**plantext**

***The United States Congress should require a declaration of war for any decision by the President of the United States to use or deploy armed forces in circumstances likely to lead to an armed attack.***

***Congress should define “armed attack” as: The use of force of a magnitude that is likely to produce serious consequences, epitomized by territorial intrusions, human casualties, or considerable destruction of property.***

**Contention 1: Wars of Choice**

***First - Commitment trap --- lack of congressional war power causes presidential utterances to become de facto strategy --- this locks us into unnecessary conflicts***

**Brookings Institution** 6-20-20**13**, The Road to War: Presidential Commitments and Congressional Responsibility, <http://www.brookings.edu/events/2013/06/20-war-presidential-power>, jj

**Ever since WWII**, Kalb said that “**history has led us into conflicts that we don’t understand” because presidents do not seek approval from Congress for declarations of war**. ***The country has reached a point now where “presidential power is so great, words out of his mouth become policy for the United States***.” **Kalb used the Syrian civil war and** President **Obama’s “red line” policy as an example of how a president’s words become strategy for the United States**. Kalb argued **that this presidential “flexibility” in foreign policy decision-making has repeatedly led the country into one misguided war to the next such as the Vietnam and Iraq wars**. ***To nullify these poor decisions***, Kalb believes that ***formal congressional declarations of war will help “trigger the appreciation for the gravity of war*” and assist in “unifying the nation” behind a strategic military intervention, resulting in more positive outcomes for the United States**. ¶ He concluded his remarks by noting that ***declarations of war by Congress are “stark commitments*,” and statements by the president of the United States must be thoroughly discussed to make well-informed decisions that will be in the best interest of the American people**. **Conflicts must be understood before the decision is made to send American troops to war, and presidents of the United States should converse with Congress before taking any military action.**

***Second - Groupthink – Comprehensive analysis proves absent sustained congressional involvement in war-making – interventions are inevitable***

**Martin ’11**, Craig Martin, Visiting Assistant Professor, University of Baltimore School of Law, Winter, 2011¶ Brooklyn Law Review¶ 76 Brooklyn L. Rev. 611, ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with In-ternational Law, Lexis, jj

II. The Causes of War

**In beginning to think about how to improve the legal constraints on the resort to war, it is essential to consider the causes of international armed conflict**. n10 The question of what causes war is the subject of a massive amount of re-search and debate, stretching back literally thousands of years. n11 **The focus of the various theories on the causes of war range from the individual decision makers, through small-group dynamics, the structure of the state itself, all the way to the structure and operation of the international system of states**. n12 Thucydides, whose analysis of the Peloponnesian War is one of the earliest studies of the subject known to us, set the stage with a complex explanation for the causes of that war that included the individual attributes of decision makers, the nature and structure of the leading city-states, and the nature of the interstate system itself. n13 Kenneth Waltz continues this classification by defining the three levels as "Images": the individual or human level ("Image I"), the level of the state structure or organization ("Image II"), and the level of the international system ("Image III"). n14 And despite the differing theories, disagreements, and areas of emphasis, there is a widely shared acceptance that all three Images play a role in explaining the causes of war, albeit to varying degrees [\*617] depending on one's theoretical perspective. n15 While it is not necessary for us to examine the various theories in detail, it will be helpful to get a flavor for some of the more important ideas as they relate to each of the three Images, as I will refer back to these ideas to support the argument for the proposed Model.

A. Image I--The Level of the Individual

**There are a wide variety of theories, and indeed a number of different sublevels within the Image I--the individual level--perspective on the causes of war. Some of these focus on aspects such as human nature itself and the inherent aggression of ~~man~~**. n16 **But the theories that relate to both the psychology of decision makers, and a number of systemic problems in small-group decision making are of greatest significance for the argument being advanced here**. **Beginning with individual psychology, one set of theories focus on the personality traits that are common among those who tend to reach the highest offices of government as factors that contribute to unsound judgments regarding the use of armed force**. **Empirical studies suggest that a number of traits that tend to be overrepresented in national leaders--such as au-thoritarian and domineering tendencies, introversion** (which is perhaps counter-intuitive, but Hitler and Nixon are both prime examples of this trait), **narcissism, and high-risk tolerance--also tend to correlate with much higher levels of con-frontation and the use of force to resolve conflicts**. n17

Psychological theories also focus on problems of misperception. **There is powerful evidence that people are prone to systematic patterns of misperception, and that such misperception in government leaders contributes significantly to irrational decisions**. n18 In particular, **decision makers frequently form strong hypotheses regarding the intentions** [\*618] **and capabilities of potential adversaries, and there is a strong tendency to then dismiss or discount information that is inconsistent with the hypothesis, and to interpret ambiguous information in a manner that is consistent with and reinforces the hypothesis**. n19 **Such misperception often constitutes a significant factor in the path to war**. n20

Another set of theories that relate to the Image I causes of war focus not on the individual alone, but on how deci-sions are made within groups and organizations. Contrary to the expectation that government agencies generally operate in accordance with rational choice theory, **studies suggest that group decision making is often characterized by dynamics that can lead to irrational and suboptimal decisions**. One such characteristic is excessive "incrementalism" and "satisfycing"--the tendency to make small incremental policy shifts, coupled with the sequential analysis of options and adoption of the first acceptable alternative, a process captured in the aphorism "the good is the enemy of the best." n21 **A second theory suggests that the dynamic of competing bureaucratic and departmental interests--interests which are often inconsistent with the larger national interest, but which nonetheless command greater loyalty and mobilize greater effort among department or division members--subvert the decision-making process**. n22 **Moreover, each department will itself approach the decision making within the constraints of its own perspectives and mindsets, standard operating procedures, and capabilities. This is the famous "where you stand is where you sit" explanation of internal government politics**, n23 **often referred to as the** [\*619] "**bureaucratic politics model**." n24 For **example, the senior representatives of the U.S. Air Force, with obviously vested interests, strongly argued in favor of the continued strategic bombing of North Vietnam in 1967, even though the Secretary of Defense and others in the Nixon administration had determined that it was at best pointless and at worst counterproductive**. n25

**Finally, there is the phenomenon known as "*groupthink***." n26 **This theory suggests that some decision-making groups--particularly those characterized by a strong leader, considerable internal cohesion, internal loyalty, overconfi-dence, and a shared world view or value system--suffer from a deterioration in their capacity to engage in critical analysis during the decision-making process**. n27 **Decision-making groups that suffer from groupthink are particularly vulnerable to the kind of systemic misperception discussed above, but they suffer from other weaknesses as well, all stemming from a failure to challenge received wisdom, consider alternate perspectives, or bring to bear exogenous criteria or modalities in assessing policy options**. n28

These theories do not, of course, explain all of the problems in decision making in all situations. Groupthink and the bureaucratic politics model generally do not operate at the same time in the same groups. But **the studies of each of these phenomena suggest that these systemic patterns can be a significant factor in the less-than-rational and suboptimal decision making about the use of armed force.** **And these theories together show the importance of introducing exogenous criteria for assessing the merit of competing policy options, and the kinds of checks and balances that might lessen the probability that these tendencies could affect the decision to go to war.** [\*620]

B. Image II--The Level of the State

**The causes of war also operate at the level of the state itself. Again, there is an extensive range of theoretical ex-planations for the causes of war that focus on factors at the state level, but those that are central to Image II relate to the actual structure or form of the government of the state**. n29 **The essential idea is that some forms of government are inherently less prone to wage war than others**. **This idea has been central to liberal theories of the state and international relations since the beginning of the eighteenth century, with the argument that liberal democratic states are less inclined to initiate wars than autocratic or other nondemocratic states**. These arguments were founded upon a number of strands of liberal political theory, including the nature of individual rights within democracies and the manner in which respect for such rights would influence how the state would behave within the international society. n30 They also drew upon liberal ideas about the influence of capitalist economies, arguing that laissez-faire capitalist systems would operate to reduce the incentives for war in liberal democratic states. n31 But **perhaps the most important argument among these liberal claims, is that the very structure of government, both in terms of its leaders being representative of and directly accountable to an electorate, and the separation of political power between the executive and a more broadly representative legislature, would operate to reduce the likelihood that such governments would embark on military adventures**. n32

Rousseau and Madison both wrote about the ramifications of the democratic structure of the state on the propensity for war. n33 But it was Immanuel Kant who developed the argument most fully in the eighteenth century with his [\*621] short work Perpetual Peace: A Philosophical Sketch. n34 Writing at a time when there were less than a handful of fledgling democratic "republics" in the world, n35 **Kant argued that a perpetual peace would result from the spread of the republican form of government among the nations of the world and the development of a form of pacific federation among these free states**. n36 His argument thus straddled the second and third images, and I will return to discuss his overall theory more fully below when we turn to consider Image III. But one of his arguments for why republics would be inherently less likely to wage war is still very much at the heart of current liberal theories relating to Image II. His point was that, **in the kind of republic he envisioned, the consent of citizens would be required for decisions to go to war**. **Those who would "call[] down on themselves all the miseries of war," not only fighting and dying in the conflict but also paying for it and suffering the resulting debt, would be much less likely to agree to such an adventure than the heads of state in other kinds of political systems such as monarchies, who can "decide on war, without any significant reason**." n37

As we will see, Kant himself did not argue that the development of democratic structures within any given state would be sufficient to prevent it from going to war, and his theory of perpetual peace also rested on the requirement that the republican form of government be also spread throughout the international system. Indeed, **one of the problems with liberal theories that rely upon governmental structure as an explanation for the cause of war is that the extensive empirical research and analysis on the subject suggest that liberal democracies are almost as prone to engaging in war as nondemocratic states, at least as against nondemocratic countries**. n38 **Some have tried to argue that liberal democracies nonetheless do not initiate wars to the same degree, and thus** [\*622**] are inherently less aggressive than other forms of government, but even that claim is very difficult to sustain from the perspective of traditional international law conceptions of aggression and self-defense**. n39

What has emerged from this line of research, however, is the widely accepted proposition that liberal democracies do not commence wars against other liberal democracies. The so-called "democratic peace" encompasses both this empirical fact and the principle said to explain it. n40 While there remains some residual debate over the validity of the principle, n41 persuasive evidence suggests that, with the possible exception of two instances of armed conflict between what might be considered democratic states, there have been no wars between liberal democracies during the period between 1816 and 1965. n42 The assertion has been made, and often cited, that the democratic peace is close to being an empirical law in international relations. n43

**There is less agreement over the best explanation for the democratic peace. There are two main theoretical posi-tions: (1) normative and cultural explanations, and (2) institutional and structural constraints**. n44 The normative-cultural explanations argue that the shared norms of democracies, and particularly the shared adherence to the rule of law and commitment to peaceful dispute resolution internally, inform and influence the approach of democratic governments to [\*623] resolving disputes that may arise as between democracies. Moreover, there is a shared respect for the rights of other people who live in a similar system of self-government. These shared beliefs, norms and expectations tip the cost-benefit analysis toward peaceful resolution of disputes when they arise as among democracies. n45

**The structural-institutional advocates argue that the elements of the liberal democratic legal and political system operate to constrain the government from commencing armed conflicts**. **This is entirely in line with the insights of earli-er writers such as Madison, Kant, and Cobden, regarding the lower likelihood of war when representatives of those who will pay and die for the war are deciding, since it is more politically risky for democratic leaders to gamble the blood and treasure of the nation in war unless it is clearly viewed by the public as being necessary**. n46 **The arguments are also based in part on the broader idea that structural checks and balances typical of democratic systems, and the operation of certain other institutional features of** deliberative democracy**, will reduce the incidence of war**. n47 We will return to some of these arguments in more detail below.

***Independently, the aff breaks imperialism, militarism and aggressive foreign policy***

**Fisher ’05**, LOUIS FISHER, Specialist with the Law Library, The Library of Congress. Ph.D., New School for Social Research, 1967; B.S., College of William and Mary, 1956, Indiana Law Journal¶ Fall, 2005¶ 81 Ind. L.J. 1199, Lost Constitutional Moorings: Recovering the War Power, LEXIS, jj

**The initiation of U.S. military operations in Iraq flowed from a long list of miscalculations, false claims, and misjudgments, both legal and political. Errors of that magnitude were not necessary or inevitable. Military conflict could have been delayed**, perhaps **permanently, had the responsible political leaders performed their constitutional duties with greater care, reflection, integrity, and commitment to constitutional principles**. Adding to the failures of elected officials were decades of irresponsible and misinformed statements by federal judges, academics, law reviews, and the media.¶ **Although the Iraq War that began in 2003 was orchestrated by the Republican Party and the Bush administration, their miscalculations built upon a half century of violations of constitutional principles over the war power**. **Democratic Presidents led the country to war against North Korea** (President Harry Truman), North **Vietnam** (President Lyndon Johnson), **and Serbia** (President Bill Clinton). **Republican neoconservatives beat the drums for war against Iraq, but Democratic academics did the same for Korea**. **The dominant theme in American foreign policy since World War II has been a bellicose spirit that champions the use of military force, boasts the virtues of "American exceptionalism," stands ready to fight "evil" anywhere** (**whether Soviet Communism or Islamic fundamentalism), and regularly attacks opponents of war as unpatriotic and unmanly**. **That these forces led to torture by U.S. soldiers at Abu Ghraib or CIA "black sites" should come as no surprise. They are the natural results of concentrated power, political arrogance, and ideological fervor.**

**Contention 2: Cult of the Presidency**

***Politics is ceded to the president now --- Americans believe the president will solve all problems --- that ensures an unrestrained imperial president --- only increasing public deliberation on the presidency allows a reinvigoration of politics***

Gene **Healy ‘09** is an American political pundit, journalist and editor. Healy is a Vice President at the libertarian think tank Cato Institute, as well as a contributing editor to Liberty magazine. Cult of the Presidency : America's Dangerous Devotion to Executive Power. Washington, DC, USA: The Cato Institute, 2009. p 2-3. http://site.ebrary.com/lib/wayne/Doc?id=10379710&ppg=12 Copyright © 2009. The Cato Institute. All rights reserved.

Nearly six years earlier, September 11 had inspired similar rhetorical excess, but with far greater consequence. The week after the attacks, President Bush invoked America’s ‘‘responsibility to history’’ and declared that we would ‘‘answer these attacks and rid the world of evil .’’ 5 A mission that vast would seem to require equally vast powers. And the Bush administration has made some of the broadest assertions of executive power in American history: among them, the power to launch wars at will, to tap phones and read e-mail without a warrant, and to seize American citizens on American soil and hold them for the duration of the War on Terror— in other words, perhaps forever— without ever having to answer to a judge. Those assertions have justifiably given rise to fears of a new Imperial Presidency. Yet, many of the same people who condemn the growing concentration of power in the executive branch also embrace a virtually limitless notion of presidential responsibility. **Today, politics is as bitterly partisan as it’s been in three decades, and the Bush presidency is at the center of the fight. But amid all the bitterness, it’s easy to miss the fact that, at bottom, both Left and Right agree on the boundless nature of presidential responsibility. Neither Left nor Right sees the president as the Framers saw him: a constitutionally constrained chief executive with an important, but limited job: to defend the country when attacked, check Congress when it violates the Constitution, enforce the law— and little else**. Today, for conservatives as well as liberals, it is the president’s job to protect us from harm, to ‘‘grow the economy,’’ to spread democracy and American ideals abroad, and even to heal spiritual malaise— whether it takes the form of a ‘‘sleeping sickness of the soul,’’ as Hillary Clinton would have it, or an ‘‘if it feels good, do it’’ ethic, as diagnosed by George W. Bush. 6 **Few Americans find anything amiss in the notion that it is the president’s duty to solve all large national problems and to unite us all in the service of a higher calling. The vision of the president as national guardian and redeemer is so ubiquitous that it goes unnoticed**. Is that vision of the presidency appropriate for a self-governing republic? Is it compatible with limited, constitutional government? The book you’re holding argues that it is not. **Americans’ unconfined conception of presidential responsibility is the source of much of our political woe and some of the gravest threats to our liberties. If the public expects the president to deal with all national problems, physical or spiritual, then the president will seek— or seize— the power necessary to handle that responsibility. We’re right to fear the growth of presidential power. But the Imperial Presidency is the price of making the office the focus of our national hopes and dreams.**

***The cult of the presidency causes cessation of our political agency and shuts down deliberation. The aff is key to reverse this.***

**Nelson ’08**, Dana D. Nelson, professor of English at Vanderbilt University, 2008, “Bad for Democracy: How the Presidency Undermines the Power of the People”, pg x-xvi

In the early months of Obama’s presidency, his positive achievements and his distinction from the previous administration were lead news (except on Fox, which manages to find something distasteful and even sinister in every action from Obama and his administration). There was some thoughtful critical coverage in mainstream media, but it was typically buried. A June 2009 New York Times Magazine cover article emphasized the former Senator’s determination to “win over” Congress, featuring the current president as a Congressional compromiser, quite different from his more adversarial and unilateralist predecessors, and meanwhile Obama’s more understated but no less significant executive unilateral ism went relatively unremarked — for instance, in his continued use of the signing statements he denounced George Bush for utilizing. Obama’s first signing statement, attached to the March 2009 spending bill, came just days after he instructed government officials not to enforce any Bush signing-statement provisions attached to laws without consulting his ad- ministration’s attorney general, Eric Holder. Obama’s statement nevertheless expressed his administration’s interest in preserving expansive executive powers (at least, his own) and went so far as to contest a Congressional whistleblower provision that established protection for federal employees who give information to Congress, asserting basically that as president he could override any such legal protections at his discretion. By July, Obama had issued enough signing statements declaring his authority to bypass legal provisions to provoke the House into issuing an official rebuke (voting 429 to 2 in favor). In a follow-up letter, Democratic Congressmen Barney Frank and David R. Obey reminded the president of statements he had made as a Senator during the Bush administration: “During the previous administration, all of us were critical of the president’s assertion that he could pick and choose which aspects of Congressional statutes he was required to enforce. We were therefore chagrined to see you appear to express a similar attitude.” **But Obama’s change of heart on the subject of expanding executive powers should not come as a surprise—rather, he’s staying true to a long historical trend**. Obama seems to register signing statements on the general principle of marking out areas where the executive’s power should not be challenged, ‘whether or not he intends to enforce particular legal provisions, making his specific approaches to executive policy difficult to discern beyond his rhetoric of transparency counterbalanced by his practice of opacity His ongoing use of signing statements promises to entrench them as a means to expand presidential powers and essentially to continue asserting the line-item veto the Supreme Court has explicitly disallowed. **He has sought other putatively constitutionally principled ways to bypass Congressional lawmaking and democratic accountability**— for instance, a bill introduced in February 2009 by Senators Leahy, Specter, Feingold, and Kennedy that aimed to provide guidance to federal courts considering cases in which the executive has asserted the state secrets privilege. The Obama administration’s response to the proposed State Secrets Protection Act seemingly appears, as Dan Fejes of the blog Pruning Shears observed in August 2009, in the odd conclusion to a july Department of justice amicus brief This was offered in response to the appeal of a suit filed by an employee fired for refusing to recant a complaint about his company’s practice of hiring illegal immigrants. The Obama administration’s filing mainly concerned arcane Issues about attorney\_client privilege, in essence arguing that an employer Victory before the Supreme Court would undermine district court judges’ ability to control the discovery process. Yet the brief spends numerous final pages addressing the question of state secrets, an issue only tangentially raised by the case at hand, arguing that the president’s right to invoke state Secrets protection is rooted in the Constitution. As Adam Liptalc summarizes in his New York Times Cover age of the amicus brief, that argument “is controversial and the brief’s account of the relevant decisions was incomplete” **It’s clear that the Obama Department of justice does not want judicial or democratic limits put on the authority the executive can claim** under the rubric of state secrets protection. **Early on, the Obama DOJ was in- yoking the doctrine to prevent courts from reviewing the same warrant- less wiretapping program that candidate Obama had so forcefully con- demned when the Bush administration was overseeing it** (for example, on his campaign web sites “Plan to Change Washington,” where he listed as one of the “problems” to be solved by his administration the “secrecy” that “dominates government actions”). While early DOJ filings in February and even March 2009 could be interpreted as transition caution, as early as April it was evident that the Obama-staffed DOJ was hewing closely to and even exceeding the desire for government secrecy that characterized Bush’s administration. The Obama DOJ even outdid Bush- era arguments on behalf of expanding executive powers in favor of secrecy, inventing an entirely new category of “sovereign immunity;” which, in Glenn Greenwald’s summary claims “that the Patriot Act bars any law suits of any kind for illegal government surveillance unless there is ‘willful disclosure’ of the illegally intercepted communications» As Greenwald elaborates on Salon.com: In other words, beyond even the outrageously broad “state secrets” privilege in vented by the Bush administration and flow embraced fully by the Obama administration, the Obama DOJ has now invented a brand new claim of government immunity one which literally asserts that the US. Government is free to intercept all of your communications (calls, emails, and the like) and — even if what they’re doing is blatantly illegal and they know it’s illegal —you are barred from suing them **Despite a prolonged uproar about the Bush administration’s unilateralism and secrecy, and its frequent assertion that the executive was above the law, surprisingly little outrage has made headlines abou.t the Obama administration’s staking remarkably similar views—its unwillingness to give up military tribunals, or to relinquish the powers claimed by the Bush administration with regard to a president’s right to indefinitely imprison military detainees, or to support any Congressional hearings reviewing the legality of the Bush administration’s conduct in the “War on Terror**” (the White House expressed its desire to “look to the future” when At torney General Holder announced his appointment of a special prosecutor to investigate CIA detainee abuses). **Supporters who later would profess themselves enraged about Obama’s domestic and economic policies hardly lifted an eyebrow about his claims to what are in essence royal powers for the presidency.** Meanwhile, conservatives concluded with genuine delight that Obama’s actions (despite his unwillingness to speak on the subject) prove him a solid supporter of Reagan’s “unitary executive theory” This theory of executive power; as I detail in this book, encourages presidents to act with all available secret and public tools to expand the purview of executive power; even extralegally. The more modest legalistic claims of the theory—related to the president’s control over agencies—do little to check the unilateralist psychology and administrative culture it has fostered since its articulation under Reagan1 Its practical effect, as law professor Peter M. Shane summarized in his analysis of unitary executive theory’s effects on government, Madison’s Nightmare, has been to undermine US. constitutional democracy. Obama’s support for that theory and its deep influence on ongoing policy decisions deserve discussion and debate among citizens on the right and left. But how do we get there? **Media and cultural hyping of Obama’s incomparability made it all the more difficult critically to evaluate how his executive aims and policies impact both constitutional government and citizen democracy**. Whether or not our society can deliberate the merits of unitary executive theory to the ongoing health of our nation’s democratic experiment is a question entirely unrelated to whether mainstream America would take off the rose-colored glasses regarding its current president. Obama is (as the nation discovered in the dog days of August) like most other : : presidents in the typical cycle of his approval ratings—the crest and then : the inevitable fall of supporter hopes. But health care reform had begun floundering. Obama tried briefly to invoke the old magic of his campaign to inspire voters to renew their enthusiasm for his “plan” (still without offering a specific plan), and headlines read “Faith in Obama Drops,” “Obama’s Trust Problem,” and “Obama’s just Not That Into You.” When politics as usual—acrimonious and uncompromising as ever—went on summer recess, reporters turned instead to town halls featuring citizens with loaded guns**. People hoping for real change—in health care, in Wash- ington gridlock—might have been indulged in a week or two of regret. But no. Get over it, recognize “he’s just not that into you,” and move on to the next guy urged the allusive Salon headline, sidestepping the very point on which reporter Mike Madden allows Obama to finish the article: the necessity of citizen activism**. The president reminded his sup- porters at a conference call and video forum on August 20 sponsored by his postelection Organizing for America that in 2008, rather than giving up when McCain and Palm surged to the head of the polls, they “kept on working steadily, deliberately, sensibly, knocking on doors, talking to your coworkers, just giving people the facts . . . and that’s what we’re going to have to do today” He labeled the problem in a nutshell, as anticlimactic as it is. **In the United States, we expect the president to do the work of democracy.** **When he disappoints**, as the Salon title suggests, **we write him off and regretfully get busy looking for the next one who will do the trick, right the ship, win the day.** **One of the (many) problems with the belief that the president is both the leader of democracy and its central agent is that it trains people to put all their energy into electing the right president, then they can settle back into their “regular” lives, waiting for him to get the(ir) job done** . As Bonnie Adkins, an Iowan organizer for the Obama campaign who subsequently tried to rally the troops to assist with his health care re-form agenda, summarized for a New York Times reporter about one of the most active set of supporters in campaign history: “The enthusiasm is not there like it was a year ago. Most people, when they get to November 5, put their political hat away and it doesn’t come out for three years.” One intelligent August criticism of Obama was that instead of leading the reform he was operating like an organizer—bringing interested actors to the proverbial table and leaving it to Congress, the health insurance industry, doctors, hospitals, the pharmaceutical companies, and, perhaps unexpectedly, to the regular Americans who mounted massive grassroots campaigns to reach the ears and votes of their Congressional representa- tives to wrangle out how reform should go. In this critique, health care reform was floundering because President Obama left the ship without its rudder. **Michael Moore**, in a Rolling Stones roundtable in August 2009 (with David Gergen and Paul Krugman), **swiftly turned that point on its head: “I want to ask people reading this conversation, ‘What have you done today, what did you do yesterday, what do you plan to do tomorrow to make sure we have universal health care in this country, to get those troops out of Iraq and Afghanistan?’ We need to see a mass mobilization like we did last year, and it can’t all be on Obama for that not happening. We have to take responsibility for that ourselves**.” That’s a great point, one Obama prepped his supporters for during his campaign, during his acceptance speech, during his inaugural address. He knew better than his supporters that his candidacy was exciting an enthusiasm that he as president would be unable to meet, an enthusiasm for democratic involvement. Citizens were bound for disappointment in their expectation that Obama would deliver that change. Not two weeks after his inauguration, Chris Bowers posted a letter on Open Left titled “What Does Obama Want Us to Do?” Seemingly immobilized in the aftermath of inauguration (“should we be holding more cocktail parties and/ or dinners with Republicans in our neighborhoods, as President Obama himself is doing?”), **Bowers spoke for many of Obama’s supporters when he castigated the new president for fostering “a major leadership vacuum right now” His letter is alarming in the level of its civic passivity and the extent to which Bowers gets the representative relationship exactly back ward. It’s not the president’s job to tell us what to do or how to represent his agenda: it’s our job to tell the nation’s “number one” representative and all our other representatives —what we want him and them to do**. In August, as Congress wrangled with health care reform, **Some people began doing that, both on the right and the left**; for instance, the well- covered Tea Party campaign, a grassroots effort to fight for fiscal responsibility, limited government, and the free market; or FDL Action, which organized Supporters to call progressive members of Congress demand ing their Support for a public Option as Obama and the Senate’s so-called Gang of Six express their willingness to abandon it; the street-theater tactics of the Backbone Campaign, a Seattle grassroots organization whose public actions aim to embolden regular citizens to demand government accountability to citizens and not just corporations; or the fifty-state grassroots organization Equality Across America, which organized an October march in Washington, D.C. on behalf of LGBT civil rights to forward the demands Washington seems perennially willing to back-burner. Democracy, **as these and many other groups grasp, is about the people’s sovereignty: our power, not the president’s. It’s Ours to shape, to grow— and to lose.**

#### Reinvigorating deliberative democracy is key to address environmental justice and climate change

David Held et al, Professor of politics and international relations at Durham University, “The Governance of Climate Change”, published Apr 11, 2011, Pages 94-95

Deliberative democracy can, in principle increase the quality, legitimacy and therefore the sustainability of environmental policy decisions. This is partly due to the uncertainty associated with environmental issues, which demands a wide range of experience, expertise and consultation. The complexity of climate change problems also requires integrated solutions that have been vetted by multiple actors and that cut across the narrow confines of expert knowledge and the responsibilities of established institutions and organizations. And the concerns of environmental justice require the political process to be as inclusive as possible, giving voice to the under-represented, including future generations. Effective and just action on climate change depends upon the continuing involvement of citizens in the making and delivery of policy: conventional representative democracy alone is a poor way to achieve this. To remodel environmental politics around deliberative democracy is thus to create an opening for a change in the way democracies address environmental management in general, and climate change in particular.

***Warming’s causes extinction. It’s anthropogenic and slowing the rate is key***

Deibel ‘7

(Terry L, Professor of IR @ National War College, “Foreign Affairs Strategy: Logic for American Statecraft”, Conclusion: American Foreign Affairs Strategy Today – card starts on page 387 of this book)

Finally, **there is one major existential threat** to American security (as well as prosperity) of a nonviolent nature, which, though far in the future, demands urgent action. It is the threat of **global warming** to the stability of the climate upon which all earthly life depends. Scientists worldwide have been observing the gathering of this threat for three decades now, and what was once a mere possibility has passed through probability to near certainty. Indeed ***not one* of more than 900 articles on climate change** published in refereed scientific journals from 1993 to 2003 **doubted that anthropogenic warming is occurring**. “In legitimate scientific circles,” writes Elizabeth Kolbert, “it is virtually impossible to find evidence of disagreement over the fundamentals of global warming.” Evidence from a vast international scientific monitoring effort accumulates almost weekly, as this sample of newspaper reports shows: an international panel predicts “brutal droughts, floods and violent storms across the planet over the next century”; climate change could “literally alter ocean currents, wipe away huge portions of Alpine Snowcaps and aid the spread of cholera and malaria”; “glaciers in the Antarctic and in Greenland are melting much faster than expected, and…worldwide, plants are blooming several days earlier than a decade ago”; “rising sea temperatures have been accompanied by a significant global increase in the most destructive hurricanes”; “NASA scientists have concluded from direct temperature measurements that 2005 was the hottest year on record, with 1998 a close second”; “Earth’s warming climate is estimated to contribute to more than 150,000 deaths and 5 million illnesses each year” as disease spreads; “widespread bleaching from Texas to Trinidad…killed broad swaths of corals” due to a 2-degree rise in sea temperatures. “**The world is slowly disintegrating**,” concluded Inuit hunter Noah Metuq, who lives 30 miles from the Arctic Circle. “They call it climate change…but we just call it breaking up.” From the founding of the first cities some 6,000 years ago until the beginning of the industrial revolution, carbon dioxide levels in the atmosphere remained relatively constant at about 280 parts per million (ppm). At present they are accelerating toward 400 ppm, and by 2050 they will reach 500 ppm, about double pre-industrial levels. Unfortunately, atmospheric CO2 lasts about a century, so **there is no way immediately to reduce levels, only to slow their increase**, we are thus in for significant global warming**; the only debate is how much and how serious the effects will be.** As the newspaper stories quoted above show, we are already experiencing the effects of 1-2 degree warming in more violent storms, spread of disease, mass die offs of plants and animals, species extinction, and threatened inundation of low-lying countries like the Pacific nation of Kiribati and the Netherlands **at a** **warming of 5 degrees** or less the Greenland and West Antarctic **ice sheets could disintegrate**, **leading to a sea level** of **rise** of 20 feet that would cover North Carolina’s outer banks, **swamp the southern third of Florida**, and inundate Manhattan up to the middle of Greenwich Village. Another catastrophic effect would be the collapse of the Atlantic thermohaline circulation that keeps the winter weather in Europe far warmer than its latitude would otherwise allow. Economist William Cline once estimated the damage to the United States alone from moderate levels of warming at 1-6 percent of GDP annually; severe warming could cost 13-26 percent of GDP. But the most frightening scenario is runaway greenhouse warming, based on positive feedback from the buildup of water vapor in the atmosphere that is both caused by and causes hotter surface temperatures. **Past ice age transitions, associated** with **only 5-10 degree changes** in average global temperatures, took place in just decades, even though no one was then pouring ever-increasing amounts of carbon into the atmosphere. Faced with this specter, the best one can conclude is that “**humankind’s continuing enhancement of the** natural **greenhouse effect is akin to playing Russian roulette with** the earth’s climate and **humanity’s life support system**. At worst, says physics professor Marty Hoffert of New York University, “we’re just going to burn everything up; we’re going to heat the atmosphere to the temperature it was in the Cretaceous when there were crocodiles at the poles, and then everything will collapse.” During the Cold War, astronomer Carl Sagan popularized a theory of nuclear winter to describe how a thermonuclear war between the Untied States and the Soviet Union would not only destroy both countries but possibly end life on this planet. **Global warming is the post-Cold War era’s equivalent of nuclear winter** at least as serious **and considerably better supported scientifically**. Over the long run it puts dangers from terrorism and traditional military challenges to shame. It is a threat not only to the security and prosperity to the United States, but potentially to the continued existence of life on this planet.

***Micro-politics can’t solve ON THIS TOPIC. The unitary executive shuts it down. We must challenge war powers and macro-structures first***

**Engels ‘9**

Note: This is a review of Dana Nelson’s book Bad for Democracy: How the Presidency Undermines the Power of the People – Jeremy Engels. Associate Professor of Communication Arts and Sciences @ Penn State University – Rhetoric & Public Affairs; Volume 12, Number 3, Fall 2009 pp. 478-48 – Project Muse

At a moment in which a majority of Americans have found a renewed faith in the office of the president, Dana Nelson’s Bad for Democracy is something of a downer. Don’t get me wrong; the book is beautifully written, and the argument is crystal clear. It is not a downer because it is a bad book. It’s a downer because Nelson exposes one central pillar of our democratic faith, which she calls presidentialism, ***to be a false idol killing our democracy,*** an idol that she believes must die. Presidentialism is the logic by which the president of the United States justifi es putting himself above the demos, above the other forms of government, and in the case of President George W. Bush, above the Constitution itself. Whereas democracy means rule by the people, and whereas the Constitution is clear that political power fl ows from the people to their representatives (including the president), presidentialism teaches that the president is the apotheosis of democracy and that “the president’s power (i.e., his sovereignty) is what constitutes and defines our power as a nation” (70). In presidentialism, there is ***a deactivation of citizen agency*** and a depoliticization of democracy, for presidentialism teaches that the ultimate democratic act for citizens is voting for a president who will then take charge and make things right. What is troubling to Nelson is not merely that presidentialism exists but that it has become part of our “democratic common sense” (10). Our vision of the president as fi rst among equals, as avenging superhero, as national father is part of the habitus in which Americans are raised. Thus we find ourselves at a critical juncture in U.S. history. Will we accept a model of the unitary, corporate executive who stands above, and is no longer accountable to, the people? Or will we reclaim the power that the Constitution guarantees us? Nelson’s argument will be interesting and provocative for rhetorical scholars who study presidential rhetoric or democratic culture more generally because she claims that the problem with our democracy is not who occupies the presidency, Democrat or Republican, but instead the fact that the offi ce of the presidency has assumed such a prominent role in our democracy. Accordingly, the majority of Bad for Democracy focuses on narrating the history of presidential power. She argues that the need for presidential leadership has been carefully cultivated from the founding period forward, and to prove her point, she describes several key moments in the evolution of presidential power in four historically rich chapters—moving from the debates over whether there should even be a president at the Constitutional Convention, to Mason Locke Weems’s famous biography of Washington, to Jackson’s invention of the presidential mandate, to Lincoln’s ***definition of war powers*** during the Civil War, to FDR’s expansion of the presidency during World War II, to Reagan’s decision to return the courtesy salute to Marines, to Bush’s corporate, and unitary, presidency. This eye-popping historical tour de force will be a source of interest, discussion, and perhaps outrage, for Nelson is not partisan in her anger. She takes aim at presidents beloved and disparaged. Every president is to blame because the offi ce of the presidency itself is to blame. Nelson employs several metaphors to capture the dynamics of presidentialism. Two metaphors—the president as the Great and Powerful Wizard behind the curtain in The Wizard of Oz, and the president as the monarch Americans fought a revolution against, returned—suffer from the same problem, for they conceptualize presidential power as unilateral, as though power could ever really fl ow downward from a president to the people (107, 70, 176). Although presidents wield tremendous amounts of political and symbolic capital to shape reality, their power is not without bound. Power is necessarily consensual, and thus the question is how presidents nurture consent. Here, a third metaphor Nelson deploys, the president as symbolic superhero father-fi gure, is best. Nelson notes, “We appeal to the future president with the same hopes that informed our childhood pleading with parents to intervene when our siblings were getting on our nerves,” and she argues that the logic of presidentialism is upheld by “childlike fantasies”—fantasies of authority fi gures who can make everything right, restoring calm and order to a messy world while bringing even the most bitterly divided siblings together (200, 221). Understanding the president as a father-fi gure, we can better understand presidential power as consensual. The president does not take anything away from citizens that, for one reason or another, we are unwilling to give up. Presidential authority, like charisma, is bestowed by an audience on the president. Authority hence exists in the symbolic space between presidents and citizens, in the everyday actions and habits of our democratic culture as they have been historically cultivated. In turn, Nelson demonstrates that presidents have been particularly good at running with the needs and desires of citizens to strengthen the offi ce of the president. Today, Nelson argues, we fi nd ourselves at a crucial juncture from which there might be no turning back, as the Roberts Supreme Court is one justice away from gaining a majority that will support the vision of a unilateral, corporate president who stands above the other branches of government and can, during wartime, do anything he chooses. “Once we’re there,” she speculates, “it’s hard to see how we might take a more robust democracy—the kind of democracy where citizens have and can exercise self-governing power—back from the uncheckable presidency imagined by Mansfi eld, Cheney, Bush, and other hard-line unitary executive proponents” (180). This problem, Nelson concludes, “will not likely be remedied by any person we elect to the Oval Offi ce”—the answer will have to come from the people regaining their power and making demands that ultimately check the president and overthrow the logic of presidentialism (182). In the book’s conclusion, Nelson speculates about ways that citizens might reclaim democratic power for ourselves, from experimenting with new technologies and open systems to learning from the wisdom of crowds and leaderless organizations. Most of these solutions are not new; on the contrary, Nelson draws on a rich literature from diverse academic fi elds attempting to imagine alternative futures for our democracy. But Nelson’s point is a provocative one— that far from enabling citizen agency or promoting democracy, ***presidentialism*** ***works to weaken “our capacity to imagine alternatives”*** (197). It is this capacity that we will need in the coming years if we are to return our democratic culture to health—if citizens can somehow fi nd the will and the courage to unmask the wizard behind the curtain, to kill the king, and to question the father.

***The global shapes the local in this context. The aff is necessary reclaim democratic agency and people’s sovereignty***

**Nelson ’08** (Dana D. Nelson, professor of English at Vanderbilt University, 2008,

“Bad for Democracy: How the Presidency Undermines the Power of the People”, pg xvii-xviii)

**But Obama detractors, right and left, might usefully cool off a bit and consider that the failures we seek to attribute to the president could as easily be dropped at our own feet**. **The cycle of the four seasons evoked by our quadrennial presidential election might encourage us to believe that democracy will perpetually renew itself**, a gift of nature reminiscent of the seasons. In the seasonal rendition, the energies of democracy wax and wane; like the winter freeze that coaxes seeds from their hulls and gives roots the rest they need to thrive again in the summer to come, this “natural” cycle is a good thing. We become energized in the democratic summer of the election cycle and involve ourselves in selecting a new president. Then we cozy into our couches during the democratic winter and wait for him to perform the magical work of democracy, preferably with a cinematic flourish that will keep us happily spellbound. **The ever-renewing cycle of seasons might be a comforting myth, but it’s not democracy’s reality. The real radicalism of the U.S. revolution for independence came in its advancement of the ideal and the practice of the people’s sovereignty, the idea that regular people were qualified and capable of self-rule** if they worked at it vigilantly, thoughtfully, and hard enough. **The Constitution structured a balanced government, and we have for centuries regarded its scheme of checks and balances as the clarion of democracy**—without really paying attention to how those checks are holding up. Here’s **what the Framers got wrong: the three branches are not in fact equally suited to protect their own self-interest**. **The one headed by the single person—the executive—is best suited for that. Consequentially**, over time, **the presidency has expanded its symbolic and practical powers to the point that**, as I argue in this book, **the presidency is jeopardizing the fundamental premise of democracy: the self-rule of the people.** As we stew in the cold of winter, once again blaming the president for not fixing everything we see wrong in our nation (and indeed, the world), we might want to consider that **we are unthinkingly surrendering our own democratic power and agency**, both as a form of government and as our most precious cultural and political heritage. Corazon Aquino, the Philippine politician who led her country into what many regarded as a democratic revolution against the corrupt Marcos government, died in August 2009. Reflecting on the optimism of that revolutionary moment, and what came after, many Filipinos expressed a sense of regret not just for the loss of Aquino but for their country since her landmark election--- for lost opportunity, the failure to capitalize on the possibilities opened up in that moment of change in the face of continuing poverty, inequality and corruption. Teresita I. Barcelo summarized in The New York Times: “We thought all we needed to do was remove the dictator and do nothing about it. We thought the problem was just the dictator. I say the problem is us. We did not change.” As Barcelo understands, **what the president does for us can be good or bad—but either way, it isn’t democracy**. Bad for Democracy urges that we learn from her wisdom that democratic change does not come like the change of seasons, a gift of nature or the president, but rather from our own efforts at self-governing. **Democracy is not “natural”; rather, it’s a habitat we build together. it won’t be easy, but if we care about our nation’s democratic experiment, we must seriously rethink the relationship of citizens to our form of self-government.** We must find ways to involve ourselves in that project among those with whom we disagree, within a government that is far friendlier to corporate than citizen interest, and within a society that has for too long considered “democracy” something that only “government” does.

***The presidency shapes reality. Challenging the cult of the presidency is key to reinvigorate local politics***

**Nelson ’08**, Dana D. Nelson, professor of English at Vanderbilt University, 2008, “Bad for Democracy: How the Presidency Undermines the Power of the People”, pg 1-2

**IN THE RUN-UP TO THE 2004 PRESIDENTIAL ELECTION, A BUSH administration official memorably asserted** to New York Times reporter Ron Suskind, “**We’re an empire now, and when we act, we create our own reality And while you’re studying that reality—judiciously, as you with we’ll act again, creating other new realities, which you can study too, and that’s how things will sort out**. **We’re history’s actors . . . and you, all of you, will be left to just study what we do** 6” **Suskind’s article** “Without a Doubt” **framed this assertion as the administration’s assessment of Left- leaning intellectuals**, and it predictably outraged Bush’s political oppositions His administration was widely seen by Democrats as heedlessly unilateralist: this bald assertion of power seemed concisely to summarize Bush’s own philosophy and his scorn for those who disagree with him. But **this is not just a simple summary of the Bush**—Cheney—Rumsfeld— Wolfowìtz **philosophy for dealing with political, opposition. Rather, it draws on a deep and relatively unnoticed tradition of expanding presidential powers** that began in the age of George Washington. This expansion has come at times through the ambitions, machinations, and moxie of individual presidents — some of them impressively gifted governmental and political leaders. **It has** also **come through the active and passive consent of citizens, the courts, and Congress.** **Because the president has come to symbolize both our democratic process and our national power, we tend to see him simultaneously as democracy’s heart** (he will unify the citizenry) **and its avenging sword** (he will protect us from all external threats). **Those beliefs**, inculcated in us from our earliest days in school, reinforced by both popular culture and media coverage of government, politics, and foreign affairs, **make us want to give the president more power**, regardless of the constitutional checks and balances we also learned to treasure as schoolchildren.

**Contention 3: Solvency**

***Requiring prior congressional approval of conflict is vital to revitalizing deliberative democracy – it fosters deliberation that breaks down group-think and ensures better decision-making***

**Martin ’11**, Craig Martin, Visiting Assistant Professor, University of Baltimore School of Law, Winter, 2011¶ Brooklyn Law Review¶ 76 Brooklyn L. Rev. 611, ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with In-ternational Law, Lexis, jj

Turning to the second element of the Model--the provision that would require legislative approval of decisions to use force--there is of course considerable theoretical support for such a constitutional structure. As we have already discussed, the concept dates back at least to the development of the American Articles of Confederation, and the war powers provisions of the U.S. Constitution continues to be a model of the principle. It is also one of the central issues in the war powers debate that has been raging in the United States for over a hundred years. But much of the modern debate in the United States is over the precise meaning and exact scope of the war powers provisions of the U.S. Constitution, and the particulars of many of those arguments need not concern us [\*680] here. n257 As we have already reviewed, however, **the primary motive of many of the drafters of the U.S. Constitution, as expressed most clearly by Madison, was to reduce the likelihood of war**. n258 **And the theoretical arguments of Madison, Kant, and others in support of such a separation of powers related to both the domestic objectives of the state: putting an important check on the state's rush to war and increasing the democratic accountability of the process of deciding on war; and the broader goals of reducing the incidence of war generally in the international system**. In this sense, the arguments in support of this element of the Model again relate to the causes of war at both the domestic level and the international level.

The starting point is the insight that **requiring legislative approval of executive decision making on the use of force will likely reduce the risk of rash decisions to go to war for the wrong reasons**. This argument was initially advanced by Madison and Kant, among others, and indeed can be traced all the way back to Thucydides. n259 Madison and John Jay both argued **that the executive is more likely to be motivated by parochial self-interest and narrow perspectives, and thus more likely to enter into armed conflict than the legislature**. n260 Madison further argued that there ought to be a separation between those who are charged with the conduct of war, as the President is as the Commander in Chief, and those who have the authority to decide on the commencement of war. n261 But **the argument becomes more compelling when unpacked and explained in a little more detail, with the support of more modern theory. We need to explore the question of how exactly the legislative involvement improves decision making or** [\*681] **engages the causes of war in a manner that would reduce the incidence of war.**

It is helpful to begin by recalling the functions of legislatures. n262 In addition to passing legislation, **the legislature in virtually all liberal democracies**, whether parliamentary or presidential in structure, **performs the core functions of representation, oversight, and control over government expenditure.** n263 **Representation and oversight in particular are important to the argued benefit of legislative involvement in the decision to use force**. **Both functions are tied to the core notions of democratic accountability and to** deliberative democracy**, which overlap in important ways**. **Democratic accountability is understood to include the idea that the people who are likely to be impacted by decisions ought to be able to participate in the decision making. Participation in this sense means not only having some expectation that the collective will of constituents will be taken into consideration in the decision-making process, but that the public debate and deliberation that is part of the parliamentary process of decision making will also serve the vital function of informing constituents and affording them some sense of access to the decision-making process**. n264

**Obviously, this process of debate and information exchange is also at the heart of ideas of** deliberative democracy. The perspective here, though, is not so much on the importance of making the process accountable to and representative of the people, but on the extent to which the **very process of deliberation among the representatives of disparate stake-holders and interests will result in the generation of sounder judgments**. **The argument is that the process results in better decisions due to the attenuation of extreme positions, the canvassing of a wider range of perspectives and sources of information, and the vigorous public interrogation of reasons** [\*682] **and motives underlying proposals**. n265 More specifically, theories of deliberative democracy hold that **the deliberative process**, of which the parliamentary debate and decision-making process is a key feature, **actually involves the transformation of preferences through the consideration of the justifications offered by various perspectives, rather than merely serving as a means by which society can aggregate preferences**. n266

**The oversight function of legislatures also feeds into both these aspects of democracy, in that the employment of specialized committees to engage in public inquiries into policy choices or proposed courses of action, provides a deeper level of deliberation that ensures a more thorough interrogation of policy justifications and the underlying information upon which policy proposals are based**. **Senate committee hearings during the Vietnam War illustrate how such oversight can reveal important information underlying policy debates, which in turn can influence public opinion and better inform the policy preferences of the representatives of the people**. In 1967, the Senate Armed Services Committee held hearings on the escalation of the strategic bombing of North Vietnam. After the representatives of the Joint Chiefs, and in particular the Chief of the Air Force, had testified before the committee on the necessity of the continued strategic bombing, Secretary of Defense Robert S. McNamara stunned the committee, the government, and the public by testifying that the bombing was entirely ineffective. n267

**The performance of these functions of the legislature, to the extent that they are permitted or required to operate in the decision-making process on the use of force, engage the domestic causes of war in important ways**. The fuller realization of the representative and oversight functions--serving as they do to both incorporate the will of the broader population and to arguably contribute to the arrival at sounder judgments through the deliberative process--would result in those structural aspects of democratic states that comprise the Image II factors most related to the causes of the "democratic [\*683] peace," being brought to bear more directly on the decision-making process. In other words, the structure would thus more perfectly reflect the theoretical ideal that is part of the structural explanations of the democratic peace. n268

**The institutional structure of the decision-making process created by the Model's separation of powers element would also affect the political costs of going to war** in a manner that would further engage the Image II causes of war. **Absent an overwhelming or obvious threat, the procedural requirements to obtain the support of the majority of the legislature would impose significant political costs upon the executive**. n269 The structure would effectively create a sliding scale, in the sense that **the greater the threat or the more obvious the case for war--such as the use of force in self-defense against an ongoing armed attack--the lower the costs would be in obtaining legislative approval**. Converse-ly, **the more tenuous the case for engaging in armed conflict, the more** [\*684] **politically costly it would be to win over the majority of the legislature for support.** This is precisely the kind of structural characteristic that reduces the Image II causes of war.

**The second element of the Model would also engage the** Image I **causes of war, which include particular psycho-logical traits that are common in many executive officers, systemic problems of misperception among decision makers, and the irrational behavior of small-group decision making reflected in "groupthink" and the "bureaucratic politics model" of decision making**. n270 **The risks that such tendencies could lead to irrational or suboptimal decisions to use armed force would be reduced, in the case of each of these particular phenomenon, by spreading the decision-making process more widely through the inclusion of the legislative body**. **The requirement to obtain legislative approval, bringing to bear the core functions of deliberative democracy on the decision-making process, such that a wider set of perspectives and criteria are brought to the process, as well as a more public interrogation of reasons and rationales, would significantly reduce the potential for these potential features of government decision making to manifest themselves in the form of unsound or dangerous decisions regarding the use of force.** n271

***The plan breaks down presidentialism***

**Fisher ’12**, Louis Fisher, Scholar in Residence, The Constitution Project; served for four decades at the Library of Congress, first as Senior Specialist, Congressional Research Service, from 1970 to March 2006, then Specialist in Constitutional Law, Law Library, from March 2006 to August 2010, 2012¶ Journal of National Security Law & Policy¶ 5 J. Nat'l Security L. & Pol'y 319, ARTICLE: Basic Principles of the War Power, Lexis, jj

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

***Redefining hostilities in the WPR boosts congressional involvement, checks intervention, and stops circumvention***

**Farley ’12**, Benjamin R. Farley, J.D. with honors, Emory University School of Law, 2011. Editor-in-Chief, Emory International Law Review, 2010-2011. M.A., The George Washington University Elliott School of International Affairs, 2007, Winter, 2012¶ South Texas Law Review¶ 54 S. Tex. L. Rev. 385, ARTICLE: Drones and Democracy: Missing Out on Accountability?, Lexis, jj

**Congress should strengthen the WPR regime by defining hostilities in a manner that links hostilities to the scope and intensity of a use of force, irrespective of the attendant threat of U.S. casualties**. **Without defining hostilities, Con-gress has ceded to the President the ability to evade the trigger and the limits of the WPR**. **The President's adoption of a definition of hostilities that is tied to the threat of U.S. casualties or the presence of U.S. ground troops opens the door to long-lasting and potentially intensive operations that rely on drones** - at least beyond the sixty-day window - **that escape the WPR by virtue of drones being pilotless** (which is to say, by virtue of drones being drones). **Tying hostilities to the intensity and scope of the use of force will limit the President's ability to evade Congressional regulation of war**. **It will curtail future instances of the United States being in an armed conflict for purposes of international law but not for purposes of domestic law, as was the case in Libya**. Finally, ***a statutory definition of hostilities will provide the judiciary with a meaningful standard for determining presidential compliance with the WPR*** - assuming the future existence of a plaintiff able to surmount the various prudential doctrines that have counseled against entertaining WPR cases thus far.

***The distinction between “declaration of war” and “authorization of war” is important***

**Mullen, 11** (May 7, Tom, author of [A Return to Common Sense: Reawakening Liberty in the Inhabitants of America](http://www.amazon.com/gp/product/0578006839?ie=UTF8&tag=tomusbl-20&linkCode=xm2&camp=1789&creativeASIN=0578006839). He writes weekly columns on his blog and has been featured at The Daily Caller, Daily Paul, American Breaking Point, guest on Fox’s Freedom Watch, Free Talk Live, and numerous other talk radio programs.¶ Tom was the opening speaker at the Revolution March in Washington, D.C. in 2008 a featured speaker at the New Hampshire Liberty Forum, Campaign for Liberty, Tom is originally a native of Buffalo, NY and graduate of Canisius College. He earned a Master’s Degree in English from State University of New York College at Buffalo¶ “What’s So Important About a Declaration of War?,” <http://www.tommullen.net/featured/whats-so-important-about-a-declaration-of-war/>)

I’m not sure that this is resonating with those that are unfamiliar with what a declaration of war means. **For most** people, **the declaration of war is a formality whereby the president makes sure that it is agreeable to the Congress that he utilizes the military**. Some might even go so far as to say it is the president “asking permission” from the Congress to do so. **By this reasoning, both** Presidents **Bush and Obama have complied**, especially considering H.J. Res. 114 (October 16, 2002). With that resolution, Congress authorized the president to use military force in the war on terror. **What is the difference between that and a declaration of war?** **The answer is both intuitive and supported by history.** **First, a “declaration” has nothing to do with “permission.”** **Neither is it the same thing as creation or initiation**. **One can only declare something that already exists.** Therefore**, a declaration of war does not create a war or initiate a war. A declaration of war is a resolution passed by Congress recognizing that the United States is already at war.**

***Redefining “hostilities” as “armed attack” solves***

**Martin ’11**, Craig Martin, Visiting Assistant Professor, University of Baltimore School of Law, Winter, 2011¶ Brooklyn Law Review¶ 76 Brooklyn L. Rev. 611, ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with In-ternational Law, Lexis, jj

A. A Process-Based Constitutional Incorporation of Jus ad Bellum The article begins with the incorporation of the principles of jus ad bellum. The first section provides: (1) **Any decision to use armed force, or to deploy armed forces in circumstances likely to lead to the use of armed force, of a level in scale, duration, and intensity equal to that constituting an armed attack in international law, shall be made only after sufficient and demonstrable consideration of whether the proposed action is consistent with the applicable principles of international law relating to the use of armed force, as found in the United Nations Charter, other relevant treaties to which the State is a party, and the related principles of customary international law. The key elements of this section**, which require some further discussion and explanation, **are that**: (i) it incorpo-rates both conventional international law (that is, treaty law) and customary international law; (ii) it specifies the regime of law from which the principles are drawn, with reference by name to the most important governing convention (the U.N. Charter); (iii) it incorporates the relevant principles of international law by reference only, rather than explicitly stipulating the substance of those principles; (iv) it is process based rather than substantive, in the sense that it does not purport to incorporate and impose the actual prohibitions from international law, but rather it only creates an obligation for decision makers to sufficiently consider compliance with those prohibitions (and the exceptions thereto); and finally, (v) **it provides a threshold level of force that would trigger the operation of the provision, with some criteria for defining that trigger**. Beginning with the first element, there are a number of reasons underlying the decision to incorporate both treaty and customary international law. There is a wide range of approaches among constitutional democracies regarding the manner in which international law is treated within their domestic legal systems, and great variation in the extent to which there is already some constitutional provision for such treatment. This not only relates to the classic theoretical division between monist and dualist perspectives, but also relates, in practical terms, to the significant differences among [\*706] states regarding how the different forms of international law are received and the status each is af-forded within the domestic legal system. n330 The mechanisms and processes by which states incorporate (or transform, as the case may be) customary international law are typically different than those used for the incorporation of conventional international law, and many states also afford one a higher status within the domestic legal system than the other. Moreover, these differences themselves vary considerably across states, even among liberal democracies, with some such as the Netherlands placing a primacy on treaty law, n331 while others such as Germany, Austria, and Italy giving customary international law higher status. n332 States vary as well on how each of these is to be received by the domestic legal systems. n333 All of this suggests a couple of inferences. First, there are clear examples of constitutional democracies incorpo-rating within their constitutions both conventional international law and customary international law, and indeed examples of each being afforded a higher status than domestic statutes and even a national constitution. Second, given the very uneven treatment among democracies for the purposes of developing a universal model of incorporation, and given that there are principles from both a treaty and custom that are thought to be [\*707] important, the incorporation mechanism should explicitly incorporate the principles of both systems as part of the Model. That way, regardless of the more general approach within the particular constitutional system, the provision would make quite clear that the principles of both systems are being incorporated directly into the constitution for the purposes of this constraint on the use of armed force. This of course raises the question of whether there are significant differences between the principles of jus ad bel-lum to be found in conventional international law and custom. There is in fact very little difference, as the International Court of Justice went to some pains to establish in Nicaragua v. United States (Merits). n334 And the most fundamental principles of the jus ad bellum regime, the incorporation of which is central to the Model, are essentially found in Article 2(4) and Chapter VII (which includes Article 51) of the U.N. Charter. Nonetheless, it will be recalled that one of the theoretical arguments in support of adopting the Model to begin with is that the jus ad bellum regime is coming under pressure to change, leading to the possible development of new principles and new legal tests to determine their application. The extent to which there is indeed some change to the jus ad bellum regime in the near to mid-term, it is unlikely to come in the form of amendments to the U.N. Charter or the adoption of any new treaty. It is much more likely to come in the form of changes to customary international law. In such circumstances, it will be important that the Model will have been structured so as to incorporate the relevant principles of customary international law, and to require that the decision making on the use of armed force be informed by the most current developments in the law. The second element of this subsection of the provision is the manner in which it refers specifically to the principles of the jus ad bellum regime, and refers even more explicitly to a particular treaty regime, namely the U.N. Charter. This is in contrast to the option of a much broader incorporation of international law as a whole, as many national con-stitutions already have. Some of the reasons for a more narrow and specific incorporation will be obvious and were discussed earlier. n335 In addition, given fairly widespread concerns about [\*708] the legitimacy in permitting interna-tional law to trump domestic law--concerns grounded in arguments about the democratic deficiency of the international law-making process, the erosion of national sovereignty, and the negating of the democratic will of the state's citizenry--it may be considerably easier in practical terms to mobilize support for a carefully tailored provision than a blanket incorporation of international law along the lines of the Netherlands. In addition to this, however, the incorporation of specific principles or regimes of international law provides a much more fertile basis for the internal interpretation and internalization of the associated norms, which as was dis-cussed earlier is an important aspect of the process of enhancing compliance with international law according to trans-national legal process theory. Moreover, by identifying particular regimes and specifying the precise treaty from which principles are drawn, examples from a number of countries suggest that the constitutional provision will thereby create the legitimate basis for courts and other domestic institutions to consider how those principles have been interpreted by international tribunals and organizations. This can be an important factor in insuring that the principles that are incor-porated remain organically connected to the international law sources from which they were drawn. One of the best examples of this approach is the constitutional incorporation of human rights principles by a number of countries over the last few decades. For instance, Article 10(2) of the Spanish Constitution of 1978 provides that "the norms relative to basic human rights and liberties which are recognized by the constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain." n336 This has been interpreted to mean that such human rights conventions as the European Convention on Human Rights and the International Convention on Civil and Political Rights n337 have constitutional status within the Spanish legal system; or, to put it another way, the relevant provisions of those conventions have effectively been incorporated by reference into the [\*709] Constitution. n338 What is more, this incorporation by explicit reference to the conventions themselves has provided a basis for the Spanish courts to not only interpret the constitutional provisions in light of the principles in the conventions, but also to draw upon the interpretation of the relevant provisions of the conventions by international courts and other interpretative bodies. n339 The third element of this subsection of the Model relates to the manner in which the provision incorporates the principles of jus ad bellum by reference only, rather than specifying the content of those principles as part of the consti-tutional text. In other words, **the provision requires decision makers to consider the applicable principles relating to the use of force, as found in the U.N. Charter and other sources,** but it does not provide an explicit list of what those princi-ples are. An alternative approach would have been to provide a set of subsections detailing the content of each principle and rule taken from international law that decision makers had to consider before taking action. Aside from the sheer awkwardness of trying to stipulate all the relevant rules and principles, the reasons for employing the "by reference" mechanism are similar to those discussed above in relation to the importance of including general references to customary international law and treaty sources. That is, **incorporation by reference preserves the flexibility of the Model, such that the provision can essentially evolve as the underlying international law principles change over time, and it retains the organic link to those principles for purposes of interpretation**. As already discussed, that has its own inherent risks, but given the likelihood that the jus ad bellum regime will develop over the next few decades, coupled with the difficulty associated with any constitutional amendment, building in that kind of flexibility is important. An example of this approach, albeit in a regular statute rather than a constitutional context, can be found in the Alien Tort Statute in the United States, the key clause of which states that "the district courts shall have original juris-diction of any civil action by an alien for a tort only, committed in violation of [\*710] the law of nations or a treaty of the United States." n340 This does not incorporate international law norms per se, but as the Supreme Court held in Sosa v. Alvarez-Machain, the statute confers subject matter jurisdiction and creates a cause of action for the violation of the "laws of nations," which is a reference to customary international law. n341 Two advantages of the incorporation by reference are well illustrated by this example. The first is the flexibility of the legislative provision, as its content can essentially evolve over time without requiring any change to statutory lan-guage. Thus, in Sosa it was recognized that the content of the "narrow set of violations of the law of nations" today is certainly not the same as the narrow set of violations that were contemplated back in 1789 when the statute was enacted. Rather, the range of what types of violations within the law of nations was defined, but the content of those violations was not specified, and is left to be ascertained according to the current principles of customary international law. n342 Second, but very much related, is the advantage of maintaining an organic connection to the international law principles, which thus continue to be the living source of the rules. The employment of the term "in violation of the laws of nations" constituted an intermediary within the statute, or a trigger, for the application of the primary norms that are promulgated in detail somewhere else--in this instance in the sources of the laws of nations. In the sense of Hart's pri-mary and secondary rules, therefore, the reference in the statute is merely a secondary norm, and leaves the primary norm as the source of the content. n343 [\*711] As explained earlier, this retention of an organic connection with the underlying international law principles also ensures that there will be full access to the associated interpretations and understanding of those principles, including the decisions of international tribunals and organizations, as they have developed over time. This relationship tends to be lost when the contemporary understanding of customary international law rules is taken or the language of a rule is lifted from some treaty and then dropped into the text of a constitution (often in some slightly revised form). Moreover, the juxtaposition of the revised language with other provisions, severed as it is from its conceptual source, can lead to significant unintended consequences. n344 The fourth element of the subsection is that it is process-based rather than substantive in nature. In other words, the provision does not incorporate the prohibitions (and corresponding exceptions) of the jus ad bellum regime as sub-stantive clauses in the Constitution. Rather, it merely requires that the decision makers contemplating the use of force sufficiently and demonstrably consider whether the proposed action is consistent with the international law principles that have been incorporated. There are several reasons for choosing to develop the mechanism in this fashion, but they largely relate to the practical issues of implementation. It can be anticipated that there would be significant political objection in many jurisdictions to any contemplated adoption of this Model. The foundation of many of these objections, principled and otherwise, would be a resistance to the idea of incorporating international law principles to bind the hands of government on issues of national security--issues relating to self-preservation and defending "vital interests." As has already been suggested above, the arguments behind many of these objections are misplaced. But the fact remains that if the Model proposed the incorporation of the principles as binding constitutional prohibitions, which would also entail conferring upon the judiciary the power to decide whether a proposed use of force did or did not comply with the exceptions to the prohibition as a matter of both constitutional and international [\*712] law, then the volume of these objections would likely be overwhelming. Such implementation of binding prohibitions may be possible and desirable in the future, but for now a process-based model may serve as an initial and more viable step along the road to that objective. And for the reasons already discussed in the previous Part, a process-based provision will still have a significant effect. **The final element in the subsection is the initial gate-keeping mechanism, which limits the application of the pro-vision to only those decisions regarding the use of armed force that could constitute an "armed attack," as that term is understood in international law**. **This is to ensure that there is a de minimis level below which the government would not be bound by the provision.** Moreover, as will be discussed in the next section, the same trigger would apply to the other elements of the Model, thus ensuring that the various elements of the Model operate in harmony, and the domestic elements are triggered by criteria that are consistent with valid concepts in international law. **The parameters of this threshold test are not novel**. As explained briefly in the discussion of the modern system of jus ad bellum, **the occurrence of an armed attack is a condition precedent to the exercise of the right of self-defense (or, for the exercise of anticipatory or preemptive self-defense, that an armed attack is imminent, in the sense that it is irrevocably in motion**). n345 Similarly, **the current understanding in international law is that the use of force against a state must reach a certain level--or be of "sufficient gravity**," **to use the language of the U.N. Resolution on the Definition of Aggression--before it can be considered an act of aggression**. n346 **The I**nternational **C**ourt of **J**ustice **has adopted this language in holding that the use of armed force must rise to a certain level before it constitutes an "armed attack" justifying the exercise of the right of self-defense, and it is clearly well above the mere use of force that would violate the prohibition in Article 2(4) of the U.N. Charter**. n347 **Where that line is actually drawn, or what criteria are to be used to determine exactly where to draw the line, has not yet been clearly established in international law, but the principle itself has been. It is no** [\*713] **more uncertain or incapable of determination than any number of other constitutional principles**. **Dinstein suggests that an armed attack requires that the use of force must be of a magnitude that is likely to "produce serious consequences, epitomized by territorial intrusions, human casualties, or considerable destruction of property**." n348 **The trigger mechanisms in current constitutions, in legislation such as the War Powers Act, and proposed legisla-tion such as that in the War Powers Commission Report, are not any clearer, and what is more, they often employ terms that are not related to known and valid concepts in international law**. We have already seen that the constitutions of many countries, including that of the United States, require legislative approval of any "declaration of war." While declarations of war continue to be theoretically part of the international law on the use of force, they are no longer reflected in state practice, and are certainly no longer considered necessary to trigger the operation of the laws of war or bring into existence the legal state of war. n349 To the extent the term is interpreted to mean anything other than a formal declaration that triggers a technical state of war, it becomes highly ambiguous, as the war powers debate in the United States illustrates. **The War Powers Act lowered the threshold significantly, using as the trigger "any case in which United States Armed Forces are introduced: . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances**." n350 **There is no definition of "hostilities," and so there is no indication of what scale, intensity, or duration of armed conflict that would be required to constitute "hostilities" for the purpose of the provision**. **It could arguably encompass peace-keeping operations, or the lowest-level border skirmishes, yet could potentially be interpreted to exclude such uses of force as cruise missile strikes on foreign targets.** The proposed legislation of the War Powers Commission Report, in contrast, tries to raise the threshold by requir-ing a "significant armed conflict" as a condition precedent, which is defined as being "any combat operation by U.S. armed forces [\*714] lasting more than a week or expected by the president to last more than a week." It explicitly excludes a number of activities, such as "limited acts of reprisal against terrorists or states that sponsor terrorism," "covert operations," and "missions to protect or rescue American citizens or military or diplomatic personnel abroad." n351 Again, "combat operation" remains undefined, creating uncertainty as to what precisely is contemplated. More sig-nificantly, not only does this formulation similarly employ concepts for the trigger that do not equate with the principles of jus ad bellum, but the provision also explicitly endorses unilateral executive action for purposes that could very well violate the prohibition on the use of force in international law. Reprisals, as the term is understood in international law, are illegal. n352 Covert ops and missions to protect nationals abroad would easily encompass the support provided to the Contras in Nicaragua, and the invasions of Grenada and Panama, all actions that are widely seen as having been unlawful. n353 Moreover, aside from the explicit exceptions, the threshold would not be crossed by such uses of force as extensive missile or air strikes, including strikes with nuclear weapons, so long as they would not be expected to lead to "combat" lasting more than one week. There is little apparent relationship between the requirements of international law and that which the War Powers Commission Report considered important enough to require Congressional involvement. **The trigger that is contemplated in the Model**, while it admittedly contains some uncertainty as to its precise scope, **is a concept understood in international law.** **By employing it in the Model, we ensure that the same criterion is used for both requiring consideration of international legality and for obligating the government to obtain legislative approval, and that the criterion itself is comprised of concepts taken from international law**. **It is the kind of principle that courts are in any event well accustomed to working with, and it is necessary to have some threshold to ensure that the government is able to act more freely in circumstances that would not implicate the jus ad bellum regime in interna-tional law. It is only the use** [\*715] **of force constituting an armed attack, whether legally justified or not, which is likely to escalate into an armed conflict. Armed attack, therefore, is arguably the appropriate level of force to trigger the requirement to involve the other branches of government and focus consideration on the questions of whether that use of force will comply with international law**. n354 **A final word should be said about whether the trigger makes any distinction between the use of force for individu-al self-defense and that used for other purposes, be it collective self-defense or collective security operations**. **Constitu-tional controls of some countries do make such a distinction**, as discussed in Part III. The Constitution of Denmark, for instance, provides that "except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Parliament." n355 This clearly limits the exception to the exercise of individual self-defense. **The trigger as it is employed in both this element of the Model** and in the separation of powers element to be dis-cussed next, **makes no such distinction**. **In this element, the whole point is to force the decision makers to consider whether the proposed action complies with the principles of jus ad bellum--that is, to determine whether it falls within the scope of either self-defense, individual or collective, or collective security operations authorized by the U.N. Security Council** (to state the current exceptions on the prohibition on the use of force). **It would simply beg the question to suggest that they could avoid such a requirement in the event that the contemplated use of force was to be an exercise of self-defense. Whether it is legally a case justifying self-defense is the very thing to be determined by considering compliance with international law principles. In the context of the next element of the Model, the requirement to obtain approval of the legislature, the trigger would serve the same function. Permitting the government to avoid obtaining legislative approval in the event the force is to be used for self-defense would simply create further incentives** [\*716] **for the government to manipulate the record to provide support for a claim that the action is in fact an exercise of self-defense. It would thereby defeat the very objective of having such assertions subjected to inquiry and debate in the legislature. If the case is obvious and pressing, the analysis will be easy and the approval from the legislature quickly forthcoming; if it is not easy, than there is all the more reason for having the legislature involved in the deliberations, with all the advantages that such delibera-tion brings to the exercise. In the event of an invasion or the like, there is an emergency exception**, as will be discussed in the next section. B. Separation of Powers: Legislative Approval and Judicial Review **The second element of the Model would require legislative approval of any decision to use force**, while the third element would explicitly confer jurisdiction and establish standing for judicial review of the decision-making process. Together they form the "separation of powers" component of the Model, and as such they will be considered together here. The two provisions would read as follows, allowing, of course, for the necessary changes to conform to the cir-cumstances of each jurisdiction: 2. (i) **Any decision to use armed force, or to deploy armed forces in circumstances likely to lead to the use of armed force, of a level in scale, duration, and intensity equal to that constituting an armed attack in international law, shall be approved by both houses of the legislature by a simple majority of votes cast.** (ii) **In the event of an armed attack against the territory or armed forces of the state, or other such national security emergency requiring the urgent use of armed force, making prior approval from the legislature impractical, the government may use armed force without prior approval, but shall immediately provide notice of such determination to the legislature, and it shall obtain approval from each house of the legislature in accordance with the terms of subsection (i) above within 14 days of providing such notice, failing which the executive shall cease any such use of armed force.** (iii) **The approval of any use of force by the legislature in accordance with subsections (i) and (ii) above shall also constitute a decision to use force, subject to the requirements of Section 1 above.** 3. (i) Any person may apply to a court of competent jurisdiction to obtain a declaration, injunctive relief, or dam-ages, or any other remedy that the Court may consider just and appropriate in the circumstances, for any violation of this Article. [\*717] (ii) Any person who has made application under subsection 3(i) above shall have standing so long as the issue raised is a serious issue to be tried, the person has a genuine interest in the issue, even if only as a representative of the general public, and there would be no other reasonable or effective means for the issue to be brought before the Court. Again, a number of the elements of these two sections require further explanation, namely, (i) the terms of the re-quirement for legislative approval of the use of armed force; (ii) the trigger for the provision, being the same de minimis level that was provided for in the first section of the Model; (iii) the emergency exception and ex post approval re-quirement; (iv) the fact that the approval of the legislature is a "decision to use force," thus triggering the application of the requirements of Section 1 of the same Article; (v) the provision of specific jurisdiction for judicial review, and the remedies provided for; and (vi) the creation of broad standing for applications for judicial review. The first element, legislative approval for the use of armed force, is obviously an explicit move away from a "dec-laration of war," and it does not even require that the approval be in the form of a law. But it does require "approval," expressed through a formal vote. This is in contrast to the "consultation" that is contemplated by the draft legislation proposed in the War Powers Commission Report. n356 **As discussed earlier, legislatures may have natural tendencies to avoid making difficult decisions in these kinds of situations, but that is precisely why the Model should require the ex-ecutive to work to obtain the legislature's approval**. At the same time, while in some jurisdictions such approval requires supermajorities of some form, a simple majority of votes cast should be sufficient for the purposes of a general model, albeit in both houses if the system consists of a bicameral [\*718] legislature. n357 **The requirement to obtain a majority vote in each house should be sufficient to engage the deliberative and representational features of the parliamentary process in a manner that will have an impact on the operation of the domestic causes of war**. The second element is the employment of the same trigger or threshold level of force as was used in the first sec-tion of the Article. The reasons for employing this particular concept as the threshold has already been discussed at some length in the explanation of Section 1 so will not be repeated here. **It is perhaps helpful to emphasize yet again, however, how important it is to use a concept that has real meaning in international law for the purposes of triggering the involvement of the legislature in the decision to use armed force**. n358 **Even if a provision providing for the separation of powers with respect to the use of force does not have as one of its objectives an increased compliance with international law, the principles of jus ad bellum would naturally serve as a good proxy for the kinds of armed force that are likely to both escalate conflict and attract international censure. The trigger employed in this Model is taken directly from international law, based on precisely the kind of action that is most likely to lead to wider armed conflict, which are exactly the types of action that should be subject to legislative deliberation and oversight. Moreover, it still provides the executive with significant scope for limited use of force that falls below that threshold. The third element is the emergency carve out**. As mentioned earlier, **this too is not a novel concept, and various forms of such an emergency exception with ex post approval requirements can be found in a number of constitutions, though more frequently with respect to the power to declare emergencies and thus trigger emergency powers domesti-cally**. An early example of such a mechanism can be seen in the [\*719] Constitution of France of 1791. n359 **A varia-tion on this form of emergency carve-out is also the cause of much of the controversy regarding the structure and operation of the U.S. War Powers Act of 1973. Upon closer inspection, however, the War Powers Act provisions in question are not so much an emergency carve out as the grant of a carte blanche for up to ninety days, followed by an effective legislative veto of further action if Congress does not move to approve the operation. n360 That is very different from what is contemplated by the Model.** Many of the criticisms of the War Powers Act may be quite valid, but they ought not to be extended to constitu-tional provisions that require the executive to obtain legislative approval, and which include an automatic termination mechanism in the event that approval is not obtained within a specified period following an emergency use of force. Precisely because the provision is constitutional rather than statutory, the legislature would be less able to shirk its obli-gations to take up the issue when approval is sought by the executive. And requiring the executive to overcome the difficulty of mobilizing support within the legislature is a key element of the Model. That it is difficult and costly is not a basis for criticism, but one of the virtues of the structure. If the executive cannot galvanize the legislature to approve the use of force by a simple majority, particularly where the use of force has already been undertaken in what are al-leged to be urgent circumstances, then that by itself ought to raise significant questions about both the necessity and legitimacy of the use of force in question. The fourth element of this subsection of the article specifies that any approval to use force enacted by the legisla-ture constitutes a "decision to use force" as contemplated by the provisions of section 1 of the article, thus being subject to the requirements of that section. This means that **the legislature** too, in **deliberating on the question of whether or not to approve the use of force, must sufficiently and demonstrably consider whether the use of force in question is in com-pliance with the relevant prevailing principles of international law**. This is key to the combined operation of the distinct elements of the Model, as **it is the mechanism through which the Model effectively causes the deliberative functions of** [\*720] the **legislature to engage the issues of international law compliance, and which causes the criteria of legitimacy under international law to be integrated into the deliberative process of the legislature**. **It is only by requiring both branches of government to grapple with the question of compliance with international law that the Model can ensure that this perspective will be brought to bear in a meaningful and serious fashion in the decision-making process, and that over time the international law norms will be internalized and subsequently exercise influence, in the manner contemplated by transnational process theory and the ideational strand of the liberal theories of international law compliance.**

***Statutory restrictions work – they raise the political cost of executive circumvention***

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In part, **these two positions can be reconciled. Recognition that presidents under specific political circumstances will in essence act unilaterally does not mean sustained tyranny is upon us**. **If congressional majorities and large segments of the public respond vigorously and negatively to specific presidential actions, political pressures will minimize the duration and impact of such actions**. Conversely if Congress and large segments of the public go along with the president, formal legal restrictions will have few decisive effects.¶ Over twenty years of experience with the War Powers Resolution (WPR) illuminates the problem. Presidents have usually claimed that they have consulted with Congress as stipulated in the WPR before committing troops to hostile zones. Few members of Congress would read the evidence that way. Presidents have notified Congress about what they were about to do while asserting that they have consulted Congress. What presidents have actually done does not conform with any normal meaning of consultation. Similarly, most presidential decisions to send troops into environments where combat is likely were reported, as required by the WPR , to the Congress. But presidents have studiously avoided reporting in the manner prescribed by the WPR, one that triggers its sixty-day cut-off provisions. [End Page 527]¶ This behavior by presidents surely leaves some critical decisions in a legal limbo. That, for good or evil, is where they actually are. What we can do is recognize that fact and act accordingly. Politics has and will govern the resolution of this issue. Whether this is desirable in principle can be debated. The realities of politics, however, have and are likely to prevail.¶ Legal restrictions sometimes cannot withstand political tides. Constitutional, limited government is not intended to work that way but it does in reality. There are few effective legal safeguards against intense and enduring political tides. Fortunately in U.S. history, such episodes have been few and relatively fleeting. **Legal restrictions** such as those specified in the War Powers Resolution have little direct, conclusive impact. They do, however, **help raise the political costs of unilateral executive actions**. **Therein lies their primary value**. Will presidents fully and freely involve Congress in decision making to send U.S. armed forces into potential or actual combat? Despite the force of Louis Fisher's account of the constitutional history of the war powers, the answer is probably not. **Will presidents carefully calculate the political costs of such initiatives? They usually will.** **Legislation designed to raise political costs may be a useful way to promote this possibility**, but Fisher places far too much weight on "solid statutory checks" (p. 205).

***Even if Congress fails --- plan triggers Court action***

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**Finally, the War Powers Resolution can become more effective if the judiciary is able to better interpret specific provisions of the statute**. n227 **Future cases must be brought by plaintiffs in such a way as to avoid dismissal on justiciable grounds, such as constituting a political question, lack of standing, or lack of ripeness**. n228 **In order to escape such dismissal, cases need to center on the meaning of the words within the statute, rather than on alleged presidential actions**. n229 [\*126] **If courts could better interpret the meaning of words within the Resolution, such as** "consult" n230 or "**hostilities**," n231 **the expectations of the president's actions would be more clearly defined. Thus, Congress would know when the president fails to meet the Resolution's requirements and could legitimately act in response to indiscretions.**