices Jackson and Douglas teach us in Youngstown,156 both political branches have participated to varying degrees in the decisions to use the armed forces. These two justices seem to be suggesting that the Constitution created a theoretical framework of balanced or shared power, leaving it to history and application to fill in the details. Statutory refinements may only serve to frustrate the application of the Constitution. And finally, it is questionable whether the 2009 War Powers Consultation Act would be enforced anymore than the 1973 War Powers Resolution has been. As with the 1973 War Powers Resolution, there is no guarantee that one or both branches will not simply ignore the law. Furthermore, based on the political question doctrine, the Supreme Court may be just as reluctant to enforce or interpret the Act as it has been the Resolution. These potential risks are **minimal as compared to the likely benefits** of the Act. The potential restoration of a balanced and shared war making power as originally intended by the Framers **outweighs the risks.** After 35 years of War Powers Resolution experimentation, the drafters have been able to create a statute which will alleviate the constitutional and policy problems with the Resolution. And as a pragmatic benefit, compliance with the act will lead to **greater strategic certainty**. From the trench, that sounds like a strategy worth pursuing.

**It’s credible and improves decision making**

**Cole, 12** – professor of law at Georgetown (David, “Are We Stuck with the Imperial Presidency?” 6/7,

<http://www.nybooks.com/articles/archives/2012/jun/07/are-we-stuck-imperial-presidency/?pagination=false>)

Posner and Vermeule contend that more specific statutory regimes have also failed to constrain the president. The War Powers Resolution, the National Emergencies Act, and the International Emergency Economic Powers Act, for example, all enacted after Watergate to rein in presidential action, have proved largely ineffectual. Presidents have repeatedly argued that the statutes do not apply. The Obama administration recently did so when it implausibly claimed that the War Powers Resolution—requiring congressional approval of any use of troops in “hostilities” that last more than sixty days—did not apply to the military intervention in Libya. And Congress has failed to exercise meaningful oversight even where such statutes call for it to do so. All of this seems right, to a point. But ironically, Posner and Vermeule base their “legal realist” critique on an excessively formalist assessment of whether law constrains, looking almost entirely at statutory language on its face and at judicial decisions. They argue that legal standards are often manipulable, and that judges therefore often defer to the executive. But the fact that law usually does not dictate particular executive decisions—hardly a surprising revelation—does not mean that it does not constrain them. And in particular, it is misguided to look only at judicial decisions, for law operates outside the courts as well. Thus, while the APA’s open-ended standards undoubtedly permit judges to defer to the executive, they do not require them to defer. Some judges will defer; others will not, as when the Supreme Court in 1983 reversed the National Highway Traffic Safety Administration’s repeal of a requirement for passive restraints in all new cars, or when the D.C. Circuit Court in 2008 rejected the Environmental Protection Agency’s rules for mercury emissions. The executive generally cannot know in advance whether court review will be strict or deferential, and that uncertainty itself has a **deterrent effect on the choices it makes,** even in the many cases that do not end up in court. In my experience**, lawyers for the executive branch generally take legal limits seriously**. They take an oath and have been trained to uphold the law. They know that claims of illegality can undermine their programmatic objectives. They cannot predict when they will end up in court and so try to avoid legal challenges. To focus exclusively on specific judicial decisions is to miss law’s daily operation outside the courts. Similarly, to look only at enacted laws misses the checking role that legislators play through other means—such as holding oversight hearings, launching investigations, or simply requesting information about executive practices. The experiences of executive officials, who devote much of their time to compliance with legal mandates and to defending their agency’s actions in Congress and the courts, contradict Posner and Vermeule’s **armchair claims that legislative and judicial checks are illusory**.3 And President Obama, who has had to fight Congress—and has often lost—on virtually every initiative he has pursued, from economic reform to health care to Guantánamo’s closure, would certainly be surprised to learn that his power knows no limits.

**Explicit congressional authorization maintains flexibility while restraining the executive**

**Fleischman, 10** [J.D. Candidate, 2010, New York University School of Law; B.A., 2007, Washington University in St. Louis, A FUNCTIONAL DISTRIBUTION OF WAR POWERS Matthew Fleischman \*, <http://www.nyujlpp.org/wp-content/uploads/2012/11/Matthew-Fleischman-A-Functional-Distribution-of-War-Powers.pdf>]

IV. THE WAR POWERS LAW WE NEED Given the theoretical outline above, this Note will now present an alternative statute, **based upon the WPCA**, to govern this complex problem. The full text of the statute is appended to the end of this Note. I will explain, section by section, how and why my proposed act differs from the WPCA. Section 1 includes an alternative title for the act: the War Powers Procedure Act (WPPA). This title reinforces that this new statute does not intend to alter the constitutional distribution of war powers, but **simply prescribes** a process by which those powers can be effectuated. The title will still include the word “Act,” “to avoid the confusion surrounding the term ‘Resolution.’”196 Section 2 of the proposed WPPA still “recognizes that we cannot resolve the constitutional questions underlying the war powers debate,” 197 but only prescribe a process by which they will be exercised. Some have argued that the language of the WPR’s section 2 provides **a mechanism for the Executive to circumvent the act**.198 Nonetheless, the proposed language in the WPPA **mitigates the risk of the act being deemed unconstitutional** just as similar language did so in the WPR. The language simply serves to explain the reasons underlying the adoption of the WPPA. Just as in the WPCA, section 3 of the WPPA **clearly defines the core terms of the statute**. This is designed to **remedy the ambiguity created by the WPR.** Section 3(A) is altered to also include “significant armed conflict” in the definition of “declarations of war.” While formal declarations of war rarely occur and few would debate that they qualify as significant armed conflicts, it is nonetheless important to write a statute that provides for all reasonably foreseeable possibilities. Section 3(A)(iii) is modified to shorten the minimum time period required for a use of force to qualify as a significant armed conflict. Given that there is substantial reason to require congressional authorization, 199 this qualification is designed **only to provide adequate flexibility** **for small tactical missions** that are not included in the exceptions of section 3(B). The list of exceptions in section 3(B) now contains a maximum number of days the exception can last. **Rather than use the vague language in the WPCA** (e.g. “limited”200), the cap on the number of days that each of the exceptions can last **provides increased clarity.** This alteration ensures that an action in defense of our nation cannot be turned into an extended offensive strike. This is important since **it is critical to limit the number of methods by which the Executive can evade congressional authorization**. The number of days is capped at 10 because that should be sufficient time for Congress to fully debate the issue at hand.201 Often times the debate over whether or not to go to war begins long before an action is commenced and, even if it is not, it is critical for decisions to be made quickly before policy options become more limited. The list of exceptions is also altered to no longer include limited acts of reprisal against states that sponsor terrorism. Attacks of reprisal on another state very well could lead to an increase in hostilities and, therefore, could be used as a backdoor around the section 4 requirement of congressional preapproval. Section 4 is the first section of the WPCA to be significantly altered. The WPPA would **strengthen the reporting requirements**, as compared to what appeared in section 4 of the WPCA. Namely, sections 4(A) and 4(B) of the WPCA explain that consultation with Congress is to occur before military engagement, and state what information is to be provided to the Joint Congressional Consultation Committee.202 The WPPA preserves the Executive’s right to begin military operations unilaterally when secrecy is required, but section 4(C) has been amended to ensure that the President reports immediately to the Committee under such circumstances. By accelerating the process of consultation, fewer policy options are foreclosed and the potential costs of the attack are limited. Section 4(F) is modified to provide greater clarity on what intelligence agencies are required to provide to the Committee’s staff. Information can be distorted in the process of writing and condensing reports; by explicitly requiring raw data to be turned over, the Committee can come to its own conclusions with limited distortion by the Executive branch.203 Section 5 is the most significantly changed aspect of the WPPA, **requiring congressional pre-authorization of military action rather than** a congressional vote after hostilities begin. This **Congress-First approach** is at the heart of the functionalist analysis discussed above. The outlined procedure is reminiscent of that delineated in the WPCA, in that **it ensures a speedy decision, but the WPPA goes much further**, **as the process leads to a vote and deliberation with the entirety of Congress.** Section 5(D) provides an avenue for the President to renew his request for congressional authorization; however, the President is required to wait fifteen days. This waiting period is required so that the Executive cannot **badger Congress into submission**. It also allows both for the Executive to collect more information, and for the circumstances of the conflict to change. While the waiting period may be disconcerting to some, given that certain situations can be urgent, there is a mechanism to temporarily bypass congressional authorization when necessary. In the interim, the President can engage in operations that do not qualify as significant military operations. In section 6, delayed congressional authorization is explained The free period is limited to fourteen days, which is **significantly shorter** than the sixty days written into the WPR204 and the twenty days written into John Hart Ely’s suggested act.205 Given that the longest deliberation on a declaration of war was seventeen days, and that it occurred in the early part of the nineteenth century,206 this should still provide ample opportunity for a full discussion of the issue. By requiring immediate production of information by the President, **the Act will allow Congress to act faster**, as Congress can begin processing the President’s proposal immediately. While a longer time period would permit greater deliberation, the policy options become more limited the longer the conflict rages on. If the resolution passes, the military engagement becomes an approved significant armed conflict **and the other** enumerated **sections become binding**. Alternatively, if the resolution fails to pass, the President is given ten days to withdraw troops from the area. While the War Powers Commission recommended tying Congress’s hands through House rules, the WPPA instead uses a modified version of the spending restrictions advocated by then-Senator Biden in his attempt to amend the WPR, the Use of Force Act.207 While some have questioned the constitutionality of this provision, it is unlikely the provision would be found unconstitutional, as the Court has already found a constitutional basis for this sort of a **funding restriction**. 208 Furthermore, there is little reason to believe that anyone would or could challenge the constitutionality of this act. CONCLUSION: THE REAL-WORLD POTENTIAL OF THE WPPA The distribution of war powers in America has “remain[ed] a dark continent of American jurisprudence”210 for too long. A consistent procedure by which it is effectuated **must be established**. The plan proposed in this Note attempts to **codify a method backed by an in-depth analysis of the rational incentives of political actors.** Every combat mission is unique and even the most justifiable wars can end in defeat. A war powers law cannot be evaluated based upon how it would function in any single conflict. Instead, it must be evaluated based on whether it creates adequate opportunities for discourse between the branches of government **without overly hindering the ability of the government to wage effective warfare**. **Congress** legislated a role for itself after Vietnam with the WPR, but Congress **should now pass the WPPA to further clarify its role in one of our nation’s most important decisions.**

**Inclusion of point of order solves loopholes and vague AUMF applications**

**Mitchell 9** (Jonathan F., Assistant Professor of Law – George Mason University School of Law, “Legislating Clear-Statement Regimes in National-Security Law,” Georgia Law Review, Summer, 43 Ga. L. Rev. 1059, Lexis)

The proposals to add funding restrictions to FISA and the War Powers Resolution are equally vulnerable to expansive executive branch theories of implied repeal. Recall that the OLC Kosovo memo asserts that the 1999 Emergency Supplemental Appropriations Act implicitly repealed restrictions in the War Powers Resolution, even though the Appropriations Act never earmarked funds for military operations in Kosovo, nor specifically authorized military operations in Kosovo beyond the WPR’s sixtyday window. According to OLC, it was enough that some 178 members of Congress thought that the President might continue the Kosovo hostilities beyond sixty days and that the appropriations legislation did not expressly withhold funds for that purpose.179 In like manner, a future executive might claim that a generic Authorization to Use Military Force implicitly repeals Senator Specter’s proposed funding restrictions under the last-in-time rule, so long as it can concoct some argument that legislators are aware (or should be aware) that warrantless surveillance of the enemy is a “fundamental incident of the use of military force.” Or the 180 President might claim that annual appropriations bills for the intelligence agencies implicitly repeal the earlier-enacted funding restrictions if legislators are aware of the President’s warrantless surveillance activities but fail to expressly reaffirm FISA’s restrictions. Proposals that would add funding restrictions to the War Powers Resolution are similarly incapable of withstanding the executive-branch lawyers’ broad theories of implied repeal. Those funding restrictions, like § 8(a)(1) of the War Powers Resolution, would be brushed aside whenever implicit congressional “authorization” might be found in later-enacted statutory language. The challenge for these efforts to strengthen the War Powers Resolution and FISA is that any future ambiguous statute will provide rope for executive-branch lawyers to concoct congressional "authorization" for the President's actions, no matter what restrictions or interpretive instructions Congress provides in framework legislation. None of these proposed reforms will disable the executive from using its expansive theories of constitutional avoidance and implied repeal to provide a veneer of legality for the President's actions, and minimize the prospect of future criminal sanctions and political reprisals against executive-branch employees. **b. point-of-order mechanisms** Congress could establish more effective clear-statement regimes in national security law if it pre-committed itself against enacting vague or ambiguous statutory language that the executive might use to claim implicit congressional "authorization." One such precommitment strategy would be to include point-of-order mechanisms in the War Powers Resolution and FISA (and other national-security framework statutes). These would **empower any individual legislator** to object to any bill **that authorizes military force**, or that funds the military or the intelligence agencies, and that fails to explicitly prohibit military hostilities beyond sixty days or warrantless electronic surveillance, unless Congress has specifically authorized such activities. Congress could further specify that if the point of order is sustained, the bill will be automatically amended to **specifically prohibit** or **withhold funding** for such activities. When a legislator raises a point of order, the chair must either sustain it and declare the legislation out of order, or overrule it. n181 Then a majority vote of the chamber can reverse the chair's ruling. Establishing point-of-order mechanisms in the War Powers Resolution and FISA **would strengthen the codified clear-statement requirements** in two ways. First, such mechanisms would impose a **procedural roadblock** to ambiguous statutory language that executive-branch lawyers might construe as implicitly authorizing extended military hostilities or warrantless electronic surveillance. Second, they would help **deter future legislators from acquiescing to Presidential actions** that Congress has not specifically authorized. Yet Congress has never established a point-of-order mechanism to [\*1105] enforce the clear-statement requirements in its national-security legislation, n182 even though it regularly employs this device to enforce precommitments in legislation that governs the federal budget process. If Congress had included such a point-of-order mechanism in the War Powers Resolution, any legislator could have objected to the 1999 Emergency Supplemental Appropriations Act when it reached the House or Senate floor. Any such objection would have required the chair to sustain the point of order **and amend the legislation**, because the bill appropriated money for the military yet failed to withhold funds for military hostilities that extend beyond sixty days. Then a majority vote of the entire chamber would have been necessary to overturn the chair's ruling and allow the 1999 Emergency Supplemental Appropriations Act to survive as written. And, if the chair had decided to overrule the point-of-order objection in violation of the chamber's rule, the objecting legislator could have appealed the chair's ruling to the full chamber, where a majority vote could overrule the chair's ruling and sustain the point of order. If FISA had included a point-of-order enforcement mechanism, any legislator could have raised a similar objection to the post-September 11th Authorization to Use Military Force, and the annual appropriations legislation to fund the intelligence agencies, unless those statutes were amended to specifically preclude electronic surveillance outside of FISA. Point-of-order mechanisms would not completely foreclose Congress from enacting ambiguous legislation such as the 1999 Emergency Supplemental Appropriations Act or the post-9/11 Authorization to Use Military Force. But they would impose **significant procedural obstacles** to legislation that executive-branch lawyers might use to claim implicit congressional authorization for extended military hostilities or electronic surveillance. Unless Congress specifically authorizes military hostilities beyond sixty days or warrantless electronic surveillance, appropriations statutes that fail to explicitly prohibit or withhold funding for such activities will survive only if: (1) Every single legislator in a chamber fails to raise a point-of-order objection; (2) A majority in that chamber votes to overrule a point-of-order objection; or (3) Congress repeals the point-of-order device before considering the bill.