



APPENDIX ONE
AN OVERVIEW OF PROPOSALS TO REFORM THE WAR
POWERS RESOLUTION OF 1973



*This document reflects due diligence done by the Commission's staff,
but not necessarily the views of the Commission.*

Since its passage in 1973, the War Powers Resolution (“WPR” or “Resolution”) has been subject to significant, sustained criticism and numerous proposals for reform. The purpose of this appendix is to provide a high-level overview of many of those proposals.

This appendix is divided into three parts. Part I briefly examines the constitutional landscape in which debates regarding the WPR have occurred. Broadly speaking, there are two schools of thought on constitutional war powers: a congressional school and an executive school. To some extent, the school to which one adheres (and how closely they adhere) affects what he or she (a) perceives to be the deficiencies in the WPR; and (b) considers to be viable reform proposals.

Part II addresses the various proposals to amend or repeal sections of the WPR. Virtually every provision of the WPR has been subject to legislative or scholarly proposals for reform at some point over the past three decades, although most proposals have focused on Sections 2 through 5 of the legislation, which we examine in more detail. In addition, this Part of the appendix addresses proposals to add new concepts to the WPR not presently contained within the statute, such as linking presidential non-compliance with the WPR to an appropriations cut-off; providing mechanisms to make the Resolution judicially enforceable; and extending the scope of the WPR to cover covert, non-military actions.

Finally, Part III describes in more detail some of the more comprehensive WPR reform proposals. Although many of the proposals to reform the WPR have been piecemeal in nature (*i.e.*, focusing on altering or repealing a handful of provisions), there have been several efforts to replace the existing statute with a re-conceptualized framework. This Part examines three prominent examples of these efforts, specifically: the Byrd-Warner “War Powers Resolution Amendments of 1989” (“Byrd-Warner Act”); Professor John Hart Ely’s “Combat Authorization Act” described in his 1993 book, *War And Responsibility: Constitutional Lessons Of Vietnam And Its Aftermath*; and Senator Joseph Biden’s 1988 “Use of Force Act.” At various points, this appendix also considers Senator Warner’s “Peace Powers Act of 1995,” as well as Representative Lee Hamilton’s “Consultation Act of 1993,” which, as drafted, would have augmented the WPR to require greater consultation, rather than amend or replace the WPR. Also instructive, although not discussed in great detail here, are Professor Peter Raven-Hansen’s “strong” and “weak” reform proposals.¹ Further worth mentioning is Representative Walter Jones’s proposed Joint Resolution of September 25, 2007,² which in some ways is an outgrowth of a 2005 report by the Constitution Project.³

I. THE CONSTITUTIONAL LANDSCAPE

As an initial matter, it is important to recognize the extent to which proposals to reform the WPR are intertwined with debates over the constitutional allocation of war powers. Although ultimately separate from the issue of whether and how the WPR should be reformed, how an individual resolves the constitutional questions surrounding the allocation of war powers can have a significant impact on the range of options that he or she is willing to consider with respect to reform proposals.

As a general matter, perspectives on how the Constitution allocates authority over war powers can

be separated into two schools of thoughts.⁴ The first school, roughly speaking, believes that Congress has paramount authority to decide when to initiate and end hostilities. This school includes members of Congress, such as Senator Biden, as well as numerous prominent academics, such as John Hart Ely, Harold Koh, Louis Henkin, and Michael Glennon.⁵ Adherents of this school generally contend that congressional preeminence in this area derives from the Article I provisions granting Congress the power to declare war; to grant letters of marque and reprisal; to raise and support armies; and to provide and maintain navies, as well as the “necessary and proper” clause.⁶ Proponents of the congressional approach do not tend to assert that the President has no authority in the area of war powers and they acknowledge that the President can initiate hostilities without congressional authorization in the case of emergencies (although there is some disagreement within the school over what constitutes an “emergency”).⁷ But, on the whole, members of the congressional school essentially believe that the President’s constitutional power to initiate hostilities without congressional authorization is limited and that the constitutional framework commits the decision about when to initiate hostilities, authorize force, or place U.S. forces in potentially hostile situations to Congress.⁸

The second school of thought is made up of those individuals, such as Robert Turner, Robert Bork, Eugene Rostow, Phillip Bobbitt, and John Yoo, who believe that the Constitution grants the primary authority for authorizing military force to the President, pursuant to the Article II provisions making the President the Commander-in-Chief of the Armed Forces and vesting all executive power in the Presidency.⁹ Proponents of this school tend to assert that congressional authority over the use of force is limited, essentially comprising the power to declare that a state of war exists (*i.e.*, to specify the nature of the conflict as a matter of international law) and to choose how to fund the armed forces.¹⁰ Similar to the congressional camp, there is some disagreement among pro-executive advocates at the margins—for example, some proponents of the executive school believe that Congress lacks the authority even to condition military funding (*i.e.*, Congress either funds the military or not, but it cannot provide funding with the condition that troops not be used in a particular theater), while others assert that the conditioning of appropriations poses no constitutional obstacle.¹¹ But on the whole, proponents of the executive school essentially believe that the constitutional framework gives the President, not Congress, the basic responsibility for determining when U.S. forces need to be deployed in the interest of national security.¹²

The school to which an individual belongs often affects both how that individual perceives the current WPR and the questions of whether and how the WPR can and should be reformed. For advocates of the congressional school, the WPR—with the possible exception of Section 5(c)’s “legislative veto” provision, *see infra*—is not only constitutional, but largely necessary, insofar as it is a constitutional imperative that Congress play an active role in the war-making process.¹³ Adherents of this school thus tend to focus on reforms of the WPR that strengthen the congressional role in authorizing force.¹⁴ By contrast, for advocates of the executive school, not only are large sections of the WPR unconstitutional, but essentially any effort by Congress to inject itself into use-of-force issues is constitutionally questionable. Accordingly, adherents of this school tend to focus on either repealing the Resolution outright or reforming it so that Congress’s role is essentially limited to an advisory capacity.

II. PROPOSALS TO AMEND OR REPEAL THE WAR POWERS RESOLUTION

As noted above, the WPR has been hotly debated since its enactment. Although much of the debate, particularly in academia, has centered on the constitutional issues reviewed in the prior section (with substantial scholarship being done regarding which school has the better argument as a matter of original intent and early historical practice), increasingly discussions about the WPR's failings have focused on its practical shortcomings. Simply put, there is significant agreement among scholars and policy-makers that the WPR framework has not worked as intended. Indeed, several Congressional Research Service (CRS) Reports issued in the past few years have demonstrated that presidential compliance with the WPR has been largely non-existent over the course of the statute's history.¹⁵

This Part of the memo catalogues the various proposals to reform provisions of the WPR, both legislative and scholarly, that have been suggested over the past three and half decades. In so doing, it also offers a brief description of each section of the WPR—excluding Sections 9 (Separability) and 10 (Effective Date), for which there have been no significant reform proposals—and describes the various critical charges to which that section has been subject. In addition, this Part of the memo also discusses proposals to add new concepts to the WPR that are not contained within the existing statutory framework. More specifically, both legislators and scholars have made proposals to supplement the WPR with: (1) provisions that tie presidential non-compliance to an appropriations cut-off; (2) provisions that purport to ameliorate standing and justiciability concerns so that courts can adjudicate the issue of presidential compliance; and (3) provisions that expand the scope of the WPR to cover military operations performed by non-military personnel or foreign paramilitaries working at U.S. direction.

Before addressing proposals to reform the WPR, however, it is important to recognize that the statute also has been subject to numerous proposals for repeal. Initially, most of these repeal proposals were advanced by advocates of executive power and predicated on the reasoning offered by President Richard Nixon when he vetoed the WPR—*i.e.*, that it constituted an unconstitutional and unwise limitation on presidential authority.¹⁶ Included among these repeal proposals is legislation that Senator John Warner co-sponsored with Senator Bob Dole and others in 1995. Section 2 through 4 of this legislation would have repealed the WPR, but preserved the duty it imposes on the President to consult with Congress and provide it periodic and episodic reports.¹⁷ Sections 5 through 9 placed restrictions on the ability of the President to involve the U.S. military in U.N. peacekeeping missions; section 5 required Congress to approve such missions by Act or joint resolution (even though such approvals for more typical wars was eliminated); and section 7 imposed criminal penalties on executive branch officials for failing to comply with these new requirements.

In recent years, there has also been a growing number of scholars who, although theoretically favoring strong congressional war powers, have called for a repeal of the WPR on pragmatic grounds. Most notably, Professor Michael Glennon, who helped craft the WPR as an aide to the Senate Foreign Relations Committee, has argued for repeal of the Resolution on the grounds that the current framework has failed, that it will be politically impossible to enact a more effective statute, and that keeping an impotent statute on the books damages the credibility of Congress in the war powers area.¹⁸ In addi-

tion, other scholars have gone further, arguing that the vagaries of foreign affairs make it impossible to ever enact an effective war powers statute, regardless of the political situation.¹⁹

The response to arguments of this sort has been three-fold. First, as demonstrated below, there are numerous legislators and scholars who disagree with the basic premise and do believe that it is possible to reform the WPR to make it effective in practice. Second, some WPR proponents, such as Louis Henkin, have argued that the WPR has had a positive effect, even if it has failed to operate as intended. They assert that the WPR has had a deterrent effect, shaping the behavior of the executive branch and forcing executive branch officials to justify their activities in light of the WPR's requirements.²⁰ Third, Thomas Franck has noted that repeal of the WPR might carry with it "hidden political costs," in the sense that repeal might result in "ever broader assertions of executive ascendancy."²¹

Section 1: The first section of the WPR simply states its title.²² Most of the proposed changes to this section have arisen from a desire to disassociate a reform proposal from the WPR's generally negative public reputation, as well as from a desire to signify more clearly that the statute applies to combat circumstances short of an actual war. Thus, for example, Senator Biden entitled his proposed replacement for the WPR, the "Use of Force Act,"²³ while Ely called his proposed substitute the "Combat Authorization Act."²⁴ In addition, there have also been a number of efforts to change the title from "War Powers Resolution" to "War Powers Act," apparently due to the idea that using the term "resolution" rather than "act" creates the public perception that the WPR has less stature than a normal statute.²⁵

Section 2: The second section of the WPR, entitled "Purpose and Policy," sets out the rationale for the statute in Subsection 2(a), and then provides a description of congressional war power and presidential war power in Subsections 2(b) and 2(c), respectively.²⁶ Most of the proposals to amend this section have focused on Subsection 2(c), which provides that a President can only constitutionally introduce U.S. forces into hostilities, or into "situations where imminent involvement in hostilities is clearly indicated by the circumstances," pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack on the United States territory or its armed forces.²⁷

Subsection 2(c) has generated significant confusion regarding its purpose and effect. At some level, this confusion is unsurprising since the subsection is essentially a vestige of the House-Senate Conference on the WPR. During the original WPR debate, the House proposed circumscribing presidential authority through procedural mechanisms, while the Senate sought to do so through substantive restrictions.²⁸ The House approach won out and is embodied in Sections 4 and 5 of the WPR; however, the Senate's substantive demarcations nonetheless ended up being codified in part in Subsection 2(c).²⁹ It is not clear, because no court has ever resolved the matter, whether Section 2 is an operative, binding portion of the WPR, or rather is merely a statement of Congress's reasoning for enacting the statute. If it is operative, it would be a prohibition on the President using force except in the circumstances set forth in the section. Although this section reads like a substantive limit on presidential power, some commentators have suggested that Subsection 2(c) is essentially hortatory in nature and has no binding effect.³⁰

Criticism of Subsection 2(c) has been varied in nature. Most of the criticism of the subsection has

focused on the notion that the subsection is an inaccurate statement of Presidential power. Although much of this sort of criticism has come from proponents of the executive school, even advocates from the congressional school concede that the subsection shortchanges the number of circumstances where a President may introduce U.S. forces into hostilities.³¹ Most notably, there is a general consensus that presidential authority extends to two circumstances originally included in the Senate-passed version of the WPR³²—the deployment of U.S. troops (1) to rescue and protect American citizens abroad from attack and (2) to forestall *imminent* attacks on the United States³³—and several advocates have also indicated that Subsection 2(c) should have provided for deployments to respond to UN Security Council resolutions.³⁴

In addition to being criticized for being inaccurate, Subsection 2(c) has also been criticized for being ineffective. There is no indication that the subsection has limited Presidential behavior in any respect. Indeed, Presidents conducted numerous operations since the WPR's enactment that have contravened the subsection's plain terms.³⁵

Proposals to reform Subsection 2(c) of the WPR therefore can be broadly divided into three categories: (1) proposals to repeal the subsection on constitutional grounds; (2) proposals to repeal the subsection on pragmatic grounds; and (3) proposals to strengthen the subsection by making its restrictions legally binding.

Proposals from the first category are relatively straightforward—they have been typically made by adherents of the executive school, such as Robert Turner, and have been predicated on the idea that Subsection 2(c) represents an unconstitutional attempt by Congress to restrain presidential war powers.³⁶

Proposals from the second category have been somewhat more varied, but the leading proposals of this nature—such as Ely's Combat Authorization Act and the Byrd-Warner Act of 1989—have generally cited two reasons for why they believe repeal makes more sense than amendment.

First, they assert that attempting to develop a complete list of all situations where a President may introduce troops is likely an impossible task—as Ely argues, “it truly is impossible to predict and specify all the possible situations in which the president will need to act to protect the nation's security before he has time to obtain congressional authorization.”³⁷ They therefore contend that effectively there are only two options for revising the list, both of which are unsatisfactory: (1) promulgate an incomplete list that will hamstring the President's ability to conduct foreign affairs or (2) use broad and open-ended language that, although nominally comprehensive, will be virtually meaningless as a practical restriction.³⁸

Second, they assert that, even if it was possible to develop a comprehensive standard, it would be impossible to enforce it.³⁹ In this sense, proponents of repeal on pragmatic grounds are largely echoing the position of the House from the original WPR debate. More specifically, such proponents argue that it is easier to force a President to comply with certain procedures in the exercise of his powers than it is to force him to comply with substantive restrictions on his authority.⁴⁰ In particular, they note that, to the extent that judicial enforcement of the Resolution is contemplated, a court is far more likely to find that procedural deadlines were not met than it is to second-guess a presidential decision that action

was needed to protect national security.⁴¹ In short, proposals from the second category are predicated on the idea that Subsection 2(c) is essentially meaningless and cannot be made meaningful, and therefore it should be discarded.

3. Strengthen Section 2(c). Proposals from the third category stand in opposition to both of the repeal schools. Those advocating strengthening Section 2(c) believe it is possible for Congress to impose substantive restrictions on Presidential war powers. They also believe that Subsection 2(c) can be made meaningful and effective, if only its provisions were made legally binding. Proposals from this category have taken two forms.

First, there have been numerous proposals to revive the original Senate approach and essentially make Subsection 2(c) legally binding.⁴² (These proposals often include a slight amendment affirming the President’s power to authorize force to (1) rescue and protect Americans, (2) forestall imminent attacks, and (3) comply with U.N. Security Council Resolutions). Senators Alan Cranston, John Stennis, and Thomas Eagleton sponsored legislation of this sort in several succeeding Congresses during the 1980s, and Representatives Don Edwards and Stephen Neal sponsored similar legislation in the House at the same time.⁴³ In the 1990s, Representative Peter DeFazio proposed similar legislation that, *inter alia*, incorporated this approach to Subsection 2(c),⁴⁴ and in their 2005 *Atlantic Monthly* article, “Declare War,” Leslie Gelb and Anne-Marie Slaughter made a similar proposal.⁴⁵ Most recently, Congressman Walter Jones introduced legislation in 2007 that would require the President to obtain a declaration of war or specific statutory authority *before* the “initiation of hostilities,” except in three emergency situations—an armed attack on the U.S., an armed attack on U.S. forces, or the evacuation of U.S. citizens. After initiating hostilities under one of the three enumerated emergency situations, Congress would have to authorize the President’s use of force within 30 days, or else all appropriations for the war would automatically be cut off.⁴⁶

Critics would argue these proposals (1) beg the constitutional question of whether the President’s authority can be limited in this way; and (2) would be impossible to enforce. Nonetheless, advocates of reforming Subsection 2(c) in this way have argued that experience has shown that the WPR’s current procedural approach is no easier to enforce. Moreover, they argue that enforcement difficulties can be overcome by linking presidential non-compliance with the WPR to an automatic funding cut-off—*i.e.*, if the President conducts deployed troops without authorization, congressional appropriations for that operation would automatically terminate.⁴⁷

The second proposed means of strengthening Subsection 2(c) takes a very different tack. Louis Henkin and Senator Joseph Biden, for example, sought to transform Subsection 2(c) from a limitation on Presidential authority to a general authorization to deploy troops in a wide range of circumstances, subject to the other provisions of the WPR.⁴⁸ Advocates of this approach argue it has the virtue of avoiding the first problem set out above, *i.e.*, the inability of obtaining consensus on what inherent constitutional powers the President possesses, while simultaneously bringing the President with the WPR’s ambit.⁴⁹ However, it is unclear whether this approach would actually resolve the debate over presidential authority to act, as Henkin and Biden suggest, or just change the nature of the debate. Indeed, Henkin and Biden were unable to reach agreement over the scope of authority that Congress

should delegate to the President pursuant to such a revised Subsection 2(c).⁵⁰

Section 3: The third section of the WPR, entitled “Consultation,” sets out the President’s obligations to consult with Congress regarding the introduction of U.S. forces into combat situations. Under this section, the President is required (a) to consult “in every possible instance” with Congress prior to introducing U.S. forces into “hostilities” or circumstances where “imminent involvement in hostilities is clearly indicated” and (b) to regularly consult with Congress while such forces remain in hostilities.⁵¹ At some level, this has been one of the least controversial sections of the WPR, in that even many of the opponents of the WPR accept the general premise that the President should consult with Congress regarding troop deployments.⁵²

Accordingly, most of the criticism of this section—and most of the proposals for reforming the consultation requirements—have focused on workability, *i.e.*, ways to make consultation effective. Research by the Congressional Research Service reveals that Presidents frequently consult with congressional leaders once the decision to deploy troops has been made, but that “there has been very little consultation with Congress under the Resolution when consultation is defined to mean seeking advice prior to a decision to introduce troops.”⁵³

Critics of Section 3 have largely focused on four flaws that they claim have hindered the section’s workability. First, although the consultation requirements are triggered by the possible deployment of troops into “hostilities” or “imminent hostilities,” Section 3 does not contain a definition of either term. Accordingly, it unclear when consultation under the WPR is required.⁵⁴ Second, assuming consultation is required, Section 3 does not specify when or how frequently it should occur, leaving such determinations to the discretion of the President. Moreover, the President’s discretion is further enhanced by the fact that consultation is not mandatory, but required “in every possible instance,” with discretion for determining what is possible also left to the President.⁵⁵ Third, the provision fails to define what it means for the President to “consult” with Congress, thereby leading to circumstances where the two branches disagree over whether the consultation requirement has been satisfied.⁵⁶ Fourth, the provision requires the President to consult with “Congress”; however, as a practical matter, the President can really only consult with certain congressional representatives. Section 3, however, does not make clear who is authorized to represent Congress for consultation purposes. This complicates the efforts for both the President and Congress to comply with the section’s requirements.⁵⁷

Accordingly, most of the proposals for amending Section 3 of the WPR have addressed these four issues. Senator Biden’s Use of Force Act, for example, (1) replaces the term “hostilities” with “use of force” and then provides a specific definition for “use of force”⁵⁸; (2) designates a Congressional Leadership Group for purposes of WPR consultations, made up of the Speaker of the House, the President Pro Tempore of the Senate, and the majority and minority leaders of both the House and Senate; (3) mandates meetings every four months between the President and the Congressional Leadership Group and meetings on a bi-monthly basis between the Secretary of State, Secretary of Defense, and Intelligence Director with the relevant congressional oversight committees; and (4) identifies specific goals the consultations are intended to achieve.⁵⁹

The Byrd-Warner Act employs a similar, but slightly different, framework. It mandates regular meet-

ings between the President and the congressional leadership, but also creates a permanent, 18-member congressional consultative group, comprised of the Speaker, the President Pro Tempore, the majority and minority leaders of both houses of Congress, and the chairmen and ranking minority member on all three relevant oversight committees (Foreign Relations; Armed Services; Intelligence) for the House and the Senate.⁶⁰ Under the Byrd-Warner Act, if a majority of the congressional leadership requests it, the President must consult with the entire permanent consultative group, absent extraordinary circumstances affecting vital national security interests.⁶¹

In the same vein, former Secretary of State Cyrus Vance suggested that Section 3's workability problems could be solved by amending the section to accomplish two objectives. First, he said one must define consultation to mandate that the President "discuss fully and seek the advice and counsel" of a specified group of congressional leaders made up of the Speaker, the majority and minority leaders of both houses, and the chairman and ranking members for the Foreign Relations and Armed Services committees of both houses. Second, he argued that the scope of the consultation requirement must be broadened so that the President needs to consult in every instance where the "reporting" obligations set forth in Section 4 of the WPR are triggered.⁶² (The reporting obligations are discussed more, *infra*.)

Congressman DeFazio's proposal for a revised WPR similarly follows this basic framework. It (a) states that the President must consult with Congress whenever he lawfully deploys forces; (b) sets up an executive-legislative consultative group, made up of designees of the President and the congressional leadership; and (c) provides that the WPR's consultation requirement is not satisfied unless the President asks "Members of Congress for their advice and opinions before the decision is made to introduce the Armed Forces" and gives the Members all information relevant to the decision being made.⁶³

Other reform proposals have focused on defining congressional consultation groups, mandating regularly scheduled meetings, and providing more specific definitions for when consultation is required and what consultation constitutes. Among these reform efforts are the bill that Representative Lee Hamilton proposed in 1993, known as the "Consultation Act of 1993." This bill did not amend or repeal the WPR, but instead augmented it. Among other things, it created a "Consultative Group" within Congress to "facilitate improved interaction" between the branches "with respect to the use of United States military force." The Act called for "regular consultation" regarding national security matters and "special consultation" whenever military action abroad is being considered. And it defined the membership of the "Consultative Group" to include Members of the House and Senate to be appointed by the Speaker of the House and majority leader of the Senate after consultation with the minority leaders and reflecting the minority and majoring leadership of various House and Senate committees, including those on Foreign Affairs, Armed Services, Intelligence, and Appropriations.⁶⁴

There are a few individuals, however, who have raised concerns about expanding consultation in this fashion. Philip Trimble has asserted that mandating that the President receive advice regarding specific executive branch decisions from specified Members of Congress unconstitutionally infringes upon the President's war power and also violates the doctrine of executive privilege, by requiring the executive branch "to reveal its pre-decision deliberations to outsiders."⁶⁵ Professor Trimble therefore contends that consultation be limited to a "Congressional-Executive review board that would meet weekly, with-

out staff, and with an open agenda.”⁶⁶ In addition, Abraham Sofaer, while broadly accepting the need for consultation, asserts that requiring regular meetings between the President and permanent congressional consultative group is too burdensome and harms the flexibility the President needs for effective decision-making.⁶⁷ In a similar vein, some (but not all) have complained that Members of Congress, more so than the executive branch officials, leak information from these sorts of meetings and thus having such meetings can harm national security.

Finally, coming at the issue from the opposing perspective, Glennon and Franck have voiced concerns about whether creating a permanent congressional consultative group will improve the consultation of Congress as a whole. More specifically, both scholars have noted that a permanent consultative committee will get co-opted by the Executive Branch, particularly if it lacks independent resources.⁶⁸ Accordingly, Franck has argued that any consultative group needs to have both adequate staffing and the power of subpoena to function properly.⁶⁹

Section 4: The fourth section of the WPR, entitled “Reporting,” sets out the circumstances in which the President needs to submit reports to Congress regarding the deployment of U.S. forces.⁷⁰ Under Subsection 4(a), in the absence of a declaration of war, the President is required to submit a report to Congress within 48 hours of deploying U.S. troops, laying out the reasons for the deployment, the expected scope and duration of the deployment, and the authority under which the deployment was made. This reporting obligation is triggered if the troops were deployed (1) into hostilities or a situation in which imminent hostilities are clearly indicated; (2) into a foreign nation, except for deployments that relate solely to supply, replacement, repair, or training of such troops; or (3) in numbers that substantially enlarge the contingent of U.S. forces equipped for combat already present in a foreign nation.⁷¹ Subsection 4(b) mandates that the President provide Congress with any other information that Congress requests to fulfill its constitutional responsibilities with respect to declaring war or authorizing troop deployments abroad. Subsection 4(c) requires the President to update Congress periodically whenever U.S. forces are deployed into a situation described in Subsection 4(a).⁷²

Most proposals to amend Section 4 have focused on Subsection 4(a). Little attention has been paid to Subsections 4(b) and 4(c), although there has been some suggestion that Subsection 4(c) is redundant in light of the President’s Section 3 obligation to consult regularly with Congress while U.S. forces remain engaged in hostilities.⁷³ In addition, most proposals have focused on Subsection 4(a)(1), because that is the provision that triggers the procedural restrictions on the President’s power, as set forth in Subsection 5(b) of the WPR. Subsection 5(b) is the “stick” the WPR employs to ensure the President does not go to war on his own accord. Pursuant to Subsection 5(b), if a President introduces U.S. forces into hostilities without congressional approval, he needs to withdraw those forces within a specified time frame (60- or 90-days, depending on the exigencies) unless he receives congressional authorization to continue the deployment.⁷⁴ The 60- or 90-day clock begins to run when Congress receives or should have received a Subsection 4(a)(1) report.⁷⁵

The central criticism of Subsection 4(a) is that Presidents circumvent Subsection 5(b) by refusing to comply with Subsection 4(a)(1).⁷⁶ Although Presidents have filed more than 120 reports with Congress under the WPR,⁷⁷ only one of them—the report filed by President Ford in connection with the *Mayaguez*

affair—actually referenced Subsection 4(a)(1), and that report was not filed until after the military operation in question had concluded.⁷⁸ In most instances, Presidents have simply filed reports without stating the subsection under which the report is being filed, thus leaving it unclear whether the situation referenced in the report triggers Subsection 4(a)(1) and Subsection 5(b).⁷⁹

In addition, because the WPR does not contain a definition of either “hostilities” or “imminent hostilities,” Presidents can avoid the reporting requirements of Subsection 4(a)(1) by merely asserting that hostilities are neither present nor imminent, regardless of the facts on the ground. For example, President George H.W. Bush accompanied his report to Congress on the deployment of approximately 230,000 troops to Saudi Arabia in the run-up to the First Gulf War with the statement that he did not believe hostilities were imminent.⁸⁰ Furthermore, although the time limit under Subsection 5(b) can commence both on the date when a Subsection 4(a)(1) report is filed or on the date when it should have been filed, neither Section 4 nor any other WPR provision provides a mechanism for making an enforceable determination that a Subsection 4(a)(1) report should have been filed.⁸¹ Thus, as a practical matter, the power to start the clock rests with the President—by never filing a report under Subsection 4(a)(1), he can ensure that the Subsection 5(b) restrictions never come into play.⁸²

Proposals for reforming Section 4 have therefore largely focused on finding ways to ensure that Subsection 4(a) is capable of starting the Subsection 5(b) clock. There have been several proposals to expand the scope of what the President needs to report:

- Representative Alcee Hastings proposed legislation in 2003 that would have amended Section 4 to require that the President include a post-conflict strategy plan in any Subsection 4(a) report;⁸³
- Senator Larry Pressler submitted a bill in 1993 that would have required the President to provide Congress with a cost assessment of the continued involvement of U.S. forces within sixty days of the date on which a Subsection 4(a) report was submitted or should have been submitted;⁸⁴ and
- Gelb and Dean Slaughter suggested in their *Atlantic Monthly* article that Presidents seeking Congressional authorization for a deployment of troops must provide “an analysis of the threat, specific war aims, the rationale for those aims, the feasibility of achieving them, a general sense of war strategy, plans for action, and potential costs.”⁸⁵
- Representative Walter Jones’s bill would require the President to submit a report to Congress within 48 hours of the “emergency” initiation of hostilities. The report would include the circumstances necessitating the initiation of hostilities, the specific constitutional and legislative authority under which such initiation is permissible, the estimated scope and duration of hostilities, the estimated cost of hostilities, the “assets” of the Armed Forces to be introduced, an assessment of the diplomatic impact on U.S. foreign relations, and a detailed assessment of post-hostilities scenarios.⁸⁶

For the most part, however, proposals for reforming Subsection 4(a) have involved efforts to improve the Subsection 4(a)-Subsection 5(b) mechanism. Such proposals have generally taken three forms. First, there have been a number of proposals to define “hostilities” and “imminent hostilities” so as to stop Presidents from refusing to report on the grounds that “hostilities” and “imminent hostilities” are not present. Most of these proposals have involved incorporating into the statute the original definitions of

“hostilities” and “imminent hostilities” set out in the original House Report on the WPR.⁸⁷ Under this version of the WPR, “hostilities” encompassed both situations where fighting had begun, and situations “where there is a clear and present danger of armed conflict,” while “imminent hostilities” encompassed situations where there was a “clear potential” for either of those states arising.⁸⁸ Other proposals employed broader,⁸⁹ narrower, or more specifically tailored definitions that, in certain cases, seemed to respond directly to situations where the President had argued America’s troops were not involved in hostilities, but the military was paying these troops hostile-fire pay.⁹⁰

Others have suggested not merely imposing definitions. Ely, for example, suggests that the problem could further be ameliorated by reducing the standard for when a report needs to be filed.⁹¹ Ely proposes eliminating the requirement that the imminent hostilities be “clearly indicated” and de-linking the reporting requirement from the introduction of troops, so that a report becomes necessary if previously deployed troops come under an imminent danger. Thus, under Ely’s revised standard, the President’s reporting obligation would attach whenever U.S. troops are introduced or present in a situation where hostilities have developed or there is an imminent danger of them.⁹² Secretary Vance similarly suggested modifying the reporting requirement to require the President to report whenever he introduces troops into a situation “in which there is armed conflict,” so as to make clear that the reporting requirement does not turn on “whether other parties to an existing conflict take it on themselves to attack U.S. forces when our forces are placed in their midst.”⁹³

Second, there have been proposals that have focused on reducing a President’s ability to circumvent the Subsection 4(a)(1) trigger by not designating the subsection under which a report has been filed. Several commentators have suggested that requiring a President to specify the section under which he is filing a report will solve this problem.⁹⁴ Ely, however, has argued that such a proposed reform will simply invite a new type of presidential gamesmanship; Presidents will just evade the Subsection 4(a)(1) trigger by filing all reports under Subsections 4(a)(2) or 4(a)(3), neither of which triggers the Subsection 5(b) time limit.⁹⁵ In addition, Sofaer has noted that “[a] definitive judgment at the outset of a deployment as to whether hostilities will result is often difficult to make,” and therefore a President may in fact have substantial difficulty determining the appropriate subsection to designate.⁹⁶ Accordingly, several commentators, including Ely and Senator Biden, have proposed solving the designation problem by making all Section 4 reports trigger the Subsection 5(b) time limit.⁹⁷

Third, many proposals have involved creating a judicial mechanism, whereby a party can bring suit and obtain an order that the President should have filed a Subsection 4(a)(1) report.⁹⁸ These enforcement mechanisms are seen as an additional and popular check, especially in the face of congressional reluctance to take firm stances in this area, to ensure that the Subsection 5(b) clock starts running in the face of presidential non-compliance with the WPR and congressional silence. To give effect to this proposed checking mechanism, Ely proposes granting standing, both to members of Congress and to members of the armed forces who are deployed to the relevant theater of operations, to bring suit to enforce Subsection 4(a).⁹⁹ If a court finds that the President has failed to comply with his reporting obligations, then it can enter a declaratory judgment to that effect and thereby commence the Subsection 5(b) clock.¹⁰⁰

Senator Biden’s and Representative DeFazio’s proposals incorporate similar, but not identical, mechanisms. Both proposals limit standing to bring suit to members of Congress; both explicitly provide for expedited consideration of such actions; and both permit the district court to specify a date other than the date of decision (*e.g.*, the date of the deployment) as the date on which the Subsection 5(b) time limit should be deemed commenced.¹⁰¹ In addition, the DeFazio bill also permits the district court to direct the President to submit the Subsection 4(a) report.¹⁰²

A few individuals have expressed doubt whether Subsection 4(a) needs to be reformed at all. However, for the most part, their objections have not been to the proposals discussed above, but rather to the Subsection 4(a)-Subsection 5(b) mechanism itself. As discussed below, there have been many proposals to repeal Subsection 5(b), both on constitutional and pragmatic grounds. For individuals who adhere to this position, there is no need to reform Subsection 4(a), since, as a general matter, Presidents have proven willing to file reports with Congress. Reform is only necessary if the reports are intended to play their larger, triggering role in the WPR framework.¹⁰³

Section 5: The fifth section of the WPR, entitled “Congressional Action,” is in many respects the heart of the WPR and sets forth the restrictions that Congress has placed on presidential troop deployments without congressional authorization.¹⁰⁴ As noted above, the procedures are, in large part, tied to the receipt of a presidential report under Subsection 4(a)(1). Thus, Subsection 5(a) lays out the procedures that Congress follows when it receives a Subsection 4(a)(1) report, while Subsection 5(b) lays out the restrictions for Presidential action if a Subsection 4(a)(1) report is submitted or should have been submitted.¹⁰⁵ Under Subsection 5(b), a President must terminate any deployment of U.S. forces covered by Subsection 4(a)(1) within 60 days of the date on which the Subsection 4(a)(1) report was received or should have been received, unless he has received congressional authorization for the deployment or Congress is physically unable to meet. (The President can extend the 60-day deployment, without authorization, for an additional 30 days if the President certifies in writing that the extension is required by unavoidable military necessity.¹⁰⁶) Subsection 5(c) provides that Congress may direct the President to remove troops engaged in hostilities outside the United States upon concurrent resolution (but without approval or possible veto from the President), if such troops were deployed without a declaration of war or specific statutory authorization.¹⁰⁷

Most proposals for reforming or amending Section have focused on Subsection 5(b). Subsection 5(a), with its focus on internal congressional procedures, has received almost no attention, while Subsection 5(c) is now considered by many to be unconstitutional on the basis of the Supreme Court’s decision in *INS v. Chadha*, 462 U.S. 919 (1983). In *Chadha*, the Supreme Court struck down a “legislative veto” in the Immigration and Naturalization Act on the ground that it violated the Presentment Clause. Many legal scholars believe that all attempts to mandate executive branch action on the basis of a congressional resolution not presented to the President for signature, including Subsection 5(c), are similarly constitutionally deficient.¹⁰⁸ A few authors have argued that Subsection 5(c) can be distinguished from the legislative veto at issue in *Chadha*, most notably Ely.¹⁰⁹ More specifically, those like Ely claim that a concurrent resolution under Subsection 5(c) is valid because (1) a concurrent resolution in such circumstances can be justified as an exercise of Congressional power to declare war—an act of

Congress not subject to the Presentment Clause;¹¹⁰ or (2) a concurrent resolution under Subsection 5(c), unlike *Chadha*, does not involve an attempt by Congress to “veto” a decision that Congress previously delegated to the executive branch, but rather is an attempt by Congress to check executive branch action taken without congressional approval of any sort.¹¹¹ However, even individuals who believe Subsection 5(c) can be distinguished from *Chadha* concede that, as practical matter, it is likely to be found unconstitutional if the issue is ever adjudicated.¹¹²

There have been a handful of proposals that have attempted to preserve Subsection 5(c) in light of *Chadha*. Several scholars have argued that a concurrent resolution, even without binding force, has value as political signal and will create political pressure on the President to end the deployment.¹¹³ More significantly, Senator Biden’s Use of Force Act tries to circumvent the *Chadha* problem by linking a concurrent resolution passed under the equivalent of Subsection 5(c) to a parliamentary procedure, such that the passage of a concurrent resolution would trigger a parliamentary rule blocking further consideration of funding measures for the use of force in question.¹¹⁴ And Franck similarly suggested that passage of a concurrent resolution could be used to “ripen the controversy between the branches so as to bring about a litigated solution and trigger certain procedures pertaining to Defense Department money bills.”¹¹⁵ But for the most part, proposals to reform Section 5 have simply assumed that Subsection 5(c) should be stricken.¹¹⁶

By contrast, Subsection 5(b) has been subject to extensive debate and significant proposals for reform. Part of the reason for why Subsection 5(b) has been the subject of such widespread discussion is because there is substantial uncertainty about what the subsection actually provides. By its terms, the subsection does not apply to situations where the President is acting pursuant to a declaration of war or specific statutory authorization. Thus, it appears that the subsection only applies to situations where (1) a President is acting pursuant to his own inherent constitutional authority; or (2) a President is acting outside his inherent constitutional authority without congressional authorization.¹¹⁷ However, applying Subsection 5(b) to either of these situations is potentially problematic. Applying the subsection to circumstances where the President is exercising his own constitutional power raises the question of how Congress can constitutionally place such limitations on presidential power. And applying the subsection to circumstances where the President is acting without constitutional or statutory authority raises two practical questions: (1) why should a President acting without any lawful authority be permitted to keep troops deployed for 60 (or 90) days without Congressional action; and (2) why, if a President has chosen to deploy troops without legal authority, will he comply with a legislative deadline to withdraw the troops.¹¹⁸

Alternatively, Subsection 5(b) can be construed as providing a President with the authority to deploy troops for up to 60 (or 90) days without further authorization, but also providing that the President may not extend the deployment beyond that date without affirmative congressional assent.¹¹⁹ But such an interpretation conflicts with Subsection 8(d), which provides that the WPR should not be interpreted as granting the President any additional power to deploy troops.¹²⁰ In addition, such a construction also raises the policy question of whether it makes sense to give Presidents complete discretion to initiate and pursue military operations for up to 90 days.

Accordingly, Subsection 5(b) has been heavily criticized by both the pro-executive and pro-congressional camps and on both constitutional and practical grounds. Pro-executive scholars contend Subsection 5(b) is unconstitutional because allowing a military operation to be terminated by congressional inaction is an impermissible restraint on a President's power as Commander-in-Chief,¹²¹ while pro-congressional scholars claim the section is unconstitutional because it impermissibly delegates the power to initiate war to the executive.¹²² To a large extent, the debates over the constitutionality of Subsection 5(b) reflect the constitutional debate set out in Part I of this memo. Members of the pro-executive school, who believe that Presidents have the authority to initiate a wide range of military operations on their own volition, see no constitutional problem with a President introducing troops into a theater without congressional authorization, but believe that a constitutional violation does arise if Congress claims the power to condition the maintenance on presidential deployments on obtaining congressional assent. By contrast, members of the pro-Congress school have no constitutional problem with Congress setting terms for deployments, but do find it constitutionally problematic if Presidents are delegated the power to initiate hostilities without congressional input.¹²³

The practical criticisms of Subsection 5(b) have broken down along similar lines. Proponents of executive authority have generally focused on the extent to which the subsection's strict timeline hinders U.S. military effectiveness.¹²⁴ They note that, under the timeline, congressional inaction results in automatic withdrawal of troops and that therefore the subsection opens the door to a scenario where a partially-completed military operation is terminated simply because Congress was unable to pass a resolution in a timely fashion. Lawmakers, like Representative Henry Hyde, have said that such a statute, under which Congress "can halt and reverse and turn around a military commitment of troops" by its own inaction "is really an absurdity."¹²⁵ In addition, proponents of executive authority assert that the existence of Subsection 5(b)'s timeline, and the possibility that Congress may not provide authorization in a timely manner, may lead Presidents to engage in reckless action in an effort to complete the mission before the "clock" runs.¹²⁶ Those in this camp add that the subsection may damage U.S. relations with allies and cause them to question U.S. resolve, by adding uncertainty to U.S. participation in joint operations.¹²⁷ They further suggest that Subsection 5(b) strengthens potential foes, by (a) encouraging them to hold out against U.S. forces for at least 90 days to see whether Congress will authorize the deployment¹²⁸; and (b) giving them the means to manipulate U.S. policy-making since, by firing on U.S. troops or otherwise making hostilities appear imminent, they can potentially activate and accelerate Section 5(b)'s withdrawal timeline.¹²⁹ Finally, they argue that the subsection's strict timeline "provides the pretext for endless arguments over constitutional prerogatives at a moment where what our troops need most is a clear mission and strong backing at home."¹³⁰

Proponents of congressional power have, by contrast, generally argued that such claims are overstated. They assert that such arguments fail to consider Sections 6 and 7 of the WPR, which allow for expedited consideration of resolutions introduced pursuant to Subsection 5(b), and note that "[g]iven the gravity of the subject matter and the provisions for priority on the legislative calendar, it is difficult to believe that Congress would fail to address the subject of extending our involvement in hostilities."¹³¹ They also contend that the concern that the Subsection 5(b) timeline aids potential adversaries

is “exaggerated.” They point out that such a claim likely overestimates the understanding that other countries have about the nuances of American law,¹³² and fails to recognize that, “as a practical matter, an enemy tactic designed to intimidate by inflicting casualties on American forces would more likely backfire and solidify congressional support” for the conflict.¹³³ Instead, proponents of congressional power have asserted that the problem with Subsection 5(b) is that it does not sufficiently restrict presidential power to initiate deployments and commence military operations. They point out that the purpose of the WPR was to prevent the President from introducing troops into hostilities without congressional authorization, and that Subsection 5(b), particularly given the invalidity of Subsection 5(c), would effectively allow a President to deploy troops into hostilities for up to 90 days without congressional assent.¹³⁴ In addition, proponents of Congressional power have further asserted that, as a practical matter, Subsection 5(b) is wholly ineffective as a restraint on presidential power for two reasons.¹³⁵ First, they contend that, as noted above, the subsection’s timeline is never activated because of the flaws in the WPR’s reporting provisions. Second, they note that, even if the subsection’s timeline were activated, the subsection lacks an effective means for compelling presidential compliance with the subsection’s restrictions.¹³⁶ In other words, they contend that Subsection 5(b) suffers from the problem as Subsection 4(a)—it assumes that Presidents will adhere to the WPR framework and contains no enforcement mechanism if that turns out not to be the case.

Proposals for reforming Subsection 5(b) have accordingly reflected this split in perspective. For the most part, proponents of executive power have proposed repealing the subsection in its entirety without providing for any replacement,¹³⁷ although a few proposals have substituted an expedited vote on a joint resolution or even an expedited vote on funding for the military operation in question for the current Subsection 5(b) timeline.¹³⁸ In contrast, proponents of congressional power have generally looked to strengthen the Subsection 5(b) framework, and have therefore tended to propose enhancing the subsection’s provisions.

Amendments aimed at strengthening Subsection 5(b) have generally taken three forms, each essentially tailored to address one of the congressional perspective’s problems with the subsection, with most proposals for improving Subsection 5(b) incorporating all three approaches. First, as noted above, there have been amendments that have sought to improve Subsection 5(b) by fixing the Subsection 4(a)(1) trigger mechanism.

Second, there have been amendments that have proposed reducing or eliminating the current 60-day/90-day timeline, so as to circumscribe presidential discretion to engage in deployments on his own initiative. Most of these amendments have been structured in a manner similar to the original Senate approach, which only permitted U.S. forces to be deployed for 30 days without congressional authorization,¹³⁹ although Ely has suggested eliminating the current Subsection 5(b) timeline in its entirety and replacing it with a prior authorization scheme, in which the President could not deploy troops without first obtaining congressional assent.¹⁴⁰ Under Ely’s proposal, the President must obtain prior congressional authorization in all cases where he wishes to introduce troops into hostilities or situations where imminent hostilities are likely unless (1) effectively combating a national security threat requires deployment before authorization can be obtained or (2) “keeping pendency of the United

States's response to such a threat secret prior to its initiation is clearly essential to its military effectiveness."¹⁴¹ For such exceptions, Ely would allow the President to seek authorization from Congress simultaneously with the deployment, but the President would have to terminate the operation in 20 days if he did not obtain congressional authorization.¹⁴²

Third, there have been amendments to supplement Subsection 5(b) with enforcement mechanisms to help compel presidential compliance with the subsection's mandate. For the most part, such amendments have involved (1) utilizing Congress's control over appropriations to create a mechanism, whereby if a President continues a deployment in contravention of the WPR, the funding for that unauthorized deployment will be subject to either mandatory cut-off or to an up-down vote on an expedited basis;¹⁴³ and (2) providing for judicial recourse, so as to (a) enlist the assistance of another branch of government in defining the WPR's boundaries and (b) minimize the capacity for presidential manipulation of Subsection 5(b)'s timeline.¹⁴⁴

Finally, there have been a handful of proposals, such as the Byrd-Warner Act and Senator Biden's Use of Force Act, which have attempted to find a middle ground between the executive and congressional approaches to reforming Subsection 5(b). The Byrd-Warner Act, for example, largely reflects the executive approach—proposing the repeal of Subsection 5(b) on the grounds that the provision constituted an unconstitutional restraint on executive authority and harmed U.S. military effectiveness.¹⁴⁵ That said, the Byrd-Warner Act also proposes supplementing the current WPR with an enforcement mechanism that would prohibit the expenditure of funds for any activity that has the purpose or effect of violating a joint resolution passed under the amended WPR.¹⁴⁶ This would give the Congress significant authority when it has spoken with one voice. Similarly, Senator Biden's Use of Force Act generally follows the congressional approach to reform. It supplements the basic Subsection 5(b) framework with enforcement mechanisms that (1) bar the appropriation of funds for uses of force inconsistent with the Act and (2) grant judicial standing for members of Congress to seek declaratory relief regarding presidential compliance with the Act's provisions. Biden's proposal nonetheless acknowledges the arguments that the WPR should not constrain the President's exercise of his constitutional authority and that military operations should not be terminated by congressional inaction. Biden's proposal therefore provides that the President may continue to use force after the 60-day timeline has run if he has either (1) certified to Congress that an emergency exists that threatens national security and requires the President to exceed the timeline; or (2) sought congressional authorization for the use of force and Congress has not acted.¹⁴⁷ This latter proposal reverses the presumption in the WPR that congressional inaction terminates the deployment. Under Biden's proposal, congressional inaction amounts to an authorization.

Sections 6 & 7: The sixth and seventh sections of the WPR, entitled "Congressional Priority Procedures For Joint Resolution or Bill" and "Congressional Priority Procedures For Concurrent Resolution" respectively, set out the expedited procedures for considering joint resolutions under Subsection 5(b) and concurrent resolution under Subsection 5(c).¹⁴⁸ For the most part, these procedures have been relatively uncontroversial and most proposals to amend them have been tied to proposals to amend Section 5. Thus, for example, many of the individuals who have proposed striking

Subsection 5(c) because of *Chadha* have proposed striking Section 7 as redundant.¹⁴⁹

The one area where these Sections have been criticized in their own right is the issue of sponsorship. By their own terms, both sections appear to apply to any bill concerning the required subject matter. Accordingly, it is possible that a single troop deployment could result in expedited procedures being applied to numerous bills simultaneously.¹⁵⁰ In addition, commentators have noted that both procedures are vulnerable to abuse by a member who wishes to tie up the legislative calendar.¹⁵¹ Accordingly, several bills have proposed amending the sections of the WPR dealing with expedited procedures to add sponsorship criteria, with the proviso that only bills that are properly sponsored are eligible for priority treatment.¹⁵²

Thus, the Byrd-Warner Act only provides expedited procedures for legislation sponsored by the permanent consultative group, and the permanent consultative group can only so sponsor a resolution if the group by majority vote agrees to do so.¹⁵³ In an even more restrictive vein, a proposal to reform the WPR in 1989 sponsored by Representative Gerald Solomon proposed limiting expedited procedures to only those resolutions that were sponsored at the time of introduction “by at least 50 percent of the Members of the House of the Congress in which it was introduced.”¹⁵⁴ By contrast, Senator Biden’s Use of Force Act, while employing sponsorship criteria, would allow expedited procedures to be used for any bill that: (1) is introduced pursuant to a presidential request; (2) is co-sponsored by a majority of the members of the congressional leadership group from the house of Congress in which the bill is introduced; or (3) is co-sponsored by 30 percent of the membership of the House of Congress in which the bill is introduced.¹⁵⁵

Section 8: The eighth section of the WPR, entitled “Interpretation of Joint Resolution,” sets out several rules of construction for the WPR. Subsection 8(a) mandates that a President may not infer congressional authorization to introduce troops into hostilities or into situations likely to become hostile from a statute Congress passes unless the statute contains a provision specifically stating that the statute was intended to constitute such authorization within the meaning of the WPR. Subsection 8(a)(2) is similar. It says authority to engage in hostilities should not be inferred from treaties, unless the treaty is implemented by legislation specifically authorizing the use of armed forces. Subsection 8(b) states that the WPR should not be construed as requiring additional legislation before U.S. troops can participate in international joint military exercises in connection with organizations to which the U.S. belonged prior to the enactment of the WPR, *e.g.*, NATO. Subsection 8(c) states that introduction of armed forces within the meaning of the WPR includes assignments to accompany the armed forces of a foreign country. Subsection 8(d) states that the WPR neither alters the constitutional allocation of authority between Congress and the President, nor provides the President with any new authority to introduce troops.¹⁵⁶

Proposals for reforming Section 8 have focused on Subsections 8(a) and 8(d), with Subsections 8(b) and 8(c) being largely ignored. Subsection 8(a) has been primarily criticized as an impermissible attempt to bind future Congresses through its requirement that future general legislation not be construed as authorizing the introduction of troops within the meaning of the WPR.¹⁵⁷ Subsection 8(d)(1), in contrast, has been criticized on the grounds that it gives the President a basis for not complying with

the WPR, *i.e.*, he can claim that following a particular WPR provision contravenes his inherent constitutional authority and therefore, under Subsection 8(d)(1), he is justified in ignoring that provision.¹⁵⁸ As practical matter, scholars have tended to criticize one subsection and not the other, and therefore in effect a debate has developed over whether to repeal Subsection 8(a), but not Subsection 8(d), and vice versa.

Proponents of repealing Subsection 8(a) assert that it is a basic rule of constitutional theory that one Congress cannot bind a succeeding one. Indeed, they argue that no other rule makes sense, since “if one Congress could bind other Congresses in this way, it would effectively enshrine itself in defiance of the electoral mandate.”¹⁵⁹ Thus, in their opinion, if Congress, through the passage of appropriations or other general legislation, indicates support for a presidential military initiative, then “the passage of such a law would properly be regarded as the equivalent of an amendment to the War Powers Resolution, since subsequent statutes are controlling over earlier ones that contain inconsistent provisions.”¹⁶⁰ Ely, however, argues that this argument proves too much—future Congresses should be presumed to know what the existing law is when they act, including Subsection 8(a), and therefore there is nothing problematic with interpreting their actions in this light.¹⁶¹

The positions are effectively reversed with respect to repealing Subsection 8(d). Ely argues that the subsection should be repealed because it is ultimately little more than hedge, designed “to indicate that should the Resolution’s provisions begin to stray across constitutional bounds, they are to be reined in.” Worse still, it provides the President a political weapon on which to predicate his non-compliance with the WPR.¹⁶² Unsurprisingly, recent legislative efforts to amend the WPR sponsored by those favoring congressional authority have excluded this provision.¹⁶³

Robert Turner, one of the most ardent defenders of executive power, has contended that Subsection 8(d) is clearly more than hedge and should not be repealed. Nevertheless, he asserts, when its two subsections are read in concert, it is the portion of the WPR that “makes it clear that Congress did not intend to expand the powers of the President to use armed forces beyond those given by Congress,”¹⁶⁴ and that this limitation is, of course, problematic given the President’s inherent powers.

* * * * *

In addition to the various reform proposals for existing sections of the WPR, legislators and scholars have also proposed supplementing the existing WPR framework with at least three new concepts. Although in many instances, these new concepts are tied to reform proposals for existing sections—for example, the various proposals to tie presidential non-compliance with Subsection 5(b) to an appropriations cut-off—because they are new concepts, the memo addresses them separately.

Judicial Enforceability: As evidenced by the preceding discussion, one of the central problems facing individuals seeking to make the WPR effective is the issue of enforcement—*i.e.*, how to enforce the WPR’s provisions against a President who does not wish to comply. On several occasions in the past, Members of Congress have attempted to solve this enforceability problem by bringing suit in federal court and seeking court orders (a) finding that the WPR has not been complied with, and (b) compel-

ling presidential compliance; however, such suits have been universally unsuccessful.¹⁶⁵ Federal courts repeatedly have refused to address the merits of such claims; instead, they have dismissed such suits on procedural grounds, finding that the congressional plaintiffs lacked standing; that such cases were not ripe for judicial review; and that the issues raised by such suits were non-justiciable political questions.¹⁶⁶ A number of proposals for reforming the WPR have accordingly included attempts to address each of these concerns, with the goal of making judicial recourse a viable mechanism for compelling presidential compliance with the WPR.¹⁶⁷

As a practical matter, proposals to provide for judicial review of the WPR have dealt with these concerns in essentially the same way. First, they have addressed the standing issue by including a provision explicitly granting members of Congress standing to bring claims asserting that the Executive Branch has not complied with the WPR.¹⁶⁸ The only major proposal to suggest broader standing is Ely's Combat Authorization Act, which would also provide standing to members of the armed forces introduced into hostilities or imminent hostilities pursuant to an order that contravenes the WPR.¹⁶⁹ Second, they have dealt with the issue of ripeness and non-justiciability by including language in their judicial review provision that categorically states that any action brought to enforce the WPR should not be dismissed on such grounds, or on any other discretionary basis, except if dismissal is constitutionally mandated.¹⁷⁰

This "exception," of course, could swallow the rule. Indeed, some scholars have expressed skepticism that these measures will be sufficient to provoke a judicial decision. In particular, Professor Franck has noted that, although a congressional statement informing courts that a controversy is justiciable might be sufficient to get them to decide a lawsuit alleging presidential non-compliance with the WPR, courts might nonetheless decline to hear the case on the merits except in the case of a clear constitutional impasse between the branches. Accordingly, he suggests that any attempt to make War Powers litigation viable incorporate procedures, such as the passage of a concurrent resolution expressing congressional disapproval, that makes it clear that Congress and the President are at odds over the scope of presidential power.¹⁷¹ Indeed, both Senator Biden's Use of Force Act and Congressman DeFazio's revised WPR contain language indicating that courts are to presume that such an impasse exists.¹⁷² Ely, however, suggests that such concerns are overblown. He asserts that deciding whether the President has complied with the WPR, particularly his reporting obligations under Subsection 4(a)(1), is no more complicated than many other determinations courts make and should not qualify as a political question, even if Congress made no statement concerning justiciability.¹⁷³

In addition, it should be noted that most judicial review proposals possess the same basic procedures. For the most part, they all provide that suits to enforce the WPR be brought in the U.S. District Court for the District of Columbia, although some proposals would permit a single judge to hear WPR claims, while others require a three-judge panel.¹⁷⁴ They also all mandate that suits to enforce the WPR be heard on an expedited basis and provide that the district court judgments on such suits are directly appealable to the U.S. Supreme Court.¹⁷⁵ Finally, although most proposals confine the relief that may be awarded in such suits to declaratory relief—specifically that certain presidential activity is not in compliance with the WPR¹⁷⁶—there are some differences. Most notably, Congressman DeFazio's

proposal for a revised WPR would permit a court to direct the President to (a) submit a Subsection 4(a)(1) report and (b) withdraw U.S. forces when their presence in hostilities is not in compliance with the WPR.¹⁷⁷ Ely, however, contends that permitting courts to order such injunctive relief (*i.e.*, attempting to compel the President to take certain steps) would be problematic because it contains a much higher risk of presidential disobedience to the court order.¹⁷⁸ By contrast, he argues, declaratory relief in situations where the President has not complied with the statute and Congress has not yet had the chance to take an “up or down” vote, would function like a “judicial remand” to Congress and, and is therefore much more palatable. In such cases, the court merely provides a definitive judgment on the state of the legal landscape—*e.g.*, the President was required to file a report and failed to do so—while leaving it to Congress to determine what to do in light of that judgment.¹⁷⁹ However, some scholars have expressed doubt as to whether Congress can legislate standing in the war powers arena, noting that, at best, Congress may only be able to get rid of prudential objections.¹⁸⁰

Automatic Funding Cut-Offs: Another enforcement mechanism favored by proponents of strengthening the WPR is to link non-compliance with the WPR with an automatic termination of the relevant appropriations.¹⁸¹ The virtue of this approach is that it ties the WPR to Congress’s power of the purse, which is one area where Congress’s constitutional authority is essentially undisputed.¹⁸² As with judicial enforcement mechanisms, reform proposals to link appropriations and WPR compliance have generally taken the same form, *i.e.*, a provision that prohibits the expenditure of funds for any deployment of U.S. forces inconsistent with the WPR.¹⁸³ However, there have also been a few proposals that—rather than or in addition to employing a flat prohibition—have linked appropriations to parliamentary rules, such that Presidential non-compliance with the WPR creates a point of order that will lie against any appropriations bill to fund the noncompliant activity.¹⁸⁴

Proposals to prohibit funding as a sanction for presidential non-compliance with the WPR have been subject to two criticisms, one legal and one practical. The legal criticism is that one Congress cannot bind a future Congress and therefore such a prohibition is legally unenforceable.¹⁸⁵ In other words, some scholars have argued that future defense appropriation bills that lack restrictions on how funds are to be expended will be interpreted as superseding any WPR provision that bars the expenditure of funds for WPR non-compliance.¹⁸⁶ The practical criticism is that, even if such a prohibition is legally enforceable, Members of Congress, as a political matter, will always be reluctant to cut-off funding if troops are already deployed and therefore they will not allow an automatic funding cut-off to take effect.¹⁸⁷

Inclusion of the Use of Force By Paramilitaries and CIA personnel: Finally, there have been several proposals to expand the scope of the WPR to include non-military personnel who are engaged in hostilities or advising military or paramilitary forces in a foreign countries who are engaged in hostilities.¹⁸⁸ The purpose of these proposals is to ensure that “secret wars” conducted by the CIA, where CIA personnel train and advise foreign fighters, come within the statute’s ambit.¹⁸⁹ Proposals of this nature were common in the 1970s, but have rarely been offered in recent years, at least in part because there is a good deal of reporting and supervisory legislation in this area not tied to the WPR.¹⁹⁰ For example, the presidential “findings” process, used to report covert action to Congress, gives Congress *at least*

some oversight of hostilities initiated by intelligence agencies.¹⁹¹ Although scholars note the “findings” process has its flaws, “in that Congress is normally notified on an *ex post facto* basis,” at least through this process, “the Executive Branch understands that it will undergo scrutiny and that it will be held accountable.”¹⁹²

III. COMPREHENSIVE REFORM PROPOSALS

As set out in the preceding part, there have been numerous proposals, from both scholars and legislators, to reform various parts of the WPR. Indeed, a study conducted by the Constitution Project, which focused on “War Powers in a System of Checks and Balances,” calls for many of the reform measures detailed above.¹⁹³

Despite the abundance of reform ideas, there have actually been relatively few detailed proposals for overhauling the existing statute and replacing it with a comprehensive, re-conceptualized framework. This Part of the memo examines three of the more prominent comprehensive proposals of the past three decades: the Byrd-Warner Act; Ely’s Combat Authorization Act; and Senator Biden’s Use of Force Act. Although the relevant provisions for all three proposals were discussed on an individual basis above, in this section each proposal is examined in its totality.

A. Byrd-Warner Act

The Byrd-Warner Act, first introduced in 1988 and then re-introduced in 1989, was a bipartisan effort to overhaul the WPR arising out of Congress’s dissatisfaction with effectiveness of the existing WPR in managing a variety of military crises during the 1980s.¹⁹⁴ The Byrd-Warner Act essentially abandoned the concept of the WPR providing an actual restriction on presidential deployments and instead focused on improving the Resolution’s consultation requirements.¹⁹⁵ Accordingly, the Byrd-Warner Act proposed (1) eliminating Subsections 2(c), 5(b), and 5(c) of the WPR; (2) supplementing the existing Section 3 consultation requirements with a much more extensive framework that mandates the President regularly consult with the congressional leadership and that establishes a permanent consultative group with whom the President must also consult if directed to do so by the congressional leadership; (3) laying out a procedure by which the permanent consultative group can force an expedited vote on a joint resolution authorizing or refusing to authorize a particular presidential deployment; and (4) prohibiting the use of appropriated funds for the purpose or effect of violating the WPR as amended by the Byrd-Warner Act.¹⁹⁶

The central criticism of the Byrd-Warner Act is that it abandons the original WPR’s goal of restricting the extent to which Presidents could introduce troops into hostilities without congressional assent in favor of an approach in which Congress merely tries to influence the President through an advisory role.¹⁹⁷ In addition, some individuals have questioned whether, despite the Act’s changes, its efforts to improve consultation would actually be successful. Unlike other proposals, the Byrd-Warner Act neither requires a regular consultation schedule nor defines consultation, instead simply providing, as the

current WPR does, that the President merely consult “in every possible instance.” Accordingly, it is not clear whether consultation under Byrd-Warner would be any more frequent or substantive than what exists under the current WPR regime.¹⁹⁸

B. John Hart Ely’s Combat Authorization Act

At around the same time that Congress was considering the Byrd-Warner Act and other War Powers-related amendments, John Hart Ely, then a Professor at Stanford Law School, began developing the framework for a revised WPR. He set out an initial draft of his proposal in 1988 article in the *Columbia Law Review*, “Suppose Congress Wanted a War Powers Act That Worked,” and then expanded on and modified this proposal in his 1993 book, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*.

Ely’s proposal was motivated in part by his sense that the Byrd-Warner Act represented a needless abandonment of the current WPR requirement that Presidents not introduce troops into hostilities without congressional approval. Thus, his proposal is largely an attempt to show that a congressional authorization scheme is workable if designed properly.¹⁹⁹ As noted above, Ely proposed renaming the WPR the “Combat Authorization Act”²⁰⁰ to distance his proposal from the WPR’s negative connotations and proposed eliminating from the WPR “a good deal of nonoperational ‘noise’ that serves only to confuse its constitutional status and otherwise encourage continued presidential defiance.”²⁰¹ On these grounds, Ely suggested repealing Subsections 2(c), 5(c), and 8(d) of the WPR.²⁰²

The thrust of Ely’s proposal is therefore counter to that of Byrd-Warner. Although he adopted the Byrd-Warner proposal for modifying the consultation requirements, Ely did not place much weight on the importance of consultation.²⁰³ Instead, Ely devoted most of his energy to enhancing the Subsection 4(a)(1) and 5(b) enforcement mechanisms. To that end, he proposed (1) implementing a prior authorization scheme; (2) restricting emergency deployments made without authorization to 20 days; (3) tightening Section 4’s reporting requirements by eliminating Subsections 4(a)(2) and 4(a)(3) and by broadening and clarifying the definition of when the President’s reporting obligations attach; (4) linking compliance with the WPR to appropriations by prohibiting the expenditure of funds for a deployment made in violation of the WPR; and (5) creating a judicial review mechanism so, in the case of presidential non-compliance, courts can provide definitive statements on when the Subsection 5(b) timeline commenced and when it concluded.²⁰⁴

The central objections to Ely’s proposal are that he ignores the arguments, both constitutional and practical, that the WPR’s system that automatically terminates deployments absent congressional authorization seriously compromises the President’s ability to exercise his power as Commander-in-Chief and harms military effectiveness.²⁰⁵ Indeed, as some scholars note, Ely’s prior authorization approach, coupled with his expanded definition of hostilities, could potentially result in a President needing explicit congressional approval for standard troop deployments to overseas military bases.²⁰⁶ In addition, there is significant skepticism about the basic premise on which Ely’s revised statute rests—*i.e.*, that Congress can be compelled to act. As Ely makes clear, the purpose of his scheme is to make Congress own up to its war powers responsibilities. As he states, his proposed statute “is calculated to

achieve more effectively the goal of forcing the president to seek congressional authorization before (or if necessary, simultaneously with) involving the nation's troops in armed combat, and thus forcing Congress to perform its constitutional duty of deciding whether we go to war."²⁰⁷ Ely thinks that his proposal will achieve that aim, but even he concedes that "the matter is not entirely free from doubt."²⁰⁸ Others, however, are more dismissive. Indeed, Turner suggests that having Congress solve its inaction problem by passing a statute forcing it to act is essentially akin to solving the crime problem by having criminals agree in advance to turn themselves in.²⁰⁹

C. Senator Biden's Use of Force Act

In connection with the congressional reexamination of the WPR that led to the Byrd-Warner Act, Senator Biden was asked to chair a special subcommittee that looked at war powers issues.²¹⁰ After performing that duty, Senator Biden developed his own proposal for a "Use of Force Act," which he laid out, with John B. Ritch III, in a 1988 *Georgetown Law Journal* article, "The War Powers at a Constitutional Impasse: A 'Joint Decision' Solution," and then introduced, in modified form, in 1995 and 1998.²¹¹ As the name of his article suggests, Senator Biden's goal was to create a framework that reconciled the competing claims of the proponents for congressional and executive power.²¹² Senator Biden therefore proposed a statute that, although preserving the essentials of the current WPR, attempted to take seriously the arguments of WPR opponents that the WPR was unjustly hindering executive power.

To that end, Senator Biden's proposal (1) amends Subsection 2(c) to grant the President statutorily the power to use force in a far wider range of circumstances than those currently listed in that subsection; (2) creates an exemption to Subsection 5(b) in which a President can avoid the Subsection's timeline by certifying to Congress that his non-compliance is required by national security; and (3) eliminates the presumption that congressional inaction can result in the termination of an operation by providing that President may continue a deployment in light of congressional inaction as long as the President has sought authorization.²¹³ However, because Senator Biden's goal is to create a "joint decision" framework, his proposal also incorporates a number of mechanisms for improving congressional effectiveness under WPR as well. Thus, Senator Biden's Use of Force Act (1) replaces the WPR's focus on "hostilities" with a more broadly-defined "use of force"; (2) includes consultation requirements even more extensive than those provided in Byrd-Warner; (3) preserves the 60-day timeline of Subsection 5(b); (4) ties compliance with the WPR to appropriations by prohibiting the expenditure of funds on a deployment made in violation of the WPR and permitting a point of order to lie against an appropriations bill that would fund a deployment for which Congress has expressed disapproval by concurrent resolution; and (5) creates a judicial review mechanism so, in the case of presidential non-compliance, courts can provide definitive statements on when the Subsection 5(b) timeline commenced and when it concluded.²¹⁴

The Use of Force Act has been subject to less scrutiny than either the Byrd-Warner Act or Ely's proposal. As a practical matter, Senator Biden's proposed exceptions to Subsection 5(b), while an honest attempt to respect executive authority, are arguably so broad that they swallow the rule. A President can essentially avoid the WPR's restrictions whenever he truly wants to do so simply by certifying to

Congress that a national security emergency exists necessitating an exemption from the WPR's strictures.²¹⁵ At same time, Senator Biden's efforts to enhance the congressional role are so extensive that they are likely to burden executive branch decision-making to a far greater extent than most proponents of executive war powers are willing to accept.

FOOTNOTES

- 1 Peter Raven-Hansen, *The War Powers Resolution: Origins, History, Criticisms and Reform: Chapter 9: Legislative Reforms*, 2 J. NAT'L SECURITY L. 157 (1998).
- 2 H.R.J. Res. 53, 110 Cong., 1st Sess. (2007).
- 3 THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES (2005), available at http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf
- 4 Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1373 (1994) ("I could multiply examples, but suffice it to say that virtually all commentary on this subject falls into one of two positions.").
- 5 John C. Yoo, *UN Wars, US War Powers*, 1 CHI. J. INT'L L. 355, 362-63 (2000); Bobbitt, *supra* note 4, at 1372-74 (1994); Senator Joseph R. Biden, Jr. & John B. Ritch III, *The War Powers Resolution at Constitutional Impasse: A 'Joint Decision' Solution*, 77 GEO. L.J. 367, 394-96 (1988).
- 6 Yoo, *supra* note 5, at 362-63; Bobbitt, *supra* note 4, at 1373.
- 7 Bobbitt, *supra* note 4, at 1373; Cyrus E. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 83-86 (1984).
- 8 See, e.g., *Panel Discussion: Executive Powers in Wartime; from the Federalist Society's 2006 National Lawyers' Convention*, 5 GEO. J.L. PUB. POL'Y 309, 312 (2007) (remarks of Richard A. Epstein) ("The basic architecture of Article I gives, as we all know, Congress the power to declare war. The word 'declaration' in this particular context conveys the view that the nation has one way of switching from a state of peace to a state of war. Owing to the gravity of the issue, that choice—war or peace—is quintessentially a collective national decision that should not be lightly made or made by any single person.").
- Similarly, Dean Treaenor has argued that the Framers' were deeply concerned Presidents would fall prey to the lure of "fame"—a distinctly eighteenth century allure—contending the "crucial problem in structuring [the] government became how to control the desire for fame and renown," especially in relation to "military glory." To stop the President from waging wars that were not in the national interest, Treaenor argues, "the Founders gave Congress, rather than the Executive, the power to decide whether to start wars because they wanted the warmaking decision to be disinterested, and they feared that Presidents would lead the nation into war in order to achieve a place in history." William M. Treaenor, *Fame, The Founding, and The Power to Declare War*, 82 CORNELL L. REV. 695, 699-700, 734-40, 758 (1997).
- 9 Yoo, *supra* note 5, at 364; Bobbitt, *supra* note 4, at 1373.
- 10 Yoo, *supra* note 5, at 364; Bobbitt, *supra* note 4, at 1373; see also Robert F. Turner, War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility, 34 VA. J. INT'L L. 903, 946-48 (1994).
- 11 Compare Turner, *supra* note 10, at 975 ("As a general principle, Congress may not use purse string constraints to indirectly accomplish any purpose that it is prohibited by the Constitution from doing directly, and that includes usurping the President's discretion as Commander in Chief.") with Bobbitt, *supra* note 4, at 1391 ("As a structural matter, Congress has the first and last word. It must provide forces before the President can commence hostilities, and it can remove those forces, by decommissioning them or by forbidding their use in pursuit of a particular policy at any time.").
- 12 Two exceptions to this general framework are Stephen Carter and Abraham Sofaer. Although Carter and Sofaer both assert that Congress can constitutionally mandate procedures that Presidents must follow in introducing American forces into hostilities, both scholars also contend that Presidents have the power to commit U.S. forces in the absence of Congressional action. See Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 50-51 (1995); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 112 (1984).
- 13 See, e.g., J Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U.L.J. 1 (2007). Atwood argues that finding a "constructive role for Congress [in the War Powers arena] is even more important today than it was in 1973." *Id.* at 18. Atwood believes that Congress must "reassert itself as an institution" and create a process that that enables it to participate in the [war-making] decision process before U.S. forces are on their way to battle stations." *Id.* (emphasis in original).
- 14 It should be noted that there are a handful of scholars who take an extremely strong view of Congressional preeminence in this area and believe that the Constitution both vests war-making authority in Congress and precludes Congress from delegating such policy-making responsibilities to the President. See Edward F. Keynes, *The War Powers Resolution: A Bad Idea Whose Time Has Come and Gone*, 23 U. TOL. L. REV. 343, 354-55 (1992). For scholars who take this position, the WPR is unconstitutional because it impermissibly delegates the power to initiate hostilities to the President. *Id.*
- 15 See generally Richard F. Grimmert, *War Powers Resolution: Presidential Compliance*, CRS Report for Congress (Jan. 16, 2007) ("CRS Report I"); Richard F. Grimmert, *The War Powers Resolution: After Twenty-Eight Years*, CRS Report for Congress (Nov. 15, 2001) ("CRS Report II").
- 16 See Message Vetoing House Joint Resolution 542, A Joint Resolution Concerning the War Powers of Congress and the President, H. Doc. 93-171 (Oct. 24, 1973); Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991); H.R. 2525, 100th Cong., 1st Sess. (1987) (sponsored by Representative Robert Dornan); S. 305, 99th Cong., 1st Sess. (1985) (sponsored by Senator Barry Goldwater).
- 17 See S. 5. 104th Cong., 1st Sess. (1995) (sponsored by Senator Robert Dole; co-sponsored by Senators John Warner and others) ("Section 3. Consultation. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.").

- 18 See Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 31 (1995) (“Given the choice between no Resolution and one that doesn’t work—one, indeed, that confounds the congressional role rather than strengthens it; one that confuses public attention rather than focuses it; one that, with each use of force, deflects attention from underlying policy considerations as well as constitutional questions; one that gives the Congress no information about a crisis that it cannot get from the New York Times; and one that has rendered the law irrelevant—the better choice is no Resolution.”).
- 19 See Keynes, *supra* note 14, at 362.
- 20 See Louis Henkin, *War Powers “Short of War”*, 50 U. MIAMI L. REV. 201, 205 (1995) (“Deterrent effect is always hard to prove, but I think the Resolution has had some deterrent effect. . . . The need to justify what he is doing in light of the War Powers Resolution shapes the President’s behavior; in any event, it contributes to the legal process and the rule of law.”).
- 21 Thomas M. Franck, *Rethinking War Powers: By Law or By “Thaumaturgic Invocation”?*, 83 AM. J. INT’L L. 766, 770 (1989).
- 22 Pub. L. 93-148, § 1.
- 23 Biden & Ritch, *supra* note 5, at 396.
- 24 John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* 115-16 (1993).
- 25 See *id.* at 115; H.R. 1304, 98th Cong., 1st Sess. (1985) (sponsored by Representative Don Edwards); H.R. 519, 98th Cong., 1st Sess. (1985) (sponsored by Representative Stephen Neal); S. 1906, 97th Cong., 1st Sess. (1983) (sponsored by Senator Alan Cranston).
- 26 Pub. L. 93-148, § 2.
- 27 *Id.* at § 2(c).
- 28 ELY, *supra* note 24, at 117.
- 29 *Id.*
- 30 *Id.*; *War Powers and the Responsibility of Congress*, 82 AM. Soc’y Int’l L. Proc. 1, 7 (1988) (remarks of Brian Atwood); Franck, *supra* note 21, at 772; but see Turner, *supra* note 10, at 972 (noting that the language of Subsection 2(c) is not written in hortatory fashion and that many advocates of the WPR, such as Senator Jacob Javits, thought the subsection was legally binding).
- 31 See Ronald D. Rotunda, *The War Powers Act in Perspective*, 2 Mich. L. & Pol’y Rev. 1, 4-5 (1997); ELY, *supra* note 24, at 117; Edward B. Firmage, *The War Power of Congress and Revision of the War Powers Resolution*, 17 J. Contemp. L. 237, 261 (1991); Abraham D. Sofaer, *The War Powers Resolution*, 62 Temp. L. Rev. 317, 318 (1989); Franck, *supra* note 21, at 772; *War Powers*, *supra* note 30, at 8 (remarks of Michael Glennon); *id.* at 6 (remarks of Philip Trimble).
- 32 See CRS Report I at 16.
- 33 See Rotunda, *supra* note 31, at 4; ELY, *supra* note 24, at 117; John W. Rolph, *The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm*, 40 NAVAL L. REV. 85, 92 (1992); Sofaer, *supra* note 31, at 318; Franck, *supra* note 21, at 772; *War Powers*, *supra* note 30, at 6 (remarks of Philip Trimble).
- 34 See Franck, *supra* note 21, at 772; H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio); H.R. 1304, 98th Cong., 1st Sess. (1985) (sponsored by Representative Don Edwards); H.R. 519, 98th Cong., 1st Sess. (1985) (sponsored by Representative Stephen Neal); S. 1906, 97th Cong., 1st Sess. (1983) (sponsored by Senator Alan Cranston).
- 35 See Rotunda, *supra* note 31, at 4-5; ELY, *supra* note 24, at 117.
- 36 Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to “Declare War”*, 25 Harv. J. L. & Pub. Pol’y 519, 535-36 (2002).
- 37 ELY, *supra* note 24, at 118; see also Rotunda, *supra* note 31, at 4; Sofaer, *supra* note 31, at 318 (“The only way that the character and limits of such fundamental constitutional powers can be defined and understood is through the actions of the two branches in coping with real world events over the years. No convenient shortcut exists.”).
- 38 See ELY, *supra* note 24, at 118; Firmage, *supra* note 31, at 261.
- 39 See ELY, *supra* note 24, at 118; Firmage, *supra* note 31, at 261.
- 40 See ELY, *supra* note 24, at 118-19.
- 41 *Id.*; Franck, *supra* note 21, at 773.
- 42 See Franck, *supra* note 21, at 772; *War Powers*, *supra* note 30, at 12-13 (remarks of Michael Glennon).
- 43 See CRS Report II at 49 (“In 1977, Senator Thomas Eagleton proposed that the War Powers Resolution return to the original language of the version passed by the Senate, and this proposal has been made several times since.”); H.R. 1304, 98th Cong., 1st Sess. (1985) (sponsored by Representative Don Edwards); H.R. 519, 98th Cong., 1st Sess. (1985) (sponsored by Representative Stephen Neal); S. 1906, 97th Cong., 1st Sess. (1983) (sponsored by Senator Alan Cranston).
- 44 See H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio); H.R.J. Res. 95, 104th Cong., 1st Sess. (1995) (sponsored by Representative Peter DeFazio).
- 45 See Leslie H. Gelb & Anne-Marie Slaughter, *Declare War*, *Atlantic Monthly* (Nov. 2005). Indeed, Gelb’s and Slaughter’s proposal arguably comes the closest of any of the proposals of simply making the current version of Subsection 2(c) legally binding. Subsection 2(c) states that a President may only authorize force without Congressional approval when he is responding to a national emergency created by an attack on the United States or its Armed Forces. Gelb and Slaughter would require a declaration of war except if the President is responding to a sudden attack. See *id.*
- 46 H.R.J. Res. 53, 110th Cong., 1st Sess. (2007) (sponsored by Representative Walter B. Jones).
- 47 See *id.*; Franck, *supra* note 21, at 768-69, 774-75.
- 48 See Henkin, *supra* note 20, at 206 (“Congress might authorize the President to use force, short of war, in order to safeguard U.S. troops abroad—which probably was not within the original Framers’ intent; to defend the lives of citizens; to act in emergency, real emergency. But we would have the President act by authorization from Congress, rather than on his own authority.”); Biden & Ritch, *supra* note 5, at 397 (“[T]hrough a Use of Force Act, Congress would affirmatively delegate authorities that embrace and extend beyond those independently held by the President solely through the Constitution. In so doing, however, Congress would impose standards, limitations, and procedures pursuant to its own constitutional powers.”); S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden).
- 49 See Henkin, *supra* note 20, at 206; Biden & Ritch, *supra* note 5, at 397
- 50 See Henkin, *supra* note 20, at 206 (“Unfortunately, from my perspective, [Senator Biden’s] bill would have delegated to the President authority to use force for virtually everything. That is not my idea.”).

- 51 See Pub. L. 93-148, § 3.
- 52 See Phillip R. Trimble, *The War Power Twenty-Five Years Later*, 3 U.c. Davis J. Int'l L. & Pol'y 183, 189 (1997); Sofaer, *supra* note 31, at 319 (“Consultation is an absolute necessity for effective executive management.”); see also S. 5, 104th Cong., 1st Sess. (1995) (sponsored by, *inter alia*, Senators Robert Dole and John Warner) (repealing majority of WPR, but preserving Section 3).
- 53 CRS Report I at 15.
- 54 See Glennon, *supra* note 18, at 28; Biden & Ritch, *supra* note 5, at 400-02.
- 55 See Firmage, *supra* note 31, at 258; Biden & Ritch, *supra* note 5, at 402; *War Powers*, *supra* note 30, at 11 (remarks of Philip Trimble).
- 56 See ELY, *supra* note 24, at 120; Firmage, *supra* note 31, at 257; Vance, *supra* note 7, at 91-92.
- 57 See ELY, *supra* note 24, at 120-21; Rolph, *supra* note 33, at 94; Firmage, *supra* note 31, at 257-58.
- 58 See Biden & Ritch, *supra* note 5, at 401-02; S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden). Biden defines “use of force” to encompass situations where U.S. troops have been (1) recently introduced into foreign territory, (2) deployed to expand significantly the military presence in a foreign territory; or (3) committed to new activities in foreign territory or on the high seas; and those troops are operating with a substantial likelihood of inflicting or incurring casualties. *Id.*
- 59 See Biden & Ritch, *supra* note 5, at 401-03; S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden). There are differences in how frequently consultations need to occur between the Use of Force Act set out by Biden & Ritch in their *Georgetown Law Journal* article and the Use of Force Act as introduced. The schedule set out above reflects the requirements contained in the introduced legislation.
- 60 See S. 2, 101st Cong., 1st Sess. (1989) (sponsored by Senator Robert Byrd).
- 61 *Id.*
- 62 See Vance, *supra* note 7, at 92-93.
- 63 See H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio); see also H.R.J. Res. 53, 110th Cong., 1st Sess. (2007) (sponsored by Representative Walter B. Jones). (calling for executive-legislative consultative committee including the Speaker of the House, the President Pro Tempore of the Senate, and the majority and minority leaders of both the House and Senate).
- 64 See H.R.3405, 103d Cong., 1st Sess. (1993) (sponsored by Representative Lee Hamilton); see also Henkin, *supra* note 20, at 208 (proposing the creation of a “small, continuing body” of Congressional leaders who meet regularly with the Executive Branch); Ely, *supra* note 24, at 120-21 (stating that consultation requires “genuine discussion, a seeking of advice and counsel” and adopting Byrd-Warner consultative group framework); Firmage, *supra* note 31, at 257-59 (embracing Vance and Byrd-Warner and suggesting that “in every possible instance” clause be eliminated to reduce Presidential discretion); S. 1790, 94th Cong., 1st Sess. (1975) (sponsored by Senator Thomas Eagleton) (requiring President to fully consider advice and counsel of Congressional leadership before committing troops to hostilities).
- 65 Trimble, *supra* note 52, at 189; see also Rolph, *supra* note 33, at 94 (raising concerns over preserving secrecy of military operations).
- 66 *Id.* at 189-90.
- 67 See Sofaer, *supra* note 31, at 319.
- 68 See Franck, *supra* note 21, at 776; *War Powers*, *supra* note 30, at 12 (remarks of Michael Glennon).
- 69 See Franck, *supra* note 21, at 776.
- 70 See Pub. L. 93-148, § 4.
- 71 See *id.*, § 4(a).
- 72 See *id.*, §§ 4(b), 4(c).
- 73 See Ely, *supra* note 24, at 134.
- 74 See Pub. L. 93-148, § 5(b); see also Rolph, *supra* note 33, at 95-96 (“Thus, sections 4(a)(1) and 5(b) were intended as the engines of the Resolution[.]”)
- 75 See *id.*
- 76 See Bobbitt, *supra* note 4, at 1398; Ely, *supra* note 24, at 125; Rolph, *supra* note 33, at 96; Michael Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 *am. j. int'l l.* 571, 571-72 (1984).
- 77 See CRS Report I at 12.
- 78 See Franck, *supra* note 21, at 769 & n.13.
- 79 See Ely, *supra* note 24, at 123; Biden & Ritch, *supra* note 5, at 389-90; Glennon, *supra* note 76, at 572.
- 80 See Ely, *supra* note 24, at 122-23; Rolph, *supra* note 33, at 96-97; Firmage, *supra* note 31, at 260; Glennon, *supra* note 76, at 580.
- 81 See Ely, *supra* note 24, at 124.
- 82 See Franck, *supra* note 21, at 769.
- 83 See H.R. 3221, 108th Cong., 1st Sess. (2003) (sponsored by Representative Hastings).
- 84 See S. 1018, 103rd Cong., 1st Sess. (1993) (sponsored by Senator Larry Pressler).
- 85 Gelb & Slaughter, *supra* note 45.
- 86 H.R.J. Res. 53, 110th Cong., 1st Sess. (2007) (sponsored by Representative Walter B. Jones).
- 87 See Firmage, *supra* note 31, at 259-60; *War Powers*, *supra* note 30, at 12 (remarks of Michael Glennon); Glennon, *supra* note 76, at 580.
- 88 CRS Report II at 3.
- 89 See Biden & Ritch, *supra* note 5, at 401-02 (substituting general “use of force” definition for hostilities and requiring report whenever force is used); S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden) (same).
- 90 Compare H.R. 5573, 99th Cong., 2d Sess. (1988) (sponsored by Representative Leon Panetta) (requires that President submit report under the WPR whenever members of the Armed Forces are paid hostile fire pay in an area declared a hostile fire zone by the Secretary of Defense), with ELY, *supra* note 24, at 173 n.10 (“[T]he specific reason that the administration decided not to designate El Salvador as a hostile fire zone was that to have done so would have triggered the provisions of the War Powers Act [Despite the refusal to designate El Salvador as a hostile fire zone,] GAO auditors found that the U.S. military personnel in El Salvador, from early 1981 until mid-1982, were receiving hostile fire pay for 97 percent of the person-months involved.”) (citation omitted).

- 91 See ELY, *supra* note 24, at 122-23.
- 92 *Id.*
- 93 Vance, *supra* note 7, at 93.
- 94 See Firmage, *supra* note 31, at 260-61; *War Powers*, *supra* note 30, at 12-13 (remarks of Michael Glennon); Glennon, *supra* note 76, at 580.
- 95 See ELY, *supra* note 24, at 123-24. As Ely notes, a Subsection 4(a)(1) situation will virtually always be a Subsection 4(a)(2) or 4(a)(3) situation as well. *Id.*
- 96 Sofaer, *supra* note 31, at 320.
- 97 See ELY, *supra* note 24, at 124; H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio); S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden). Ely would accomplish this end by simply eliminating Subsections 4(a)(2) and 4(a)(3); DeFazio would do so by attaching the Subsection 5(b) trigger to all reports filed under the section; and Biden would do so by replacing the existing reports with a single Use of Force report and linking the Subsection 5(b) trigger to that report.
- 98 See, e.g., H.R.J. Res. 53, 110th Cong., 1st Sess. (2007) (sponsored by Representative Walter B. Jones) (which would grant standing to any Member of Congress to “bring an action in the United States District Court for the District of Columbia for declaratory and injunctive relief on the ground that the President or the Armed Forces have not complied with any provision of this joint resolution”).
- 99 See ELY, *supra* note 24, at 125-26.
- 100 *Id.* at 126, 136.
- 101 See H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio); S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden).
- 102 See H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio).
- 103 See Rotunda, *supra* note 31, at 6; Sofaer, *supra* note 31, at 320.
- 104 See Franck, *supra* note 21, at 769-70.
- 105 See Pub. L. 93-148, §§ 5(a), 5(b).
- 106 See Pub. L. 93-148, § 5(b).
- 107 See Pub. L. 93-148, § 5(c).
- 108 See, e.g., Rotunda, *supra* note 31, at 8; Trimble, *supra* note 52, at 187-88; Bobbitt, *supra* note 4, at 1398; Turner, *supra* note 10, at 977; Keynes, *supra* note 14, at 355-56; Firmage, *supra* note 31, at 262; Franck, *supra* note 21, at 769; Glennon, *supra* note 76, at 577.
- 109 See ELY, *supra* note 24, at 119-20.
- 110 See *War Powers*, *supra* note 30, at 3 (remarks of Senator Brock Adams); Carter, *supra* note 12, at 130.
- 111 See ELY, *supra* note 24, at 119-20; Vance, *supra* note 7, at 86-87.
- 112 See ELY, *supra* note 24, at 120; Carter, *supra* note 12, at 131-33.
- 113 See Rotunda, *supra* note 31, at 7; Trimble, *supra* note 52, at 188.
- 114 See S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden); 144 Cong. Rec. S9447 (remarks of Senator Joseph Biden).
- 115 Franck, *supra* note 21, at 775.
- 116 Indeed, Congress itself has apparently come to this conclusion, since, shortly after *Chadha* was decided, it adopted stand-alone legislation providing for the use of joint resolutions when requiring future Presidents to withdraw troops under the WPR. See CRS Report II at 9-10.
- 117 See Biden & Ritch, *supra* note 5, at 386-87.
- 118 *Id.* at 387.
- 119 *Id.* at 387-88.
- 120 See Turner, *supra* note 10, at 969-71. Section 8 is discussed in more detail, *infra*.
- 121 See Sofaer, *supra* note 31, at 323; *War Powers*, *supra* note 30, at 5 (remarks of Phillip Trimble); *The President’s Powers As Commander-in-Chief Versus Congress’ War and Appropriations Power*, 43 U. Miami L. Rev. 17, 33-35 (1988) (remarks of Geoffrey Miller).
- 122 See ELY, *supra* note 24, at 116, 127; Keynes, *supra* note 14, at 355.
- 123 Some scholars have also argued that Subsection 5(b), like Subsection 5(c), constitutes a “legislative veto” and therefore is unconstitutional under *Chadha*. See, e.g., Patrick D. Robbins, Comment, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. Rev. 141, 176-79 (1988); see also Ely, *supra* note 24, at 121 n.32 (collecting cases). These scholars have based their argument on the fact that Subsection 5(b) allows a Presidential decision to be overridden by legislative inaction, i.e., if Congress takes no action, then the President must end the deployment when the time limit is reached. In contrast to Subsection 5(c), however, most scholars have concluded that *Chadha* is not controlling for Subsection 5(b). Instead, scholars have generally viewed the time limit of Subsection 5(b) as akin to the “sunset clause” found in many types of legislation, in which Congress authorizes an activity but only for a limited duration. See ELY, *supra* note 24, at 121 n.32; *The President’s Powers*, *supra* note 121, at 28 (remarks of William Van Alstyne); Carter, *supra* note 12, at 133.
- 124 See Will Marshall & Bert Brandenburg, *War Powers in a New Security Era: Restoring the Constitutional Balance*, Progressive Policy Institute (October 1990); Sofaer, *supra* note 31, at 320-21.
- 125 See Rotunda, *supra* note 31, at 9; Turner, *supra* note 10, at 973; Sofaer, *supra* note 31, at 321; 141 Cong. Rec. H 5655-5656 (June 7, 1995) (remarks of Representative Henry Hyde).
- 126 See Marshall & Brandenburg, *supra* note 124; Sofaer, *supra* note 31, at 321.
- 127 See Sofaer, *supra* note 31, at 321.
- 128 See Marshall & Brandenburg, *supra* note 124; Sofaer, *supra* note 31, at 320-21; 141 Cong. Rec. H 5655-5656 (remarks of Representative Henry Hyde).
- 129 See Glennon, *supra* note 18, at 21; Turner, *supra* note 10, at 973; Marshall & Brandenburg, *supra* note 124.
- 130 Marshall & Brandenburg, *supra* note 124; see also Sofaer, *supra* note 31, at 321; *War Powers*, *supra* note 30, at 11 (remarks of Phillip Trimble).

- 131 Vance, *supra* note 7, at 86; see also Biden & Ritch, *supra* note 5, at 404-05.
- 132 See Ely, *supra* note 24, at 127-28.
- 133 Biden & Ritch, *supra* note 5, at 405; see also ELY, *supra* note 24, at 128.
- 134 See Ely, *supra* note 24, at 125-26; *The President's Power*, *supra* note 121, at 31 (remarks of Congressman Charles Bennett).
- 135 See Ely, *supra* note 24, at 121-25; Franck, *supra* note 21, at 769-70; Glennon, *supra* note 76, at 574.
- 136 See Ely, *supra* note 24, at 121.
- 137 See Turner, *supra* note 10, at 973; Marshall & Brandenburg, *supra* note 124; Sofaer, *supra* note 31, at 325; 141 Cong. Rec. H 5655-5656 (remarks of Representative Henry Hyde in connection with proposed amendments to 1995 Overseas Investment Act).
- 138 See Trimble, *supra* note 52, at 187-88; *War Powers*, *supra* note 30, at 11-12 (remarks of Phillip Trimble); H.R.J. Res. 234, 101st Cong., 1st Sess. (1989) (sponsored by Representative Gerald Solomon); H.R.J. Res. 678, 100th Cong., 2d Sess. (1988) (sponsored by Representative William Broomfield).
- 139 See H.R. 1304, 98th Cong., 1st Sess. (1985) (sponsored by Representative Don Edwards); H.R. 519, 98th Cong., 1st Sess. (1985) (sponsored by Representative Stephen Neal); S. 1906, 97th Cong., 1st Sess. (1983) (sponsored by Senator Alan Cranston).
- 140 See ELY, *supra* note 24, at 126.
- 141 ELY, *supra* note 24, at 133.
- 142 *Id.* at 133-36.
- 143 See *id.* at 121; Firmage, *supra* note 31, at 263; Franck, *supra* note 21, at 775-76; Vance, *supra* note 7, at 93 (“I would therefore recommend that the Resolution be amended to provide that, notwithstanding any other law, no funds made available under any law may be obligated or expended for any use of United States forces prohibited by section 5(b) of the Resolution[.]”); H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio).
- 144 See Ely, *supra* note 24, at 125; Firmage, *supra* note 31, at 264-5; Franck, *supra* note 21, at 774-75; Glennon, *supra* note 76, at 578-80; H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio).
- 145 See 134 Cong. Rec. S6177-78 (May 19, 1988) (remarks of Senator George Mitchell).
- 146 See S. 2, 101st Cong., 1st Sess. (1989) (sponsored by Senator Robert Byrd).
- 147 See S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden); see also Biden & Ritch, *supra* note 5, at 406-07.
- 148 See Pub. L. 93-148, §§ 6, 7.
- 149 See Ely, *supra* note 24, at 136.
- 150 See Biden & Ritch, *supra* note 5, at 408.
- 151 *Id.*
- 152 *Id.*
- 153 See S.2, 101st Cong., 1st Sess. (1989) (sponsored by Senator Robert Byrd).
- 154 H.R.J. Res. 234, 101st Cong., 1st Sess. (1989) (sponsored by Representative Gerald Solomon).
- 155 See S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden).
- 156 See Pub. L. 93-148, § 8.
- 157 See Sofaer, *supra* note 12, at 55; Bobbitt, *supra* note 4, at 1399; Sofaer, *supra* note 31, at 325-26.
- 158 See Ely, *supra* note 24, at 116.
- 159 Bobbitt, *supra* note 4, at 1399.
- 160 Sofaer, *supra* note 31, at 326.
- 161 Ely, *supra* note 24, at 129.
- 162 Ely, *supra* note 24, at 116.
- 163 See H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio).
- 164 Turner, *supra* note 10, at 971.
- 165 See generally CRS Report II; CRS Report I.
- 166 See Firmage, *supra* note 31, at 264-65; John Hart Ely, *Suppose Congress Wanted A War Powers Act That Worked*, 88 Colum. L. Rev. 1379, 1406-16 (1988). See also, *Miller Center of Public Affairs, Federal Courts and the War Powers* (2008).
- 167 See Firmage, *supra* note 31, at 264-65; Franck, *supra* note 21, at 773-74; Ely, *supra* note 166, at 1406-16; Biden & Ritch, *supra* note 5, at 409-10; Glennon, *supra* note 76, at 578-80.
- 168 See Firmage, *supra* note 31, at 264-65; ELY, *supra* note 24, at 125; *War Powers*, *supra* note 30, at 13 (remarks of Michael Glennon); Glennon, *supra* note 76, at 578-80; Peter Raven-Hansen, *supra* note 1 at 177; S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden); H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio); H.R.J. Res. 53, 110th Cong., 1st Sess. (2007) (sponsored by Representative Walter B. Jones).
- 169 See ELY, *supra* note 24, at 125.
- 170 See Firmage, *supra* note 31, at 264-65; Ely, *supra* note 24, at 135; *War Powers*, *supra* note 30, at 13 (remarks of Michael Glennon); Glennon, *supra* note 76, at 578-80; S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden); Peter Raven-Hansen, *supra* note 1 at 177; H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio).
- 171 See Franck, *supra* note 21, at 774-75.
- 172 See S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden); H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio).
- 173 See Ely, *supra* note 166, at 1409-11.
- 174 See ELY, *supra* note 24, at 135 (single judge); Peter Raven-Hansen, *supra* note 1 at 177 (three-judge panel); S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden) (three-judge panel); H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio) (single judge); H.R.J. Res. 53, 110th Cong., 1st Sess. (2007) (sponsored by Representative Walter B. Jones) (single judge).
- 175 *Id.*
- 176 See ELY, *supra* note 24, at 135; S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden).
- 177 See H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio).

- 178 See Ely, *supra* note 166, at 1416-17.
- 179 *Id.*
- 180 See, e.g., *War Powers for the 21st Century: The Constitutional Perspective: Hearing before the H. Subcomm. on International Organizations, Human Rights and Oversight Comm. on Foreign Affairs*, 110th Cong. 7 (2008) (statement of Professor Jules Lobel, Univ. of Pittsburgh), available at <http://foreignaffairs.house.gov/110/lob041008.htm>.
- 181 See Firmage, *supra* note 31, at 263; Ely, *supra* note 24, at 121; Franck, *supra* note 21, at 775-76; *War Powers*, *supra* note 30, at 13 (remarks of Michael Glennon); *id.* at 12 (remarks of Phillip Trimble); Vance, *supra* note 7, at 93; S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden); H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio); S. 2, 101st Cong., 1st Sess. (1989) (sponsored by Senator Robert Byrd); H.R.J. Res. 53, 110th Cong., 1st Sess. (2007) (sponsored by Representative Walter B. Jones).
- 182 See Firmage, *supra* note 31, at 263; Ely, *supra* note 24, at 121; John Yoo, *Unlawful Entry: The Supreme Court's intrusion into the conduct of foreign policy is unjust and unwise*, *American Lawyer* 75-77 (Feb. 1, 2007); but see Turner, *supra* note 10, at 974-75 (stating that Congress cannot use spending power to usurp President's power as Commander-in-Chief); Robbins, *supra* note 123, at 180-81 (asserting that automatic funding cut-off would violate *Chadha*).
- 183 See ELY, *supra* note 24, at 121; Franck, *supra* note 21, at 776; Vance, *supra* note 7, at 93; S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden); H.R.J. Res. 42, 106th Cong., 1st Sess. (1999) (sponsored by Representative Peter DeFazio); S. 2, 101st Cong., 1st Sess. (1989) (sponsored by Senator Robert Byrd).
- 184 See Franck, *supra* note 21, at 775-76; *War Powers*, *supra* note 30, at 12 (remarks of Phillip Trimble); S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden).
- 185 See Sofaer, *supra* note 12, at 55; Bobbitt, *supra* note 4, at 1399; Sofaer, *supra* note 31, at 325-26.
- 186 See Bobbitt, *supra* note 4, 1399; Sofaer, *supra* note 31, at 326.
- 187 See CRS Report II at 50.
- 188 See Firmage, *supra* note 31, at 263-64; *War Powers*, *supra* note 30, at 13 (remarks of Michael Glennon); Glennon, *supra* note 76, at 578-80; H.R. 12255, 94th Cong., 2d Sess. (1976) (sponsored by Representative James Scheuer); H.R. 7744, 94th Cong., 1st Sess. (1975) (sponsored by Representative Gladys Noon Spellman); S. 1790, 94th Cong., 1st Sess. (1975) (sponsored by Senator Thomas Eagleton).
- 189 See Firmage, *supra* note 31, at 263-64; *War Powers*, *supra* note 30, at 13 (remarks of Michael Glennon).
- 190 See, e.g., Alfred Cumming, *Statutory Procedures Under Which Congress is to be Informed of U.S. Intelligence Activities, Including Covert Actions*, *CRS Report for Congress* (Jan. 18, 2006) (explaining that 50 U.S.C. § 413 requires that the President keep the congressional intelligence committees "fully and currently informed" of any U.S. intelligence activities, including any "significant anticipated intelligence activity"). In the case of exceptionally sensitive covert actions, the President may limit his reporting to just the "Gang of Eight"—the chairmen and ranking members of the congressional intelligence committees, the House and Senate majority and minority leaders, and any other members of the congressional leadership that the President may designate. See *id.* at 5; see also L. Britt Snider, *The Agency & The Hill: Cia's Relationship With Congress, 1946-2004* 310-11 (2008).
- 191 See J Brian Atwood, *supra* note 13, at 17 (citing Lori Fisler Damrosch, *Covert Operations*, 83 *Am. J. Int'l L.* 795, 795, 805 (1989)).
- 192 *Id.* at 17.
- 193 See, e.g., *The Constitution Project*, *supra* note 3, at 37-42; (Recommendation 9: "To preserve the system of checks and balances of which war powers are a part, the federal courts should, in appropriate cases, decide whether authority exists for the use of force abroad.").
- 194 See 134 Cong. Rec. S6173-78 (May 19, 1988) (remarks of Senators Robert Byrd, Sam Nunn, John Warner, and George Mitchell).
- 195 See Biden & Ritch, *supra* note 5, at 393-94, 403 (noting that Byrd-Warner Act "implicitly places all of its antimonarchist hopes" in consultation procedures).
- 196 See S. 2, 101st Cong., 1st Sess. (1989).
- 197 See Ely, *supra* note 166, at 1384-85; Biden & Ritch, *supra* note 5, at 393-94.
- 198 See Captain Keith D. Simmons, *Revising The War Powers Resolution: The Wrong Answer*, 1989-jan *Army Law.* 21, 25-26 (1989).
- 199 See Ely, *supra* note 166, at 1385.
- 200 See ELY, *supra* note 24, at 116.
- 201 Ely, *supra* note 166, at 1385.
- 202 See ELY, *supra* note 24, at 116-20.
- 203 *Id.* at 120-21.
- 204 *Id.* at 121-28.
- 205 See Turner, *supra* note 10, at 920-21, 968, 973-78; Bobbitt, *supra* note 4, at 1375, 1398-1400.
- 206 See Turner, *supra* note 10, at 976 ("Professor Ely's approach would arguably require specific legislative sanction virtually every time the President made a troop movement outside of the continental United States.").
- 207 ELY, *supra* note 24, at 115.
- 208 *Id.* at 130.
- 209 See Turner, *supra* note 10, at 978.
- 210 See 144 Cong. Rec. S9444-47 (July 30, 1998) (statement of Senator Joseph Biden).
- 211 *Id.*
- 212 See Biden & Ritch, *supra* note 5, at 394-96.
- 213 See S. 2387, 105th Cong., 2d Sess. (1998) (sponsored by Senator Joseph Biden); 144 Cong. Rec. S9444-47 (July 30, 1998) (statement of Senator Joseph Biden).
- 214 *Id.*
- 215 See Biden & Ritch, *supra* note 5, at 406-07. In the *Georgetown Law Journal*, Biden and Ritch suggested that the scope of the exception might be circumscribed by requiring Congress to accept the President's rationale by joint resolution if he invokes the exception for more than 30 days. *Id.* at 407. But this restriction was not incorporated in the Use of Force Act that was actually introduced.