The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks

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Robert F. Turner
THE WAR POWERS RESOLUTION AT 40: STILL AN UNCONSTITUTIONAL, UNNECESSARY, AND UNWISE FRAUD THAT CONTRIBUTED DIRECTLY TO THE 9/11 ATTACKS

Robert F. Turner, SJD*

The 1973 War Powers Resolution was a fraud upon the American people, portrayed as a legislative fix to the problem of “imperial presidents” taking America to war in Korea and Vietnam without public approval or the constitutionally required legislative sanction. By its own terms, the War Powers Resolution would not have stopped the Vietnam War. Sadly, this and other legislative intrusions upon the constitutional authority of the president contributed to the loss of millions of lives in places like Cambodia, Afghanistan, Angola, and Central America. The statute played a clear role in encouraging the terrorist attack that killed 241 Marines in 1983, and equally clearly encouraged Osama bin Laden to kill thousands of Americans on September 11, 2001. Similarly unconstitutional usurpations of presidential power prevented our Intelligence Community from preventing those attacks and dissuaded a key ally from sharing sensitive information that might also have prevented them. After forty years, the time has come to bring an end to this congressional lawbreaking.

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I. Introduction

More than forty-six years have passed since I first became interested in the constitutional separation of foreign affairs powers while listening to a lecture by the legendary University of Chicago scholar Professor Quincy Wright. At the time I was working on my undergraduate honors thesis on the war in Indochina, and following graduation I was commissioned in the Army and served twice in the Republic of Vietnam. After leaving the Army at the end of 1971 as a junior Captain, I accepted a fellowship at Stanford’s Hoover Institution on War, Revolution and Peace where I continued my work on the war and authored the first major English-language history of Vietnamese Communism.

The War Powers Resolution was enacted over President Nixon’s veto on November 7, 1973, as a response to the Vietnam War. Just over a month later, my Hoover Institution fellowship landed me in the office of Assistant Senate Minority Leader Robert P. Griffin, of Michigan, a member of the Foreign Relations Committee. Soon thereafter, the Senator hired me off of the fellowship and for five years I served as his national security adviser, dealing directly with every war powers issue addressed in the Senate during that period. In 1981, while serving as Special Assistant to the Under Secretary of Defense for Policy, I wrote an eighty-page memorandum on the modern utility of formal declarations of war. Later, while I was an attorney in the White House, I frequently briefed members of Congress (including, at the time, such largely unknown figures as Representative Newt Gingrich and Senator Dan Quayle) about the 1973 statute at the request of the National Security Adviser. I worked on war powers issues again in 1984–1985 while serving as Acting Assistant Secretary of State for Legislative Affairs.

As a scholar, I’ve published two books specifically about the War Powers Resolution and testified repeatedly in both the House and

1. Among his many other achievements, Professor Wright served as President of the American and International Political Science Associations and of the American Society of International Law. His 1922 volume, The Control of American Foreign Relations, remains a classic in the field.
5. ROBERT F. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE (1983); ROBERT F. TURNER,
Senate on the statute. My 1,700-page SJD (academic law doctorate) dissertation dealt heavily with war powers issues, and over nearly a quarter-of-a-century I’ve taught courses and seminars dealing with constitutional war powers at the undergraduate and post-graduate level at the University of Virginia, where in 1981 I co-founded the Center for National Security Law.

All of that is to emphasize that these are not new issues to me. And while I like to think that my views have evolved and become perhaps a bit more sophisticated over the decades, my basic conclusions have not changed since 1973—irrespective of which political party has occupied the White House. Put simply, I believe the War Powers Resolution is unconstitutional, unnecessary, and unwise. This is not merely a theoretical problem, because in my view that statute has done tremendous harm to U.S. national security and the cause of world peace—including playing a key role in persuading Osama bin Laden to launch the 9/11 attacks that killed nearly 3,000 innocent Americans and precipitated conflicts that claimed hundreds of thousands of lives and depleted our treasury by more than one trillion dollars.6

My time is limited, but let me at least summarize my concerns.

II. The War Powers Resolution Is Unconstitutional

To understand the separation of constitutional powers regarding “war” and the use of military force, we need first of all to appreciate the importance of Article II, Section 1, which grants to “a President of the United States” the nation’s “executive Power.”7 Today, Americans read that clause and assume it conveys merely the power to “execute” the laws and policies established by Congress. But that was not the understanding of the men who wrote the Constitution during the summer of 1787. They understood “executive power” as the term was used by Locke,8 Montesquieu,9 and Blackstone10—whose

7. U.S. Const. art. II, § 1.
8. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶¶ 146–47 (1690).
10. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (1765).
writings were often referred to as the “political bibles”\textsuperscript{11} of the Framers. Each of these writers viewed what Locke described as the business of “war, peace, leagues and alliances”\textsuperscript{12} to be the province of the king, prince, or magistrate—the “executive” officer of the government.

How do we know the Founding Fathers embraced this view? Because they repeatedly told us so in clear terms. Writing in June 1789, Representative James Madison explained: “[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department. . . .”\textsuperscript{13} The following year, Madison’s friend and mentor Thomas Jefferson wrote in a memorandum to President Washington:

The Constitution . . . has declared that “the Executive power shall be vested in the President,” submitting only special articles of it to a negative by the Senate. . . .

The transaction of business with foreign nations is Executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.\textsuperscript{14}

Those “[e]xceptions” included the Senate’s negatives on treaties and diplomatic appointments, as well as the power of Congress to “declare War.”\textsuperscript{15} President Washington discussed Jefferson’s memorandum with Chief Justice John Jay and Representative Madison, recording in his diary three days later that both agreed with Jefferson that, beyond these enumerated exceptions, the Senate had “no Constitutional right to interfere” in the business of diplomacy, “all the rest being Executive and vested in the President by the Constitution.”\textsuperscript{16}

Jefferson’s chief rival in Washington’s cabinet, Treasury Secretary Alexander Hamilton, took an identical position in 1793:

The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President;

\textsuperscript{11} See, e.g., QUINCY WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS 263 (1922).

\textsuperscript{12} LOCKE, supra note 8, ¶ 146.

\textsuperscript{13} James Madison to Edmund Pendleton, June 21, 1789, in 5 WRITINGS OF JAMES MADISON 405–06 (1904).

\textsuperscript{14} 16 PAPERS OF THOMAS JEFFERSON 378–79 (Julian P. Boyd, ed. 1961) (emphasis added).

\textsuperscript{15} U.S. CONST. art. I, § 8, cl. 11.

\textsuperscript{16} IV DIARIES OF GEORGE WASHINGTON 1748–1799, at 128 (1925).
subject only to the exceptions and qualifications which are expressed in the instrument. . . .

It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general “Executive Power” vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.\textsuperscript{17}

Yet another key Jefferson rival, Chief Justice John Marshall, reaffirmed the president’s independent constitutional responsibilities in the field of foreign affairs in perhaps the most famous of all Supreme Court decisions, \textit{Marbury v. Madison}, when he wrote:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience . . . .

[\textit{W}hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.\textsuperscript{18}]

Marshall illustrated this principle by mentioning the Secretary of Foreign Affairs (later retitled Secretary of State) and declaring that the acts of that officer “can never be examinable by the courts.”\textsuperscript{19} As Professor Wright observed in 1922, “when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant. . . .”\textsuperscript{20}

In addition to understanding the vast grant of “executive Power” to the president with respect to foreign affairs, we must also recognize that the Constitutional Framers intentionally limited the authority of

\begin{itemize}
  \item \textsuperscript{17} XV \textit{The Papers of Alexander Hamilton} 39, 42 (Harold C. Syrett ed., 1969) (emphasis altered).
  \item \textsuperscript{18} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 165–66 (1803).
  \item \textsuperscript{19} \textit{Id.} at 166.
  \item \textsuperscript{20} \textit{Wright, supra} note 11, at 147. In his 1972 classic, \textit{Foreign Affairs and the Constitution}, Columbia Law School Professor Louis Henkin observed: “The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone.” \textit{Louis Henkin, Foreign Affairs and the Constitution} 43 (1972).
\end{itemize}
the legislature over the business of war. In the original draft, Congress was empowered “to make War”—giving it essentially all powers related to war beyond the actual command of troops, as had been the case under the Articles of Confederation.21 But on August 17, 1787, James Madison moved to amend the language to give Congress only the power “to declare war.”22 After Rufus King observed that “make” war might give Congress some role in the conduct of war, which was “an executive function,” the vote of Connecticut was changed to ay and Madison’s motion prevailed with but a single negative vote.23 Soon thereafter, a motion to involve Congress in decisions to conclude wars (“to give the Legislature power of peace”) was unanimously rejected.24

The concept of a “declaration of war” was a term of art from the law of nations, and such instruments were only considered necessary when a nation was about to launch an all-out “aggressive” attack against a nation with which it was at peace. The Framers understood the concepts of “perfect” and “imperfect” war, and also of force short of war.25

Throughout our history, Congress has formally “declared war” eleven times involving five wars.26 But as the Supreme Court noted in

21. See Articles of Confederation of 1781, art. IX, para. 1 (“The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war. . . .”).
23. See id. at 319.
24. See id.
25. As Justice Washington noted in the 1800 case of Bas v. Tingy:

   It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance . . . .

   But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war . . . .

   Bas v. Tingy, 4 U.S. 37, 40–41 (1800) (emphasis added).
26. In addition to the War of 1812, The Mexican-American War, and the Spanish-American War, Congress declared war against Germany and Austria-Hungary during World War I and against Japan, Germany, Italy, Bulgaria, Hungary, and Romania during World War II.
Verdugo-Urquidez, “The United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security.” To mention one early example, President Thomas Jefferson ordered two-thirds of the new American Navy to sail for the Mediterranean in March 1801 with orders to protect our commerce and sink and burn the ships of any Barbary States that they should learn had declared war on America, without even formally informing Congress until his December 8, 1801, State of the Union report—and the Annals of Congress reveal no expression of concern that the president should first have obtained prior legislative sanction.

The great publicists in international law, like Hugo Grotius and Emmerich de Vattel, noted that formal declarations of war were not necessary when a nation was, as Grotius put it, “repelling an invasion, or seeking to punish the actual author of some crime.” Vattel added that “[h]e who is attacked and only wages defensive war, needs not to make any hostile declaration. . . .” Other scholars made similar statements.

Many things have changed in the 225 years since the Constitution was drafted, and some of the powers vested in Congress have little contemporary relevance. Article I, Section 8, Clause 11 of the Constitution vests in Congress the powers to “declare War, [and] grant Letters of Marque and Reprisal,” but I would submit that both are anachronisms. The use of “Letters of Marque and Reprisal” was outlawed by the 1856 Declaration of Paris, and they

28. For information on this operation, see Robert F. Turner, President Thomas Jefferson and the Barbary Pirates, in PIRACY AND MARITIME CRIME: HISTORICAL AND MODERN CASE STUDIES 157, 162–63 (Bruce A. Elleman et al. eds. 2010).
32. U.S. CONST. art. I, § 8, cl. 11.
33. Letters of Marque and Reprisal authorized private ship owners to capture ships belonging to an enemy or its subjects and were widely used by the United States during the Revolutionary War and the War of 1812. It has been suggested that this clause gives Congress a negative
have not been granted by the United States since the War of 1812. Similarly, the types of all-out “offensive” (i.e., “aggressive”) wars historically associated with formal declarations of war were outlawed in principle by the 1928 Kellogg-Briand Treaty35 and again by the UN Charter in 1945.36 No country in the world has issued a declaration of war in more than 65 years.

However, this is not to suggest that the UN Charter or the Declaration of Paris have altered our Constitution in any manner. If an American president concluded that it was useful to launch an aggressive “perfect” war, or to authorize private ship owners to use armed force against the ships of nationals of a foreign nation on the high seas, then Congress would certainly still retain its negative over either action. But if the United States respects its treaty commitments and the rule of law, such behavior will not occur and the once important powers of Congress to declare war and grant Letters of Marque and Reprisal will not come into play.

Does this mean that Congress no longer has any role in the business of war? It does not. To the contrary, the Commander-in-Chief Power by itself is totally conditional upon prior legislative action. The president has no “army” or “navy” to command until they are raised or provided by statute,37 and no money is available to pay salaries or purchase weapons or other supplies without “Appropriations made by Law. . . .”38 No major prolonged military engagement is likely to prevail without additional funds and forces from Congress, and even without a constitutional need for a declaration of war, presidents usually and wisely seek some sort of legislative sanction before committing U.S. forces to major combat activities. Since World War II, this has often been done by joint


34. See Declaration Respecting Maritime Law, Apr. 16, 1856, LXI B.S.P. 155, 155–58.


36. See U.N. CHARTER art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).


38. Id. art. 1, § 9 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).
resolutions\textsuperscript{39} (the same legislative instrument historically used to declare war) styled in more recent years as “Authorizations for the Use of Military Force” or “AUMFs.”\textsuperscript{40} Congress has every right to refuse to approve requested appropriations for forces or supplies, and thus can indirectly undermine virtually any major commitment of U.S. military forces into hostilities. But a “narrowly construed”\textsuperscript{41} power to “declare War” does not carry with it legislative authority to prevent the president from using whatever military Congress creates to safeguard the national against both foreign threats and acts of aggression, or to see the laws (including the UN Charter) “faithfully executed.”\textsuperscript{42}

Put simply, the power “to declare War” does not equate to the power to limit “the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances”\textsuperscript{43} as asserted in the War Powers Resolution. Particularly outrageous is Section 2(c)(3) of that statute, which pretends to limit the president’s constitutional power to protect American civilians abroad or on the high seas. Section 2(c) reads:

\begin{quote}
(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by
\end{quote}

\textsuperscript{39} For the texts and associated citations of various declarations of war and AUMFs, see NATIONAL SECURITY LAW DOCUMENTS 867–97 (John Norton Moore, Guy B. Roberts & Robert F. Turner eds., 2d ed. 2006).

\textsuperscript{40} See, e.g., id. at 888–97. For useful background on declarations of war and AUMFs, see generally JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS (2007).

\textsuperscript{41} See supra text accompanying notes 13–17.

\textsuperscript{42} U.S. CONST. art. II, § 3 (“[The President] . . . shall take Care that the Laws be faithfully executed . . . ”). That this was intended to empower the President to enforce the nation’s treaty obligations is apparent both from statements by Hamilton and John Marshall. For example, in his first \textit{Pacificus} essay, Hamilton wrote: “The President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning.” HAMILTON, supra note 17, at 43. See also the 1800 statement by Representative John Marshall quoted \textit{infra} text accompanying note 76.

attack upon the United States, its territories or possessions, or its armed forces.\textsuperscript{44}

In a December 1984 debate with Senator Jacob Javits—the principal sponsor of the War Powers Resolution—before the American Branch of the International Law Association, I noted that the exclusion of civilians from the final clause of this provision was clearly unconstitutional. To my surprise, during his rebuttal the Senator conceded the point, explaining that the Senate had tried to get the House to include a reference to civilians in this clause but had failed. (Put differently, after failing to get House approval, the Senators voted for legislation they understood infringed upon the constitutional powers of the president, despite their oath of office to “support” the Constitution.\textsuperscript{45})

Another highly respected liberal member of the Senate, who would go on to serve as Majority Leader and receive the Nobel Peace Prize, also recognized both the statute’s constitutional infirmities and its practical effect of undermining U.S. national security. During a 1988 Senate floor colloquy in which he, Senator Bobby Byrd, Senator Sam Nunn, and Senate Armed Services Committee chairman John Warner took turns criticizing the 1973 statute, Senator George Mitchell explained:

\begin{quote}
[T]he War Powers resolution does not work, because it oversteps the constitutional bounds on Congress’ power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.

By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief. . . .

Although portrayed as an effort “to fulfill—not to alter, amend or adjust—the intent of the framers of the U.S. Constitution,” the War Powers Resolution actually expands Congress’ authority beyond the power to declare war to the power to limit troop deployment in situations short of war. . . .

The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It
\end{quote}

\begin{itemize}
\item \textsuperscript{44} Id. § 2(c)(3).
\item \textsuperscript{45} U.S. CONST. art. VI, cl. 3.
\end{itemize}
potentially undermines America’s ability to effectively defend our national security.46

On February 29, 1996, it was my honor to take part in a debate on Capitol Hill under the sponsorship of the Center for National Security Law on the proposition that the War Powers Resolution should be repealed. I was paired in the affirmative with the late House Judiciary Committee Chairman Henry Hyde, and our opponents were former House Foreign Affairs and Intelligence committees chairman Lee Hamilton and Dr. Louis Fisher of the Library of Congress. As the debate unfolded, I was pleasantly shocked to hear that neither Representative Hamilton nor my old friend Lou Fisher was willing to actually defend the War Powers Resolution. Shortly thereafter, Lou co-authored an article calling for the statute’s repeal, 47 and in 2008 Representative Hamilton served on the bipartisan National War Powers Commission, which unanimously concluded that the War Powers Resolution was unconstitutional and should be repealed.48

III. THE WAR POWERS RESOLUTION IS UNNECESSARY

There is a popular belief today that the 1973 War Powers Resolution was made necessary by “imperial”49 presidents who dragged the nation kicking and screaming into unpopular wars in Korea and Vietnam against the will of Congress and the American people. But both charges are patently false. As I have discussed elsewhere,50 when the Korean War broke out in June of 1950 President Truman could not have played it more by the book. He instructed the Department of State to draft an AUMF for Congress to consider and repeatedly asked to address a joint session of Congress. He personally met with the joint congressional leadership twice during the week following the invasion of South Korea, and he spoke separately with Foreign Relations Committee Chairman Tom Connally (who had helped draft the UN Charter) and Senate Majority Leader Scott Lucas—and both assured him that he had authority to act without legislative sanction and urged him to “stay away” from

Congress. So Truman agreed not to push for an AUMF. But statements by legislators and public opinion polls confirmed that sending U.S. troops to fight in Korea initially had strong bipartisan support in Congress and among the American people.51

In 1955, the Senate consented to the ratification of the Southeast Asia Collective Defense Treaty, creating the South East Asia Treaty Organization (SEATO), with but a single dissenting vote—committing the United States to come to the defense of South Vietnam, Laos, and Cambodia. The commitment was reaffirmed by a joint resolution (statute) in August 1964 that declared:

The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.52

If there was any doubt about whether Congress was authorizing the president to take the nation to war by that statute, it should have been dispelled both by the clear and unambiguous language of the statute and by this exchange between the majority and minority floor leaders in the debate, Senate Foreign Relations Committee Chairman J. William Fulbright and Ranking Republican John Sherman Cooper:

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51. For a more detailed discussion of President Truman’s efforts to gain legislative sanction for the Korean War, see id.

52. Southeast Asian Resolution, Pub. L. No. 88–508, § 2, 78 Stat. 384 (1964) (emphasis added); repealed by Pub. L. 91-672 § 12 (1971). This resolution is often referred to as the “Gulf of Tonkin Resolution,” but was clearly addressing a history of North Vietnamese aggression that preceded the relatively minor incident on August 2, 1964, that North Vietnamese General Vo Nguyen Giap later admitted to former U.S. Secretary of Defense Robert McNamara did occur. See, e.g., David K. Shipler, Robert McNamara and the Ghosts of Vietnam, N.Y. TIMES MAG. (Aug. 10, 1997), http://www.nytimes.com/1997/08/10/magazine/robert-mcnamara-and-the-ghosts-of-vietnam.html?pagewanted=all&sref=pm. Since the war ended, Hanoi has admitted that its leaders made a decision on May 19, 1959 to “liberate” South Vietnam by armed force and began building the Ho Chi Minh Trail through Laos and Cambodia to send troops and supplies into South Vietnam for that purpose. See, e.g., The Legendary Ho Chi Minh Trail, VIETNAM COURIER (Hanoi), May 1984, at 9.
Mr. COOPER. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

Mr. FULBRIGHT. That is the way I would interpret it.\(^{53}\)

The Vietnam War (or, more correctly, the Indochina War\(^ {54}\)) was not in the slightest sense a “presidential war” that lacked the support of Congress or the American people. True, like all American wars, the commander-in-chief and his military subordinates were solely responsible for its conduct.\(^ {55}\) But Congress formally authorized “the use of armed force” by a combined vote of 504 to 2, a 99.6% majority, and appropriated funds for several years by overwhelming majorities.\(^ {56}\) As for public support, during the month surrounding

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53. 110 CONG. REC. 18,049 (1964) (emphasis added).

54. The operative language of the Southeast Asian Resolution did not even mention “The Republic of Vietnam” or “South Vietnam” (as it was more colloquially known), but rather authorized the President to use armed force to defend the “Protocol States” of the SEATO treaty—which were Laos, Cambodia, and [South] Vietnam. This reality was ignored (presumably out of ignorance) by those who protested as illegal President Nixon’s decision to send U.S. troops into Cambodia in 1970. As someone who was in Vietnam at the time (and the following year as well), I can confirm that the operation was a tremendous military victory for the South Vietnamese and American forces, and for all practical purposes broke the back of the Viet Cong in the populated areas of the Mekong Delta.

55. Writing for the plurality in \textit{Ex parte Milligan}, Chief Justice Chase observed “neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. \textit{Congress cannot direct the conduct of campaigns. . . .}” 71 U.S. 2, 88 (1866) (emphasis added). My old friend Dr. Louis Fisher used to downplay this language on the basis of it being but a plurality opinion, but the language was subsequently quoted with approval by Justice Stevens writing for the Court majority in \textit{Hamdan v. Rumsfeld}, 548 U.S. 557, 591–92 (2006).

56. If anything, the record shows that Congress dragged President Johnson into the war. Rather than approving his request for $125 million for Vietnam when LBJ submitted the 1964 Southeast Asia Resolution, Congress on its own initiative provided $400 million. Eight months later, Congress provided another $700 million for the war by a vote of 408 to 7 in the House and 88 to 3 in the Senate. In 1966, a $13 billion supplemental appropriation for Vietnam cleared the House 389 to 3 and the Senate 87 to 2. And in 1967, when hundreds of thousands of American soldiers were clearly involved in a serious war in Vietnam, a $12 billion Vietnam supplemental appropriation passed the House 385 to 11 and the Senate 77 to 3 (a combined margin of greater than 30 to 1). ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 21 (1991).
LBJ’s air attacks against North Vietnamese bases and enactment of the Southeast Asia Resolution, LBJ’s approval rating in the Gallup Polls increased from 42% to 72%—an unprecedented 58% jump in a single month—and the Gallup organization attributed the rise to LBJ’s strong stand in Vietnam. Professor John E. Mueller observed that “support for the war in Vietnam rose very considerably as American troops joined the fighting during the last half of 1965,” when polls revealed that supporters of the war outnumbered opponents by a margin of greater than three-to-one.

In March 1966, Senator Wayne Morse (D-Oregon)—one of the two members of the Senate to vote against the Southeast Asia Resolution (both of whom were defeated in their next reelection bids)—introduced a resolution that would have repealed the 1964 statute authorizing the war. Speaking in opposition to the Morse Amendment (which was tabled by a large majority vote), Senator Jacob Javits (R-New York) declared: “It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy.” Later that same year, when the House of Delegates of the American Bar Association approved a lengthy legal memorandum drafted by my friend and colleague, Professor John Norton Moore (with whom I co-founded the Center for National Security Law at the University of Virginia School of Law more than three decades ago) declaring the war to be lawful under international and U.S. constitutional law, Senator Javits inserted a lengthy excerpt from the memo in the Congressional Record and declared:

Mr. President, now, for the first time, we have an authoritative analysis of the legal basis for U.S. assistance to the Republic of Vietnam. In my own thinking there can no longer be any doubt about the legality of our assistance to the people of South Vietnam in view of the report to be distributed today by the American Bar Association. . . . I have never doubted the lawfulness of the U.S. assistance to the Republic of Vietnam. Today, it is my privilege to present to the Senate and the American people a document, which, I believe, supports this proposition beyond any reasonable doubt.

At the time, the American people strongly supported the war. Seven years later, public opinion had shifted and Senator Javits went

59. 112 CONG. REC. 4,374 (1966) (emphasis added).
60. Id. at 13,870.
with the flow. He introduced the War Powers Resolution, explaining that it was designed to prevent “future Vietnams” and declared on the Senate floor:

The War Powers Act would assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be lawful. . . .

By enumerating the war powers of Congress so explicitly and extensively in article I, section 8, the framers of the Constitution took special care to assure the Congress of a concurring role in any measures that would commit the nation to war. Modern practice, culminating [in] the Vietnam war . . . has upset the balance of the Constitution in this respect.61

Put simply, the War Powers Resolution was a fraud upon the American people. Voters were angry about the unpopular war, and members of Congress found it in their interest to misrepresent the facts and pretend that they (and their predecessors a decade earlier) had nothing to do with sending U.S. forces to fight and die in what by 1972 was widely seen as an unwinnable quagmire without clear purpose. (The fact that the military war had largely been won62 by that point was irrelevant—it was the public perceptions that would influence the next elections.) In fairness, by 1973 some of the more junior legislators may have honestly believed that version of history, but Senator Jacob Javits—one of the most intelligent members of the Senate—clearly knew better.

Indeed, the irrelevance of the War Powers Resolution to the conflict in Indochina is apparent by a simple reading of Section 2 of the statute (quoted above63), which recognizes the president’s legal authority to commit U.S. armed forces to hostilities pursuant to “specific statutory authorization. . . .” That’s precisely what the 1964 Southeast Asia Resolution was. Put simply, had the War Powers

62. As Yale History Professor John Lewis Gaddis (often described as the Dean of American Diplomatic Historians) observed writing in Foreign Affairs in 2005, “Historians now acknowledge that American counterinsurgency operations in Vietnam were succeeding during the final years of that conflict; the problem was that support for the war had long since crumbled at home.” John Lewis Gaddis, Grand Strategy in the Second Term, FOREIGN AFF., Jan.—Feb. 2005, at 2, 9. As someone who studied the war at the time and made frequent trips to Vietnam between 1968 and the 1975 evacuation (I was the last congressional staff member to be evacuated), I strongly agree with Professor Gaddis’ assessment, as did most of my colleagues who followed the war closely at the time.
63. See supra text accompanying notes 43–44.
Resolution been in force in 1964, it would have had zero impact upon the decision to commit U.S. armed forces to war in Indochina.

Before concluding this section of my paper, it may be useful to address the constitutional role of Congress in the event of a UN Security Council decision to authorize the use of armed force pursuant to Chapter VII of the Charter. 64 On the eve of Operation Desert Storm, I was a witness before the Senate Judiciary Committee when a discussion arose about possibly impeaching President George H. W. Bush if he sought to implement Security Council Resolution 678 65 and resist Saddam Hussein’s brutal aggression without first getting an AUMF from Congress. (What a useful signal to send to our enemies at a time when the world community had united in an effort to deter continued international aggression.) President Obama’s 2011 decision to use U.S. armed force in and over the territory of Libya pursuant to Security Council Resolution 197366 raised similar questions.

One thing is clear. The Senators who in 1945 consented to the ratification of the UN Charter, and the members of both chambers of Congress who overwhelmingly approved the U.N. Participation Act (UNPA)67 later that year, did not envision a role for Congress in the authorization of U.S. combat operations to enforce a Chapter VII decision of the Security Council.

Indeed, the unanimous report of the Senate Foreign Relations Committee recommending consenting to ratification of the Charter—in language later quoted with approval by the unanimous report of the House Foreign Affairs Committee on the UNPA—declared:

Preventative or enforcement action by these [U.S.] forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war.

The committee feels that a reservation or other congressional action . . . would also violate the spirit of the United States Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress. 68

64. U.N. CHARTER arts. 39–51 (providing the authority of the Security Council to authorize the use of military force and related matters).
The House Foreign Affairs Committee’s UNPA report also explained:

The basic decision of the Senate in advising and consenting to ratification of the Charter resulted in the undertaking by this country of various obligations which will actually [be] carried out by and under the authority of the President as the Chief Executive, diplomatic, and military officer of the Government. Among such obligations is that of supplying armed forces to the Security Council concerning which provision is made in section 6 . . . .

[T]he ratification of the Charter resulted in the vesting in the executive branch of the power and obligation to fulfill the commitments assumed by the United States thereunder. . . .

Under the Constitution, the president is empowered and charged to “take Care that the Laws be faithfully executed. . . .” Under the Supremacy Clause, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .” Thus, treaties are a part of the “Laws” the president is obligated (and empowered) to faithfully execute.

This is not a new theory. Before he became our third Chief Justice, John Marshall served a term as a Federalist Representative to Congress from Virginia. During the 1800 House debate over the Jonathan Robbins affair, Marshall argued that President Adams had been right in surrendering an accused deserter found in South Carolina to the British pursuant to the extradition provision of the Jay Treaty without involving the judiciary:

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him. . . . The treaty, which is a law, enjoins the performance of a

70. U.S. Const. art. II, § 3.
71. Id. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." (emphasis added)). While there has been some confusion about this phraseology, and some have speculated that it might have allowed treaties to violate the Constitution, the actual explanation is that the United States had already entered into important treaties when the Constitution was written and the Framers did not wish to create uncertainties about their validity by requiring that treaties be made only “pursuant” to the Constitution.

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particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed.\(^72\)

However, when the 1945 UN Participation Act was being debated in the Senate, not everyone was anxious to see the president empowered to order U.S. military forces into combat based upon a decision by a group of foreigners on the UN Security Council (although, in fairness, those “foreigners” could not authorize any use of force over the objection of the American representative to the Security Council). Isolationist Senator Burton Wheeler (D-Montana) tried to pull some of the Security Council’s teeth by an amendment to the UNPA requiring affirmative authorization by the Congress before U.S. forces could actually be sent into combat to enforce a Security Council decision. The Wheeler Amendment was very clear in its purpose:

\[\text{[T]he President shall have no authority, to make available to the Security Council any armed forces to enable the Security Council to take action under article 42 of said charter, unless the Congress has by appropriate act or joint resolution authorized the President to make such forces available . . . in the specific case in which the Council proposed to take action.}\(^73\)

The Wheeler Amendment was soundly rejected by a bipartisan margin of greater than seven-to-one, receiving only nine affirmative votes,\(^74\) and the following year Senator Wheeler could not even get his party’s nomination to run for reelection.

The unanimous views of the Senate and House foreign affairs committees in 1945 that no congressional authorization was necessary for the president to use American military forces to enforce a Security Council resolution under Chapter VII were fully consistent with the original understanding of the Constitution. Formal declarations of war were universally recognized by scholars of the law of nations in the late eighteenth century to be unnecessary when a nation was using force defensively, which is precisely the reason the Security Council authorized the use of force in Korea, Kuwait, and Libya.

There remains the issue of whether the War Powers Resolution has in any way altered the president’s power to carry out Security Council Chapter VII resolutions. After all, the Supreme Court has consistently held treaties and statutes to be of equal dignity, and

72. 10 ANNALS OF CONG. 613–14 (1800).

73. Turner, Truman, Korea, and the Constitution, supra note 50, at 554 (quoting 91 CONG. REC. 7,989 (1970)).

74. Id. (quoting 91 CONG. REC. 11,405 (1970)).
when the two cannot be reconciled the Court gives effect to the most recent expression of the sovereign will.\textsuperscript{75} It follows that if the pronouncements of the Senate and House committees were but “interpretations” of authority given to the President by a 1945 treaty, a 1973 statute like the War Powers Resolution would prevail—\textit{provided} that the more recent statute were constitutional.\textsuperscript{76}

I have already argued that the War Powers Resolution is unconstitutional, and that the Constitution clearly vested in the commander-in-chief all military powers not clearly granted to Congress or the Senate. It seems also clear that the Senate and House\textsuperscript{77} believed they were interpreting the Constitution rather than merely the Charter, as they referred to the “Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress.”\textsuperscript{78}

Every administration from Richard Nixon to George W. Bush—five Republicans and two Democrats—has taken the view that the War Powers Resolution is unconstitutional. Assuming that is true, President Obama did not need statutory authorization to participate in the UN/NATO operation that led to the overthrow and death of Muammar Qaddafi. However, the situation becomes more complicated because the Obama Administration has refused to declare the War Powers Resolution to be unconstitutional. This has placed the president in a very difficult situation, because if the 1973 statute is constitutional then the president is clearly guilty of violating the law.

Interestingly, in his June 15, 2012, report to Congress, President Obama asserted he was reporting not “pursuant to” but merely “consistent with”\textsuperscript{79} the War Powers Resolution—embracing the language originated during the Ford Administration and used by every subsequent president to make it clear that by submitting reports the executive was not acknowledging any legal duty to report under the unconstitutional statute. The White House report goes on to explain that the U.S. role had been a limited one, including:

\begin{itemize}
\item 75. \textit{See, e.g.,} Whitney v. Robertson, 124 U.S. 190 (1888).
\item 76. As Chief Justice John Marshall declared in \textit{Marbury}, “an act of the legislature, repugnant to the constitution, is void . . . .” \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 177 (1803).
\item 77. Note that the House report quoted with approval the earlier Senate report.
\item 78. \textit{See supra} text accompanying note 50.
\end{itemize}
(3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO led coalition’s efforts. . . . With the exception of operations to rescue the crew of a U.S. aircraft on March 21, 2011 . . . the United States has deployed no ground forces to Libya.”80

Congress did not include a definition of “hostilities” in the War Powers Resolution. Perhaps the best definition to date is from the very able University of Texas Professor Robert Chesney, who suggested the test might be “whether U.S. forces have been authorized to use lethal force other than on a self-defense basis.”81 But it is difficult to imagine any definition that is consistent with the clear spirit and intent of Congress when the statute was enacted that would permit U.S. military aircraft to fly over the territory of a foreign nation and fire missiles to kill its soldiers.

Particularly amusing, for some of us who have tilled in this vineyard for the past four decades, was the testimony to the Senate Foreign Relations Committee by State Department Legal Adviser Harold Koh—who previously served as Dean of Yale Law School and for the previous two decades was the strongest academic champion of the War Powers Resolution. When the Attorney General, White House Counsel, and Department of Defense General Counsel all reportedly concluded that legislative authorization was necessary, it fell to Legal Adviser Koh to defend the Libyan operation. After quoting statements by predecessors from the Ford and Reagan Administrations (which he had historically dismissed82), he told the Committee: “I continue nearly four decades of dialogue between Congress and Legal Advisers . . . regarding the Executive Branch’s legal position on war powers.”83

Noting that past presidents had largely ignored the War Powers Resolution, Legal Adviser Koh cautioned the Senators about “narrow parsing of dictionary definitions” so as “to avoid unduly hampering

80. Id.
82. For a statement of Professor Koh’s views on the War Powers Resolution, see, e.g., HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION (1990).
future presidents. 

He quite correctly noted that “the military operations that the President anticipated . . . were not sufficiently extensive . . . to constitute a ‘war’ requiring prior specific approval under the Declaration of War Clause,” adding: “Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us which is not one of law but of policy.”

A legal opinion on the Libya operation by the Department of Justice’s Office of Legal Counsel (OLC) reasoned that legislative authorization was unnecessary, inter alia, because: “[T]he anticipated operations here served a ‘limited mission’ and did not ‘aim at the conquest or occupation of territory.’” The memorandum was dated April 1, 2011, and my first reaction upon reading it was that it must be an April Fool’s joke. The War Powers Resolution was enacted to prevent “future Vietnams,” and at no time in Vietnam did U.S. forces attempt “the conquest or occupation of territory.” Those conditions are not even arguably implicit in the statutory language.

As someone who spent many years working in both political branches of government, I take pride that my legal positions have not shifted either because of the branch that issued my paycheck or the political party that occupied the White House. In the Senate, I strongly denounced as unconstitutional the War Powers Resolution, the Foreign Intelligence Surveillance Act (FISA), and the use of “legislative vetoes” that years later would be declared unconstitutional by the Supreme Court. But I am well familiar with the old Washington adage that “Where you stand often depends upon where you sit,” and watching my old friend Harold Koh attempting to reconcile the administration’s actions in Libya without totally

84. Id. at 13.
85. Id. at 17.
abandoning his historical adulation for the War Powers Resolution has been more than mildly amusing.

IV. THE WAR POWERS RESOLUTION IS UNWISE

Let me turn now to my final point, that in addition to being unnecessary and flagrantly unconstitutional, the War Powers Resolution has done serious harm to the United States and the causes of world peace and human freedom. There is enough material here for a good size book, but I shall try to be brief.

To begin with, the War Powers Resolution played at least a small part in persuading our enemies in Indochina that America had lost its will to fight and President Nixon (who, to his credit, still hoped to help protect the millions of non-communists who would later die when tyranny was allowed to prevail throughout Indochina) was no longer able to stymie their planned aggression. But, in fairness, Congress did far more damage six months prior to enactment of the War Powers Resolution when it enacted legislation prohibiting the expenditure of appropriated funds for “combat activities” anywhere in Indochina:

Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

Congress clearly had the right to refuse to appropriate new funds for the war, which might ultimately have produced the same result; but the Framers of the Constitution unanimously excluded Congress from any direct role in ending wars (denying it the “power of peace”) and they agreed that any “exceptions” to the president’s general control of foreign affairs and hostilities were to be “construed strictly.” In domestic affairs, Congress has great latitude in proscribing details as to how laws are to be executed. But legislation that interferes with the ways in which the commander-in-chief

90. In Cambodia alone, the Yale Cambodia Genocide Program estimated that approximately 1.7 million people (more than 20% of the country’s population) died after Pol Pot’s Khmer Rouge (“Red Cambodians”) came to power in 1975. See The CGP 1994-2012, CAMBODIA GENOCIDE PROG., http://www.yale.edu/cgp/ (last visited Feb. 21, 2013).


92. See supra text accompanying note 24.

93. See supra text accompanying notes 14–16.
conducts hostilities—e.g., the proposals made by several legislators to prohibit the “surge” in Iraq (in which the commander-in-chief was committing reserve forces during an ongoing conflict, a core decision in the conduct of hostilities)—are inherently suspect. Here, the president is not executing powers delegated by Congress, but rather those granted directly to him by the people through the Constitution. I personally believe this statute to be unconstitutional.

There is a popular belief in Congress and among some scholars that Congress can achieve its goals by attaching “conditions” to appropriations bills mandating how the president must act. And in settings where the president is simply executing authority delegated by Congress, that is often the case. But this power is limited—like all grants of constitutional power—to exercises of power that do not otherwise conflict with the Constitution itself.94

Thus, when Congress in 1942 sought to attach a bill of attainder to a military supplemental appropriations act for World War II, arguing that the “power of the purse” was a plenary power and thus a “political question” not subject to judicial review, without dissent the Supreme Court struck it down.95 The fallacy of this modern view is easily demonstrated by a hypothetical. If Congress may by conditional appropriations usurp part of the Commander-in-Chief Power, by what logic may it not place comparable conditions upon appropriations for the judiciary—e.g., denying funds if the Supreme Court overturns (or fails to overturn) a controversial precedent (e.g., Row v. Wade96), or even prohibiting any exercise of the power of judicial review (which, unlike the Commander-in-Chief Power, is not expressly enumerated in the Constitution)? For that matter, why can’t Congress condition judicial appropriations upon the justices of the Supreme Court appearing before the Senate Judiciary Committee weekly during their term to receive instructions on how to decide pending cases? Such a theory would totally destroy the doctrine of

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It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Id. at 319–20 (emphasis added).


96. 410 U.S. 113 (1973).
separation of powers and leave us with the legislative “tyranny” about which the Founding Fathers warned us.97

Returning to the harm done by the War Powers Resolution, one could make a strong case that it encouraged Soviet adventurism in places like Angola98 and Afghanistan99—and undermined deterrence in

97. The Supreme Court has repeatedly observed “the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.” See, e.g., Buckley v. Valeo, 424 U.S. 1, 129 (1976); Bowsher v. Synar, 478 U.S. 714, 727 (1986). Typical of the prevailing view was Representative James Madison’s remark in 1789 that: “[I]f the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the Encroachments of the Legislative department.” James Madison to Edmund Pendleton, supra note 13, at 406.

98. This is not the occasion for a full discussion of the conflict in Angola. Summarized briefly, the April 1974 socialist revolution in Portugal led to the Alvor Agreement in January 1975 in which three rival revolutionary groups agreed to hold elections to decide the nation’s future in October. Moscow had been supporting the MPLA (People’s Movement for the Liberation of Angola) since 1961, and—following the Communist victories in Indochina—tens of thousands of Cubans were airlifted to Angola to support the MPLA. The United States began covertly assisting the two other groups (the FNLA and UNITA) to “level the playing field,” and on December 9 President Ford met personally with Soviet Ambassador Anatoly Dobrynin to complain of the intervention. The airlift immediately stopped, but ten days later the Griffin Amendment (which I had drafted) was defeated, and the Senate quickly approved the Clark Amendment cutting off all CIA assistance to the non-Communist forces in Angola. The airlift immediately resumed. Estimates of the number of people who subsequently died in Angola before Congress repealed the Clark Amendment in 1985 range as high as 1.5 million. See, e.g., Bethany Lacina & Nils Petter Gleditsch, Monitoring Trends in Global Combat: A New Dataset of Battle Deaths, 21 EURO. J. POPULATION 145, 159 (2005).

99. President Carter’s failure to understand the nature of Leninism likely played a significant role in undermining deterrence in this setting, but the fact that Congress had enacted legislation preventing him from responding to international aggression was almost certainly a factor. In June 1977, President Carter declared in a commencement address at Notre Dame University that America was finally free of its “inordinate fear of communism. . . .” See President Jimmy Carter, Human Rights and Foreign Policy, Commencement Remarks at Notre Dame University (June 1977), available at http://teachingamericanhistory.org/library/index.asp?document=727. To his credit, President Carter became more aware of the Leninist threat following the Soviet invasion of Afghanistan. In his final weeks in office, President Carter began providing covert assistance to the Mujahideen in Afghanistan and military aid to the government of El Salvador as well. For a useful summary of why resisting Communist aggression was important, see
Central America as well—but, for reasons of space, I want to focus on the deployment of peacekeepers in Beirut, Lebanon three decades ago.

As some will remember, in 1982 President Reagan sent a contingent of Marines to join peacekeepers from Great Britain, France, and Italy in what might be described as a “presence” mission. The goal was simply to keep things peaceful and provide assurance to the representatives of the various rival factions in Lebanon that they could come together to try to negotiate a peace agreement without fear of being killed. Every country in the region and every faction in Beirut initially supported the mission. Further, the Chief Counsel to the Senate Foreign Relations Committee, Dr. Fred Tipson, told me personally that he had never seen better consultation from the White House on a military deployment.

Not a single member of Congress objected to the deployment, although several recognized that there were some risks associated with sending U.S. forces into the region. Violence was not uncommon in either the Middle East or in Beirut at the time. But most observers seemed to think that the mission was warranted by the chance of bringing peace to Lebanon.

If we apply Professor Chesney’s definition of “hostilities,” it is useful to note that the Rules of Engagement for the Marines were that they could “only return rather than initiate fire” and use force “only in self-defense.” The deployment had nothing to do with the power of Congress to “declare War.”

Nevertheless, “consistent with” the War Powers Resolution, President Reagan submitted a report to Congress explaining the mission. But some congressional Democrats apparently saw political


102. See Chesney, supra note 81.


104. This is not in my view a partisan issue. A look at some of the remarks made by Republican leaders during the 2011 Libya operation reveals that neither political party has much interest in Senator Arthur Vandenberg’s principle that “politics should stop at the water’s edge” when the White House is controlled by the other party. Arthur Vandenberg: A Featured Biography, Senate Historical Office,
hay to be made if they could portray the deployment as “another Vietnam,” and House Foreign Affairs Committee chairman Clement Zablocki took public exception to the fact that President Reagan had not reported specifically under Section 4(a)(1), as required when a president sends U.S. armed forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. . . .”105 Zablocki declared that the president’s failure to report under Section 4(a)(1) was “eroding the integrity of the law” and threatening a “constitutional crisis.”106 (One can only wonder how the various militia groups in Beirut would have responded to learning that President Reagan had informed Congress he was sending U.S. Marines into “hostilities” when they had been assured the multinational force intended only to engage in “peacekeeping.” Certainly such a message would not have contributed to the goal of reassuring the armed factions that they could safely engage in peaceful negotiations.)

Particularly in the Senate, the debate soon took on an even more partisan tone. The Washington Post noted that “the fairly prominent involvement of Senate Democratic Campaign Chairman Lloyd Bentsen in the dispute . . . suggest[s] that the Democrats are doing push-ups for 1984.”107 Although the Senate Foreign Relations Committee has historically prided itself for a tradition of non-partisanship, when its report on the Beirut deployment legislation was released it included a section entitled “Minority Views of All Democratic Committee Members”—which from my five years of experience working with that committee was uncommon if not unprecedented.

During the hearings leading up to that report, Marine Corps Commandant General P.X. Kelley cautioned the Senators that their partisan debate was endangering the lives of his Marines. As summarized in the Committee Report:

Marine Corps Commandant Paul X. Kelley testified to the Committee on September 13 that a short time limit might


105. For details on this deployment and relevant citations for this section of my paper, see TURNER, REPEALING THE WAR POWERS RESOLUTION, supra note 5, at 138–44.


stimulate more attacks on the Marines in an effort to encourage a public outcry for the withdrawal. He commented that “I am concerned that we could impose what could prove to be a dangerous time constraint that would be misread by our potential adversaries. . . . It would encourage hostile forces or forces inimical to the best interest, the life and limb of the Marines.”109

Soon thereafter, when an unidentified White House spokesman made the same point, Senate Democrats went ballistic. As reported in the Washington Post, Senator Thomas Eagleton “blasted back angrily” that “[t]o suggest . . . that congressional insistence that the law be lived up to is somehow giving aid and comfort to the enemy is totally unacceptable.” The Post observed: “When the anonymous White House comment implying danger for the Marines was reported on Capitol Hill, Democratic leaders were infuriated and, if anything, hardened their position.”110

During the highly partisan Senate floor debate on a joint resolution to extend the deployment another eighteen months, Senator Joe Biden (D-Delaware) made reference to the fears expressed by some that even having the debate might be endangering the lives of the Marines in Beirut:

[Y]ou have already heard the argument—“what will happen is that those who wish to see the marines leave and spoil things for Lebanon will in fact continue the pressure upon the United States of America by shelling the marines, building up support in America to bring the boys home”. . . . My response to that is that may be true, but until we once invoke the War Powers Act . . . . we are going to always be in the situation where we are beaten over the head by every administration that says 60 days is not enough time.111

The joint resolution passed the Senate by the narrow margin of 54 to 46—a shift in four votes could have denied the president authority—with only two Democrats breaking ranks and supporting President Reagan.112 Immediately after the vote, Foreign Relations Committee Chairman Charles Percy (R-Illinois) assured his Senate colleagues that “we are not simply dropping out of the picture” until the eighteen-month extension expired, and “we will follow the situation carefully,” emphasizing that the authorization could be

109. Id. at S12913.
amended “if the circumstances should justify it.”113 In case America’s adversaries missed that subtle message, the Christian Science Monitor had already put it more bluntly: “Congressional hesitation, reservations, and fears are such, however, that should American troops suffer casualties in Beirut, many senators and congressmen would immediately reconsider their support.”114

The message was clearly not missed by the forces of radical Islam in the Middle East, and soon after the highly-partisan congressional debates, American intelligence intercepted a message between two Muslim militia units: “If we kill 15 Marines, the rest will leave.”115

This intelligence intercept was apparently leaked to the news media, as it was quoted in the U.S. News & World Report that hit the streets on Monday, October 24, 1983.116 The day before, at 6:22 AM a terrorist truck bomb had claimed the lives of 241 sleeping Marine peacekeepers in Beirut. The truck bomb was estimated by the FBI to have been more powerful than 12,000 pounds of TNT—the largest non-nuclear, man-made explosion since World War II.117

One might ask why the Marines were attacked. Traditionally, anyone considering attacking U.S. Marines would realize that, soon thereafter, a large contingent of other Marines with very bad attitudes would descend upon them and impose a painful lesson—not something any rational person would wish. But, starting with Vietnam, Congress changed the rules—in the process flagrantly disregarding the oath of office taken by each member to support the Constitution. And in Beirut, Congress unintentionally placed a virtual bounty on the lives of American Marines, assuring our enemies that if they could kill enough Marines, Congress would likely “reconsider” the deployment, and enough votes would be changed to require the prompt withdrawal of the survivors. This certainly wasn’t intentional, but at the same time the Senators had been expressly warned by the Commandant of the Marine Corps that their partisan debate was placing his Marines at risk.

116. This periodical is always dated one week after it is released, presumably so potential purchasers will view it as still current news. To allow for printing and distribution, it would certainly have been finalized prior to the bombing of the Marine barracks the previous morning.
Soon thereafter, the remaining Marines were withdrawn. But that’s not the end of the story. In 1998, Osama bin Laden told an ABC News reporter in Afghanistan: “We have seen in the last decade the decline of American power and the weakness of the American Soldier, who is ready to wage Cold Wars, but unprepared to fight long wars. This was proven in Beirut in 1983 when the Marines fled after two explosions.”118 It does not take a rocket scientist to recognize that the partisan and unconstitutional 1983 congressional debates pursuant to the War Powers Resolution on the Beirut deployment played a major role in persuading Osama bin Laden to launch the 9/11 attacks eighteen years later.

In fairness, the Beirut congressional debates were not the only factor. Time will not permit a detailed discussion of the role of Congress in undermining U.S. humanitarian efforts to save hundreds of thousands of lives in Somalia in 1991 to 1993, for example. But when Major General Thomas Montgomery requested Abrams tanks for force protection, “[t]he Clinton team, under mounting congressional pressure to withdraw all U.S. forces, blocked this recommendation.”119 Soon thereafter, on the night of October 3–4, 1993, a Haitian commando attack on a U.S.-Panamanian U.N. peacekeeping force at the UN’s Hotel des Palmes killed 18 and wounded 37.

118. Robert T. Jordan, 

After a little resistance, The American troops left after achieving nothing. They left after claiming that they were the largest power on earth. They left after some resistance from powerless, poor, unarmed people whose only weapon is the belief in Allah The Almighty, and who do not fear the fabricated American media lies. We learned from those who fought there, that they were surprised to see the low spiritual morale of the American fighters in comparison with the experience they had with the Russian fighters. The Americans ran away from those fighters who fought and killed them, while the latter were still there. If the U.S. still thinks and brags that it still has this kind of power even after all these successive defeats in Vietnam, Beirut, Aden, and Somalia, then let them go back to those who are awaiting its return.

Id.

1993, eighteen American rangers were killed and eighty-four others wounded in an event later portrayed in the 2001 movie Blackhawk Down—a tragedy that might easily have been prevented by the use of the denied Abrams tanks. The subsequent withdrawal of U.S. forces provided further evidence to bin Laden that Americans had no stomach for casualties.¹²⁰

This leads me to my final point. The War Powers Resolution is hardly the only unconstitutional statute enacted by Congress in the wake of Vietnam that has done serious harm to our nation and the cause of peace. Indeed, having played a prominent role via the War Powers Resolution in providing the incentives that led bin Laden to attack America on 9/11, a separate statute usurped the president’s constitutional power over what John Jay in Federalist No. 64 referred to as “the business of intelligence”¹²¹—preventing our intelligence community from discovering and preventing the plots that killed nearly 3,000 Americans on September 11, 2001. I am talking, of course, about the 1978 Foreign Intelligence Surveillance Act (FISA).

From 1981 to 1984, I worked in the White House as counsel to the President’s Intelligence Oversight Board. One of my duties was to ensure that the Federal Bureau of Investigation, National Security Agency, and other elements of the intelligence community complied with laws (and Executive Orders) constraining intelligence activities—one of the most important of which being the FISA statute. Now is not the time for a detailed discussion of this statute, but it makes it a felony for anyone within the intelligence community to engage in electronic surveillance within the United States unless he or she first obtains a warrant from the Foreign Intelligence Surveillance Court—and to obtain such a warrant he or she must satisfy the court that the target of the surveillance is a “foreign power” or agent thereof. The term “foreign power” is defined so as to include international terrorist organizations like al-Qaeda.

To their credit, FBI agents in San Diego identified two of the men who later hijacked American Airlines Flight 77 that crashed into the Pentagon on 9/11 as potential terrorists, but they had no evidence to tie them to al-Qaeda and were instructed to back off out of fear even a visual surveillance in public might lead to civil liberties complaints.

Similarly, FBI agents in Minneapolis learned that Zacarias Moussaoui was taking lessons to learn how to pilot large commercial jet aircraft, and they became convinced he was a foreign terrorist who


¹²¹ See infra text accompanying notes 130–31.
intended to use a hijacked plane as a weapon. Repeatedly, they sought assistance from the National Security Law Unit of the FBI’s Washington, D.C., headquarters; but they were told (correctly) that without evidence Moussaoui was an “agent of a foreign power” such a warrant could not be obtained. After the 9/11 attacks, Coleen Rowley—the chief legal adviser to the Minneapolis FBI office—wrote a scathing memorandum to FBI Director Robert Mueller complaining about the incompetence of the bureaucrats at FBI headquarters—which along with congressional testimony to the same effect resulted in her being named one of three “whistleblowers” in Time magazine’s “Persons of the Year” in 2002.

In reality, the lawyers in the National Security Law Unit did exactly what the statute required and patiently explained to Ms. Rowley that if she could not find information linking Moussaoui to a foreign power she might try to obtain a criminal warrant through the local U.S. Attorney. But Ms. Rowley believed the U.S. Attorney’s office in Minneapolis was too strict in its requirements for probable cause, and did not pursue that avenue—a decision she later admitted she regretted. Ultimately, there was a major investigation by the Department of Justice Inspector General’s Office, and in their (declassified in 2006) report of more than 400 pages the inspectors emphasized Ms. Rowley’s ignorance of the FISA statute.

This same Inspector General report revealed what may be another consequence of the congressional assault of presidential powers following the Vietnam War. Specifically, a strong case can be made that the reason America could not get the information necessary to sustain a FISA warrant for Moussaoui is because one of our most important foreign allies did not believe we could be trusted with extremely sensitive intelligence information.

The report notes that the FBI had made repeated inquires both in writing and by phone of the British government seeking any information it might have tying Moussaoui to al-Qaeda or any other “foreign power.” Although it was emphasized that the request was extremely urgent, weeks went by with no response. The day after the


124. U. S. Dep’t of Justice, supra note 122, at 130–31, 140.

125. Id. at 140.

126. See, e.g., id. at 190 n.146.

127. Id. at 101, 121, 151.
attacks of September 11, 2001, killed thousands of Americans, the British provided the FBI with information that Moussaoui had attended an al-Qaeda training camp—information that might theoretically have allowed the FBI to obtain a FISA warrant to search Moussaoui’s laptop and collect other information that might have prevented the attacks. (I say “theoretically,” because FISA warrants require considerable documentation and layers of high-level approval, and in 2001 usually took weeks if not months to obtain once the necessary evidence of a tie to a “foreign power” like al-Qaeda had been established. So even if the British had been more cooperative, the request for a warrant might well have still been tied up in procedural delay when the attacks occurred. The entire fiasco reaffirms the brilliance of the Founding Fathers, who repeatedly emphasized the need for “speed and dispatch” in military and diplomatic matters.)

The Inspector General report concluded: “It is not clear why the information from the British was not provided to the FBI until after September 11.” One possible explanation that comes readily to mind is that the source of the British intelligence might have been extremely sensitive—someone providing information of the greatest importance who might be killed if such information became public, and the United States could not be relied upon to keep secrets. While classified information is leaked by members of both political branches, the access given to legislators and their staff starting in the mid-1970s has been a source of particular concern to foreign intelligence services that have traditionally been cooperative with the United States. And while I deplore the delay that might possibly have prevented the 9/11 attacks, I can’t honestly say that I blame the British for wishing to protect their sources and methods.

If fear of American “leaks” was in reality the reason the British withheld the information on Moussaoui, it was hardly a new concern. Writing in Federalist No. 64 in 1788, John Jay had explained that the reason the Congress had been excluded from any role in “the business of intelligence” was because their members could not be trusted to keep secrets and foreign intelligence sources would be unwilling to

128. Id. at 180.
129. Id.
130. In 1776, when the Committee of Secret Correspondence of the Second Continental Congress learned through secret agents that France had agreed to provide major assistance to aid the new nation in its war for independence against Great Britain, Benjamin Franklin and the other four members of the Committee unanimously concluded that they could not share the information with anyone else in Congress, adding in their secret report: “We find by fatal experience that Congress consists of too many members to keep secrets.” Verbal Statement of Thomas Story to
share sensitive information if they knew it would be shared with legislators:

These are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming, them act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest. 131

I have charged that FISA was unconstitutional, and a brief summary of the reasons for that conclusion may be in order before bringing this piece to a close. I worked in the Senate when FISA was enacted in 1978 and I believed it to be unconstitutional at the time. I have testified before both the Senate 132 and House 133 Judiciary committees on the statute at some length since the 9/11 attacks, but space will not permit a lengthy discussion of its infirmities here. I will note that every federal court to decide the issue has held that there is a “national security” or “foreign intelligence” exception to the Fourth Amendment’s warrant requirement, and when the 1980 Truong case, 134 reaching that same conclusion, was appealed to the Supreme Court, not a single justice voted to grant certiorari. 135 Indeed, even Congress recognized the president’s independent constitutional power to collect “foreign intelligence information” when it wrote the first

131. FEDERALIST No. 64, at 434–35 (Jacob E. Cooke, ed. 1961) (emphasis added).
133. See Is Congress the Real “Lawbreaker”? , supra note 87.
134. United States v. Truong, 629 F.2d 908, 912 (4th Cir. 1980). The court held that “separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.” Id. at 914.
135. The Court usually does not grant certiorari when all of the circuits are in accord, but surely if the justices had believed that the government was violating fundamental principles of the Bill of Rights at least one of them would have made that known.
The War Powers Resolution at 40

federal wiretap law in 1968, and the appellate court established by the FISA statute unanimously noted in 2002:

The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President’s constitutional power.*

Those interested in a more detailed discussion of the issue are invited to examine my extensive congressional testimony on the issue.

Speaking at the National Press Club in Washington, D.C., on January 23, 2006, the Director of the National Security Agency from 1999 to 2005 discussed the Terrorist Surveillance Program (TSP) authorized by President Bush shortly after the 9/11 attacks and declared: “Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such.” From working with the Intelligence Community over many decades, and private conversations with friends in the business both from this country and abroad, I don’t think there is any doubt about that.

V. CONCLUSION

In conclusion, the 1973 War Powers Resolution is a horrible law. It is without the slightest doubt unconstitutional—not just in specific terms like the legislative veto in Section 5(c), but at its very core. Nor does it serve any serious purpose, because it was premised upon the

136. “Nothing contained in this chapter . . . shall limit the *constitut*ional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.” Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3) (1970) (emphasis added).


falsehood that “imperial presidents” took America to war in Korea and Vietnam without consulting Congress, when the facts clearly show that President Truman was talked out of seeking an AUMF in Korea and the Indochina War (not only in South Vietnam, but in Cambodia as well) was formally authorized with the affirmative votes of 99.6% of the members of Congress.

Finally, I submit that the evidence shows that partisan debates over the War Powers Resolution—and the military disasters they produced—were a primary factor in Osama bin Laden’s decision to launch the 9/11 attacks, and another post-Vietnam unconstitutional statute (FISA) prevented our intelligence community from detecting and preventing those attacks.

The time has come to demand—as the bipartisan National War Powers Commission unanimously recommended four years ago—that Congress repeal the 1973 War Powers Resolution. Forty years of congressional law-breaking is long enough.