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Clinton, Kosovo, and the Final Destruction of the War Powers Resolution

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CLINTON, KOSOVO, AND THE FINAL DESTRUCTION OF THE WAR POWERS RESOLUTION

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In February of 1999, as the rhetoric of possible United States use of force against the Federal Republic of Yugoslavia began to reach a crescendo, Congressman Tom Campbell and thirty-eight other members of Congress sent the following letter to President Clinton:

February 19, 1999

Honorable William Jefferson Clinton
President of the United States
The White House
Washington, D.C.

Dear Mr. President:

We have serious constitutional concerns about recent reports that you are planning military intervention in the Kosovo region of Yugoslavia, and again respectfully remind you that the Constitution requires you to obtain

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> authority from Congress before taking military action against Yugoslavia.
>
> As we stated in our letters of August 4, and October 2, 1998, military intervention by U.S. forces into the war-torn region of Kosovo in order to stop attacks by Serbian forces against civilians and halt the fighting with the Kosovo Liberation Army in an area the United States recognizes as sovereign Yugoslav territory cannot be construed as "defensive" action within your inherent authority as Commander-in-Chief. Rather it would involve military actions against territory and air space which has not been the source of an attack on the United States. This action falls within the exclusive powers and responsibilities of Congress under Article I, Section 8, of the Constitution—the war powers clause. No provision of the United Nations Charter or the North Atlantic Treaty can override the requirement of United States domestic law as set forth in the Constitution. In fact, Congress conditioned U.S. participation in both the U.N. and NATO on the requirement that Congress retain its constitutional prerogatives.
>
> The Constitution compels you to obtain authority from Congress before taking military action against Yugoslavia. In earlier correspondence, dated January 15, 1999, your National Security Advisor cited previous uses of force in Bosnia and Somalia as examples of authority to conduct offensive military operations in this case. The examples are inapposite as none involve sending military forces into a foreign country's territory contrary to the will of the recognized government of that foreign country. Furthermore, past violations of constitutional duty form no justification for additional violations. Nor does consulting with a few Members of Congress satisfy the constitutional obligation to obtain the approval of Congress.[1]

With this proverbial "shot across the bow," Representative Campbell set the stage for what he probably believed would be a monumental constitutional showdown over the authority of the

1. Letter from Representative Tom Campbell and other Members of Congress to President Clinton, *at* http://www.house.gov/campbell/990219.htm (Feb. 19, 1999).

President to commit the armed forces of the United States to combat. What actually transpired was far less sensational than such a showdown would have been. Yet, although little public or press attention was paid to the constitutional debate surrounding Operation Allied Force—the combat operations directed against the Federal Republic of Yugoslavia[2]—Representative Campbell's action, and the political and legal response to it, had a potentially profound impact on the law related to the domestic legal authority to commit United States armed forces to combat. Specifically, while this action may or may not have brought about the downfall of the regime of Slobodan Milosevic, it may have provided the ammunition to bring about the final demise of the quarter-century old, oft-avoided, and generally misunderstood War Powers Resolution.

Over twenty-five years ago, the Congress of the United States passed, over the veto of then President Richard Nixon,[3] a joint resolution which was intended to restore the proper balance between the executive and legislative branches with regard to the decision to send United States forces into combat.[4] This law, which was codified as part of the United States Code, came to be known as the War Powers Resolution.[5] Since the date it came into force, the armed forces of the United States have conducted combat operations all over the world, ranging from the armed escort of foreign-flagged merchant ships reflagged with the U.S. colors for the purpose of gaining U.S. military protection, to massive air and ground operations against conventional enemy forces.[6] Looking

2. This was the designation for the air and missile attacks launched by the United States and other members of the North Atlantic Treaty Organization against the Federal Republic of Yugoslavia on March 24, 1999. *See* Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (containing factual discussion of Operation Allied Force), *cert. denied*, 121 S. Ct. 50 (2000).

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

4. The War Powers Resolution, Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)). The War Powers Resolution indicates: "It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . ." 50 U.S.C. § 1541(a).

5. *See* 50 U.S.C. ch. 33 (1994); Pub. L. No. 93-248, § 1, 87 Stat. at 555.

6. *See generally* LOUIS FISHER, PRESIDENTIAL WAR POWER 134-61 (1995) (cataloging the instances of military force used by Presidents under their unilateral power as Commander in Chief in the administrations from President Ford to President Clinton); Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145 (1995) [hereinafter Stromseth, *Collective Force*] (discussing

back over this period, it is indisputable that the central component of the War Powers Resolution—the requirement that the President obtain express congressional authorization to conduct such operations[7]—has been virtually meaningless.[8] In fact, it is probably only a slight exaggeration to state that the most significant effect of the War Powers Resolution has been to provide separation of powers scholars with an interesting subject to analyze and debate. Analysis of the actual operation of the Resolution in relation to these various combat operations reveals a consistent pattern of executive side-stepping,[9] legislative acquiescence,[10] and judicial abstention.[11] Many scholars have criticized this pattern of "nullifying" the intent of the Resolution.[12] However, few have

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the influence of actions taken under the United Nations Charter); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 865-86 (1996) [hereinafter Stromseth, *War Powers Today*] (reviewing FISHER, *supra*). For a factual discussion of Operation Allied Force, see *Campbell*, 203 F.3d at 20.

7. *See* 50 U.S.C. at § 1541(c). This section states:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Id.

8. *See* Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 1-6, 10-12 (1998) (arguing instead that "[t]he Resolution . . . grants to the President unbridled discretion to go to war as he deems necessary against anyone, anytime, anywhere, for at least ninety days").

9. *See* FISHER, *supra* note 6, at 134-61; Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715, 742-50 (1984); Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 87-95 (1984).

10. *See* Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 28-31 (1995); Vance, *supra* note 9, at 87-95.

11. *See* Ratner & Cole, *supra* note 9, at 751-61.

12. *See, e.g.*, Christopher A. Ford, *War Powers As We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609, 700-08 (1995); Glennon, *supra* note 10, *passim*; Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A. L. REV. 599, 631-52 (1984); Ratner & Cole, *supra* note 9, at 742-50; Rep. Clement J. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579 *passim* (1984); Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 Yale L.J. 1330, 1332-33 (1984); Brian M. Spaid, Comment, *Collective Security v. Constitutional Sovereignty: Can the President Commit U.S. Troops Under the Sanction of the United Nations Security Council Without Congressional Approval?*, 17 U. DAYTON L. REV. 1055, 1078-88 (1992).

analyzed the impact of this pattern on the constitutional validity of the Resolution. As a result of the most recent use of combat force by the United States, Operation Allied Force, this analysis can no longer be avoided.

Opponents of the War Powers Resolution have always insisted that it represented an unconstitutional intrusion into the power of the President as Chief Executive and Commander in Chief.[13] Indeed, this was the prime factor leading to President Nixon's veto of the Resolution.[14] Up until 1999, however, proponents of the constitutional validity of the Resolution could generally muster two theories to explain why they continued to persist in their views, despite the pattern of executive nullification. The first reason was essentially that repeated presidential abuse of the law did not undermine its validity—that an illegal presidential practice cannot, by virtue of repetition, be transformed into a legal one.[15] The

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13. *See* Lieutenant Commander 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, 91-93 (1992); Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683, 683-85 (1984).

14.

> I hereby return without my approval House Joint Resolution 542—the War Powers Resolution. While I am in accord with the desire of the Congress to assert its proper role in the conduct of our foreign affairs, the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation.

Veto of the War Powers Resolution, *supra* note 3.

15. *See* HAROLD JONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 133 (1990); Ratner & Cole, *supra* note 9, at 742-66; Zablocki, *supra* note 12, at 597-98. According to one scholar:

> It has been argued that congressional acquiescence in the practice of executive war making has constitutionally legitimized the model of presidential predominance. *See, e.g.*, Henry P. Monaghan, *Presidential War-Making*, 50 B.U.L. REV. (Special Issue) 19 (1970). If this theory is correct, then it can only mean that an unconstitutional practice long endured amends the Constitution for we are not here dealing with anything that can be legitimately described as a grey area. The theory is without merit. Article V of the Constitution provides a method of amendment and so long as that method is not used, the Constitution remains unaltered regardless of any pattern of behavior undertaken by the President, the Congress or the Supreme Court. There is no doctrine of amendment by violation. Patterns of unconstitutional behavior call for one response— repudiation.

Ides, *supra* note 12, at 626 n.92. Indeed, the Letter from Representative Campbell noted this point when it indicated that the repetition of an unconstitutional act does not render it constitutional. *See supra* text accompanying note 1.

second, and perhaps more persuasive, reason was that the Resolution had never conclusively been violated by a President.[16] This conclusion is reached by combining two propositions. First, that contrary to the express meaning of the Resolution, the "60 day clock"[17] provision has served as a de facto source of authority for Presidents to employ force.[18] Second, that no combat operation initiated by a President during this period extended beyond sixty days without express congressional authorization, thus satisfying the requirements of the Resolution.[19]

As this Article will demonstrate, contrary to the arguments of proponents of the continued validity of the Resolution, Operation Allied Force left an indelible mark on the history of war making under the Resolution. Operation Allied Force was the first combat operation to continue beyond sixty days without express statutory authorization, in apparent contravention of the War Powers Resolution.[20] Thus, it is an action that must be analyzed to assess whether the arguments surrounding the Resolution remain legitimate.

This Article proposes that analysis of the history of war making, with particular emphasis on Operation Allied Force and the war powers litigation it generated, establishes that the War Powers Resolution's requirement that the President conduct nondefensive

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16. *See, e.g.*, Fisher & Adler, *supra* note 8, at 10-12.

17. 50 U.S.C. § 1544(b) (1994).

18. *See* Fisher & Adler, *supra* note 8, at 11.

19. *See* Stromseth, *Collective Force*, *supra* note 6, at 165-66; Stromseth, *War Powers Today*, *supra* note 6, at 910-11.

20. On March 24, 1999, President Clinton announced the commencement of NATO strikes against Yugoslav targets, and on April 28, the President submitted to Congress a report, "consistent with the War Powers Resolution," detailing his decision. *See* Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000). Under the War Powers Resolution:

> Within *sixty calendar days* after a report is submitted . . . the President shall terminate any use of United States Armed Forces . . . unless Congress (1) has declared war or has enacted *specific authorization for such use of United States Armed Forces*, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.

50 U.S.C. § 1544(b) (1994) (emphasis added). On April 28, Congress voted down a declaration of war and an "authorization" of the air strikes, but also voted against a resolution requiring the President to immediately cease U.S. participation in the air strikes, and voted to fund the operation. *See Campbell*, 203 F.3d at 20. The conflict continued for 79 days, ending on June 10. *See id.*

combat operations[21] pursuant only to express legislative authorization[22] is unconstitutional. This conclusion, however, will not be based on the traditional theory that the Resolution impermissibly intrudes upon the exclusive power of the executive to initiate combat operations. In fact, it is premised on an interpretation of the Constitution that the power to initiate nondefensive combat operations is not an exclusive executive power, but a power shared between the executive and legislative branches.[23] This interpretation is reinforced by "historical gloss,"[24] and in light of Operation Allied Force, conclusively establishes that *how* the Congress and the President choose to cooperate in the exercise of this shared power is their choice. Thus, the requirement in the War Powers Resolution that only express legislative consent serve as constitutionally legitimate authorization for presidential combat initiatives[25] is an unconstitutional restriction on how future Congresses choose to manifest support for the President, and on

21. This Article does not address the legal authority for the President to order the conduct of "defensive" or "responsive" war. While an exact definition of such a term is difficult to provide, there is ample historical and judicial support for the conclusion that the President has unilateral constitutional authority to respond to an attack on the United States or its armed forces. *See* Major Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 212-15 (1998) [hereinafter Corn, *Presidential War Power*] (analyzing the impact of the *Prize Cases*, 67 U.S. (2 Black) 635 (1862), on the authority of the President to respond to enemy attack); *see also Campbell*, 203 F.3d at 25-27 (Silberman, J., concurring) (discussing the relevance of the *Prize Cases* when analyzing the authority of the President to respond to situations of hostilities).

Instead, this Article focuses on military operations that cannot legitimately be classified as falling into the realm of "responsive" or "defensive" war. Such operations are characterized by the initiation of hostilities by the United States against an opponent who cannot be perceived as planning an imminent attack against the United States or its armed forces, as in the case of Operation Allied Force. It is important to note that this is a distinction that is central to the War Powers Resolution, which acknowledges that the President is constitutionally authorized to order the armed forces of the United States into combat "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. §1541(c) (1994). Thus, it is only the issue of conflict outside this category that leads to controversy under the War Powers Resolution.

22. *See* 50 U.S.C. § 1541(c).

23. *See* Corn, *Presidential War Power*, *supra* note 21, at 182-86 (analyzing the shared authority theory of war power).

24. *See infra* notes 27-80 and accompanying text.

25. *See* 50 U.S.C. §§ 1541(c), 1547(a)(1).

what future Presidents can constitutionally rely upon to conclude that their initiatives are cooperative ventures.[26]

Part I of the Article will briefly review the concept of historical gloss in separation of powers analysis. The second part will highlight some significant pre-Resolution examples of the historical practice of flexible cooperation. Part III will illustrate the profound limitation placed on this flexibility by the War Powers Resolution. The fourth part will illustrate that post-Resolution practice continued to validate this historical practice, with particular emphasis on Operation Allied Force. Part V will analyze the constitutional significance of this practice. The conclusion will analyze the significant distinction between determining unconstitutionality based on this theory versus a theory of intrusion upon an exclusive executive power.

PART I: THE NATURE OF "HISTORICAL GLOSS"

In April of 1952, during the height of the conflict in Korea, President Truman issued an executive order[27] that triggered a landmark decision in the field of separation of powers and national security law.[28] His order to seize steel mills in the wake of a steel workers' strike, motivated by his desire to ensure the continued supply of arms and ammunition to U.S. forces engaged in conflict,[29]

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26. *See generally* Corn, *Presidential War Power*, *supra* note 21 (analyzingthe constitutional significance of cooperative war-making decisions).

27. *See* Exec. Order No. 10,340, 3 C.F.R. 861-62 (1949-1953) (directing the Secretary of Commerce to take possession of and operate the plants and facilities of certain steel companies).

28. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *see also* KOH, *supra* note 15, at 105-13 (discussing *Youngstown*).

29. According to the executive order:

> WHEREAS the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and
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> . . . .
>
> WHEREAS a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the United States, upon which our military strength depends; and
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> . . . .
>
> WHEREAS in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States

led to the case of *Youngstown Sheet & Tube Co. v. Sawyer*.[30] The Supreme Court struck down the executive order, rejecting an emergency executive power argument.[31] Four separate concurring opinions accompanied the opinion of the Court. Two of these concurring opinions, delivered by Justices Frankfurter[32] and Jackson,[33] have gained great prominence as models for national security analysis.[34] Although both of these opinions enunciated a flexible framework for analyzing national security powers, Justice Frankfurter provided the analytical model for considering the impact of past practice to determine constitutional authority in this area.[35]

Justice Frankfurter began his opinion by emphasizing the critical importance of checks and balances in the function of our constitutional system:

> Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. . . .
>
> To that end [the Founders of our Nation] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.[36]

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take possession of and operate the plants, facilities, and other property of said companies as hereinafter provided.

Exec. Order No. 10,340, 3 C.F.R. 861-62 (1949-1953).

30. 343 U.S. 579 (1952).

31. *See id.* at 587-89.

32. *See id.* at 593 (Frankfurter, J., concurring).

33. See *id.* at 634 (Jackson, J., concurring).

34. *See, e.g.*, KOH, *supra* note 15, at 105-13.

35. *See Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring); *see also* KOH, *supra* note 15, at 70-72; Corn, *Presidential War Power*, *supra* note 21, at 240-41.

36. *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring).

Justice Frankfurter then rejected the stoic model of judicial analysis enunciated by Justice Black in the opinion of the Court.[37] Instead, he emphasized the importance of viewing the Constitution as a "framework" for the exercise of government power, particularly when the power under scrutiny is not textually committed to a specific branch of the government.[38] According to Justice Frankfurter: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[39] In this sentence, Justice Frankfurter signaled the importance of looking to past practice as a guide to judicial interpretation. The essence of his theory was that a long-standing practice of the government concerning a given power is evidence of how the drafters of the Constitution intended the power to be exercised. Accordingly, he indicated that:

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. . . . In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making it as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by §1 of Art. II.[40]

This theory of constitutional power is based on two critical factors. First, past practice is relevant not just because it occurred, but because the political branches of the government which initiated or acquiesced to the exercise of such power both shared the obligation to interpret the Constitution.[41] Second, the "test" for when such practice establishes the existence of constitutional power

37. *See id.* at 585-89.

38. *See id.* at 610 (Frankfurter, J., concurring).

39. *Id.*

40. *Id.* at 610-11.

41. *See id.* at 610-11, 614 ("In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.").

must be exacting, because the issue at stake will be the meaning of the Constitution.[42]

The test Justice Frankfurter expounded contained several critical elements. First, the practice had to be "systematic, unbroken . . . [and] long pursued" by the executive.[43] Thus, isolated incidents or recent trends are insufficient to support the conclusion that the exercise of power is constitutionally based. Second, Congress must have notice of the long-standing practice.[44] This is essential because a conclusion that an executive exercise of power is based on the Constitution has the potential consequence of disabling the Congress from participating in such exercise. Thus, past practice of executive power must reflect not only an executive belief that the power belonged to that branch, but legislative acceptance of that belief, which can only exist if Congress had notice of the practice.[45] The final component, linked to the "notice" element, is that the practice must not have been questioned or challenged by the legislature.[46] This is because evidence of such a challenge is evidence that past Congresses did not share in the view that the exercise was constitutional.

According to Justice Frankfurter, satisfaction of this test would have a profound consequence: it would make "as it were such exercise of power part of the structure of our government, [and] may be treated as a gloss on 'executive Power' vested in the President by §1 of Art. II."[47] Thus, it would constitutionally validate the exercise of power by the President. Unfortunately for President Truman, Justice Frankfurter concluded that the test had not been satisfied with regard to emergency seizure power.[48] The comprehensive extent of his analysis is, however, informative of how detailed such analysis must be. Before reaching his conclusion, Justice Frankfurter scrutinized every past industry seizure,

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42. *See id.* at 610 ("[T]hey give meaning to the words of a text or supply them.").

43. *Id.*

44. *See id.* (referring to practices "long pursued to the knowledge of the Congress").

45. *See* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("[A] long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .").

46. *See Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (referring to practices "never before questioned").

47. *Id.* at 610-11.

48. *See id.* at 614.

focusing on the statutory authority, duration, terms, and compensation related thereto.[49] His research was laid out in an appendix spanning thirteen pages and is a visual reminder that application of this test must be exacting.[50]

Justice Frankfurter's "historical gloss" theory of constitutional interpretation dovetails with Justice Jackson's concurring opinion in *Youngstown*. Jackson proposed a spectrum of possible executive/congressional conflict. On one extreme, the President may act concurrent with an express or implied congressional authorization, in which case his actions will only be rejected by the Court if specifically prohibited by the Constitution.[51] On the other extreme, the President may act contrary to an express or implied congressional directive. In these instances, the President must have exclusive constitutional authority in order for his action to be legitimate.[52] In between these two extremes, however, is a "zone of twilight" where Congress may not have spoken authoritatively on the matter.[53] In such instances, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[54] Accordingly, where Congress has notice and does not object to a consistent executive practice, both Justices Jackson and Frankfurter would recognize that practice as constitutional.

Justice Frankfurter's theory of constitutional analysis took on new life when it was relied on heavily in *Dames & Moore v. Regan*.[55] In *Dames & Moore*, Justice Rehnquist upheld President Carter's suspension of private claims against Iran as a valid exercise of executive power under the Constitution.[56] Although this power was

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49. *See id.* at 615-28.

50. *See id.*

51. *See id.* at 635-637 (Jackson, J., concurring).

52. *See id.* at 637-38. Jackson cited the "exclusive power of removal in executive agencies" as an example of Executive power which cannot be limited by congressional act. *See id.* at 638 n.4 (citing Myers v. United States, 272 U.S. 52 (1926)).

53. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

54. *Id.*

55. 453 U.S. 654 (1981).

56. *Id.* at 686. The dispute arose out of the hostage crisis following the seizure of the American embassy in Tehran during the 1979 revolution in Iran. *See id.* at 662. In 1981, the Americans held hostage were released by Iran pursuant to an agreement under which the United States and Iran agreed "to terminate all litigation as between the Government of each party and the nationals of the other." *Id.* at 664-65. Implementation of this agreement

not textually committed to the executive, Justice Rehnquist relied on the historical gloss theory to support his conclusion.[57] Looking to past incidents of executive claims suspension, Justice Rehnquist noted that Congress had never challenged the exercise of such power and therefore approved it.[58] He bolstered this argument with a review of the International Emergency Economic Powers Act[59] and the Hostage Act,[60] which did not prohibit such executive action, but instead legislated around it, thus inviting the exercise of the power in question.[61]

In upholding the suspension of claims, therefore, the Court focused on two factors: first, the history of congressional acquiescence to such presidential claims settlements;[62] and second, "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion [and therefore] may be considered to 'invite' 'measures of independent presidential responsibility.'"[63] Such "closely related" legislation was, according to the Court, significant more for what it did *not* say than what it did say: "At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President."[64] In other words, this "closely related" legislation indicated that the President did not act contrary to the express will of Congress, and therefore made the history of acquiescence to executive claims settlement determinative. Only after identifying a long history of such congressional acquiescence did the Court hold the President acted pursuant to his inherent constitutional authority.[65] Although the Court's analysis did not attempt the

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suspended all private claims and judgments against Iranian assets, *see id.* at 665-66, including a judgment entered for Dames & Moore against Iran for payment due under a contract between the two, *see id.* at 663-64.

57. *See id.* (quoting *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring)).

58. *See id.* at 678-83, 686-88.

59. 50 U.S.C. §§ 1701-1706 (1994).

60. 22 U.S.C. § 1732 (1994).

61. *See Dames & Moore*, 453 U.S. at 675-87.

62. *See id.* at 680-82.

63. *Id.* at 678 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

64. *Dames & Moore*, 453 U.S. at 678-79.

65. *See id.* at 679-80 (tracing "a longstanding practice of settling such claims by executive

comprehensiveness of Justice Frankfurter's appendix,[66] *Dames & Moore* nonetheless significantly added to the influence of the historical gloss theory.

As Part V of this Article will demonstrate, this theory of constitutional analysis provides a solid foundation for the proposition that the President is entitled to rely upon the implicit support of Congress to conclude that the initiation and continuation of combat operations in a given case is constitutionally valid.[67] For this proposition to be valid, however, it is necessary to address the impact of historical gloss on the text of the Constitution. Does such a gloss modify the text of the Constitution, or does it illuminate the original meaning of the Constitution? This question is critical in the context of war power, because if it is simply a "customary" modification,[68] subsequent legislation, here in the form of the War Powers Resolution, should trump this custom. If the impact of such a gloss is to illuminate the original meaning of the Constitution, however, then the attempt to modify such meaning through legislation should be impermissible. This seems especially true when the legislation is passed over the veto of the President.

One of the most prominent scholars in the area of national security law, Professor Harold Koh, asserts the position that the "gloss" created by history is not illumination of the Constitution, but customary modification, and thus susceptible to legislative retraction.[69] Thus, in his book *The National Security Constitution,* he describes Justice Frankfurter's theory as tantamount to "customary constitutional law."[70] As such, he places its significance at the lowest level of the model for national security analysis that Justice Jackson announced in *Youngstown*,[71] and indicates that:

> Although this large body of quasi-constitutional custom fills in the interstices of the textual and statutory skeleton of the National Security Constitution, it is perennially subject to revision. In the same way as nations modify customary rules of

agreement").

66. *See supra* text accompanying note 50.

67. *See infra* notes 161-75 and accompanying text.

68. *See* KOH, *supra* note 15, at 70-72.

69. *See id.*

70. *Id.*

71. *See supra* notes 51-54 and accompanying text.

> international law by establishing more formal rules in a particular area by treaty, so too can Congress and the president override quasi-constitutional custom by enacting a framework statute or issuing a framework executive order, which can in turn be invalidated or modified by a formal constitutional amendment or judicial decision construing the Constitution.[72]

In my view, Professor Koh's explanation of the impact of historical gloss misconstrues Justice Frankfurter's opinion. This conclusion is based on two factors. First, Justice Frankfurter was clearly analyzing the existence of a constitutional executive power, not whether the executive and the legislature had agreed to provide for such a power. This point was emphasized early in his opinion when he indicated that "our first inquiry must be not into the powers of the President, but into the powers of a District Judge to issue a temporary injunction . . . ."[73] With this caveat, Justice Frankfurter clearly indicated that once this initial inquiry was resolved, the ultimate issue of the case entailed analysis of the President's constitutional power. The opinion further emphasized this point when Justice Frankfurter stated: "The Constitution is a framework for government. Therefore, the way the framework has consistently operated fairly *establishes that it has operated according to its true nature*."[74] Frankfurter insisted that if the requisite "systematic, unbroken" practice is established, it "may be treated as a gloss on 'executive Power' vested in the President by §1 of Art. II."[75] Justice Frankfurter was therefore endeavoring to determine the authority vested in the President by the Constitution.

Second, Justice Frankfurter's predicate, that the value of a past practice derives from the shared responsibility of the branches engaged in it to interpret the Constitution,[76] indicates that his focus was the meaning of the Constitution, and not the mere agreement to lodge power in a particular branch. This supports the conclusion that a finding of historical gloss is an enunciation of the meaning of

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72. *Id.* at 71.

73. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring).

74. *Id.* at 610 (emphasis added).

75. *Id.* at 610-11.

76. *See supra* note 41 and accompanying text.

the Constitution. As such, modification by mere legislation would be invalid, even if both branches consent to the modification.

To take Professor Koh's analogy to international law one step further, Justice Frankfurter's historical gloss analysis should be equated not to mere customary international law, but to a norm *jus cogens*—a nonderogable principle of customary international law.[77] Therefore, just as a *jus cogens* principle may only be modified by a subsequent customary international law principle of the same character,[78] and not by agreement of the interested parties,[79] a power derived from historical gloss may only be modified by a subsequent constitutional modification, and not by legislation.

Even conceding that Professor Koh is correct in his analysis of the significance of historical gloss, his own enunciation of how such past practice is modified seems to suggest that the War Powers Resolution is invalid. According to Koh, post-practice modification requires the consent of *both* the legislative and executive branches.[80] Indeed, in equating the modification to a modification of customary international law through the treaty process, Professor Koh concedes the critical nature of the consent of all parties involved in the proposed modification. Thus, even under Koh's description, President Nixon's veto of the War Powers Resolution invalidates the Resolution as an effective modifier to any historical gloss related to the exercise of war power. As will be illustrated in Part V, this conclusion is essential to the analysis of historical gloss on presidential war power.

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77. The Restatement of Foreign Relations Law of the United States defines a *jus cogens* principle of customary international law as follows:

> Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

78. *See id.*

79. *See id.* § 331(2)(b). Thus, the concept of *jus cogens* is identified in the *Vienna Convention on the Law of Treaties* as a bar to the subject matter of a treaty. May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344.

80. *See supra* text accompanying note 72.

PART II: FLEXIBILITY: THE KEY TO CONSTITUTIONAL WAR POWER DECISIONS

The decision to send U.S. armed forces into combat includes a multitude of policy considerations. From a legal perspective, however, there are really only two issues: the international and domestic legal basis for the operation.[81] Although the international legal aspects of decisions to use force have been most prominent in recent operations,[82] this has not always been the case. Indeed, from the earliest days of our nation, the issue of domestic legal authority for launching combat operations has been addressed by courts, scholars, media, and the political branches of our government.[83]

This history of debate regarding the exercise of war power under domestic law also provides a fertile landscape of military operations to review for the purpose of analyzing the "constitutional custom" related to war power. One of the first comprehensive studies of the legal history of U.S. military action was conducted by the State Department in 1966 in support of the Vietnam War, a project that has continued since.[84] Virtually every historical analysis, however, has attempted to support or challenge assertions of *unilateral* executive authority to initiate combat operations.[85] Indeed,

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81. *See* INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY, OPERATIONAL LAW HANDBOOK ch. 1 (2001), http://www.jagcnet.army.mil/TJA65A.

82. *See, e.g.*, Richard G. Maxon, *Nature's Eldest Law: A Survey of a Nation's Right to Act in Self-Defense*, PARAMETERS, Autumn 1995, at 55; Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281 (1991).

83. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); KOH, *supra* note 15; Corn, *Presidential War Power*, *supra* note 21.

84. *See* Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet Nam*, 54 DEP'T ST. BULL. 474 (1966), *reprinted in* 75 YALE L.J. 1085, 1101 (1966) (citing "at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization"); Monaghan, *supra* note 15, at 25-31 (discussing the Meeker article and asserting that "[t]he occasions on which presidents have refused to take military action abroad because of a lack of prior congressional authorization are few in number and increasingly rare"). *But see* FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR, 133-34, 142-49 (2d ed. 1986) (discussing the historical support for Meeker and Monaghan's arguments and concluding that "[i]n the case of executive wars, none of the conditions for the establishment of constitutional power by usage is present").

85. *See generally* SENATE COMMITTEE ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA (Comm. Print 1970) [hereinafter

Presidents themselves have routinely cited this history in support of a unilateral offensive war power.[86] However, to my knowledge, there has been no attempt to rely upon this same history for the proposition that although the power of the President to initiate combat operations is not unilateral, that power may be legally exercised based on the implied consent of Congress.[87]

DOCUMENTS RELATING TO THE WAR POWER] (discussing this history in the context of the proper roles of both the President and Congress in the conflict in Vietnam).

86. During the prelude to the Persian Gulf War, President Bush, during a press conference on January 9, 1991, was asked if he would go to war if Congress failed to authorize offensive operations. In response to this question, he stated: "I don't think I need it. . . . Secretary Cheney expressed it very well the other day. There are a lot of differences of opinion on either side. But Saddam Hussein should be under no illusions. *I believe I have the constitutional authority—many attorneys having so advised me.*" Glennon, *supra* note 10, at 21 n.18 (quoting *Excerpts: The Great Debate on War Powers*, NAT'L L.J., Jan. 21, 1991, at 26) (emphasis added); *see also* Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 527-28 (Mar. 26, 1999) [hereinafter Letter to Congressional Leaders] (indicating that the attack was ordered "pursuant to [the President's] constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive"). According to Professor Stromseth:

> Presidents and their advisers regularly invoke historical practice as a means of validating presidential power to commit U.S. forces to hostilities. Before the Persian Gulf War, for instance, Defense Secretary Richard Cheney appealed to history in arguing that President Bush did not need congressional approval to send American troops into battle against Iraq: "[I]n the more than 200 times that U.S. military force has been committed over the history of the Nation, there are only five occasions in which the Congress of the United States voted a prior declaration of war." Likewise, scholars who contend that the President has broad unilateral authority to commit U.S. forces to combat appeal to the pattern of history.

Stromseth, *War Powers Today*, *supra* note 6, at 872-86 (alteration in original) (citations omitted).

87. Ironically, it is this practice of presidential reliance on the implicit support of the Congress and not unilateral presidential war making, that is supported by history. *See* Corn, *Presidential War Power*, *supra* note 21, at 251-55; *see also* LEON FRIEDMAN & BURT NEUBORNE, UNQUESTIONING OBEDIENCE TO THE PRESIDENT: THE ACLU CASE AGAINST THE ILLEGAL WAR IN VIETNAM (1972). An example of the significance of a finding of implied consent is provided by an excerpt from a decision related to the legality of the Vietnam War:

> It is urged that evidence can be produced to demonstrate, in effect, that a steady course of executive usurpation of initiatives that, constitutionally, require the coaction of the Congress and the Executive has rendered the Congress impotent to withhold the grudging and involuntary appropriations and implementing laws relied on as constituting its authorization of combat activities in Southeast Asia. But extended argument has brought out that the reference is to the now-familiar compilations and analyses of the combat occasions of the past coupled with proffered testimony of members of Congress

In a 1998 article,[88] I illustrated how an analysis of judicial decisions related to war power leads to two critical conclusions. The first is that there is no historical gloss which empowers the President to initiate combat operations based on unilateral executive authority, because the Constitution mandates a congressional role in such a decision.[89] The second conclusion is that this same history demonstrates that although Congress must support such an initiative, the support need not be express.[90] Thus, the President is permitted to rely upon the implied support of Congress to conclude that a war-making initiative is constitutionally sound.[91] While I do not intend to regurgitate every case

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> that their supportive votes were coerced by the predicament in which unauthorized executive action had placed the lives of men and the honor of the nation and do not reflect a will to ratify usurped initiatives. That, however, is simply a charge of Congressional pusillanimity. Such evidence, and its extent and validity are not to be supposed, could only disclose the motive and could not disprove the fact of authorization. The Constitution presents the Congress with the opportunity for it, but it cannot compel the making of unpopular decisions by the members of Congress. . . .
>
> The place of the controversial Tonkin Gulf Resolution in the whole of Congressional action is unclear; its importance no doubt lay in its practical effect on the presidential initiative rather than its constitutional meaning, *but it has not the compelling significance of the steady legislative support of the prosecution of the war.*

Orlando v. Laird, 317 F. Supp. 1013, 1019 (E.D.N.Y. 1970) (emphasis added) (citation omitted)).

88. *See* Corn, *Presidential War Power*, *supra* note 21.

89. *See id.* at 251-54.

90. *See id.*

91.

> [T]he history of war-making decisions in the United States demonstrates that, so long as the actions of Congress reasonably suggest support for the President, the President may treat such support, even if implied, as authority to execute such decisions. This practice of relying on "implied consent," which was so significant for the Vietnam era decisions, is consistent with a broad view of executive war powers; yet, it plants the foundation for such power not in a theory of unilateral presidential war power, but in the combined authority of both political branches, as executed by the President.
>
> Ironically, it is this practice of presidential reliance on the implicit support of the Congress and not unilateral presidential war making, that is so "long standing" that it may be considered to represent the proper constitutional process for making war power decisions. It appears reasonable to conclude that this practice of executive reliance on the implied support of the legislature comes much closer to satisfying the "historical gloss" test than the theory that the executive is now vested with broad unilateral constitutional authority to wage war.

related to this analysis, a discussion of the judicial decisions related to the Vietnam War will serve to illustrate the significance of the pre-War Power Resolution practice.

Throughout the war in Vietnam, service members ordered to duty in Southeast Asia turned to the courts to challenge the legality of their deployment orders.[92] In most cases, these challenges were premised on the assertion that the President lacked the constitutional authority to order the armed forces to engage in conflict because Congress had never declared war. In response, the executive branch consistently asserted a theory of unilateral executive war power to defeat the challenges, either as nonjusticiable political questions, or on the merits.[93]

Initially, the political question arguments were successful. Several courts relied on the political question doctrine to dismiss challenges on the grounds that the decision to go to war is "textually . . . commit[ted] to a coordinate political department."[94] These courts held that "[t]he fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power."[95] However, this theory was soon rejected by other courts as a basis for outright dismissal.[96] Instead of holding that the decision to initiate and wage war was textually committed to *a* coordinate branch of the government, these courts concluded

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Id. at 252.

92. *See id.* at 218-31 (discussing judicial decisions related to the legality of the Vietnam War).

93. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1308-09 (2d Cir. 1973); DaCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); Massachusetts v. Laird, 451 F.2d 26, 28-29 (1st Cir. 1971); Orlando v. Laird, 443 F.2d 1039, 1041 (2d Cir. 1971); Berk v. Laird, 429 F.2d 302, 304-05 (2d Cir. 1970); Atlee v. Laird, 347 F. Supp. 689, 691 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973); Mottola v. Nixon, 318 F. Supp. 538, 539-40 (N.D. Cal. 1970), *rev'd. on other grounds*, 464 F.2d 178 (9th Cir. 1972); FRIEDMAN & NEUBORNE, *supra* note 87, at 23-50; Ratner & Cole, *supra* note 9, at 727.

94. Baker v. Carr, 369 U.S. 186, 217 (1961); *see* Velvel v. Nixon, 415 F.2d 236, 239 (10th Cir. 1969); Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir. 1967) (per curium); United States v. Sisson, 294 F. Supp. 511, 515 (D. Mass. 1968); Velvel v. Johnson, 287 F. Supp. 846, 849-50 (D. Kan. 1968), *aff'd sub nom.*

95. *Atlee*, 347 F. Supp. at 704 (quoting *Luftig*, 373 F.2d at 665-66).

96. *See, e.g.*, *Holtzman*, 484 F.2d at 1309; *DaCosta*, 471 F.2d at 1155; *Laird*, 451 F.2d at 31-34; *Orlando*, 443 F.2d at 1042; *Berk*, 429 F.2d at 304-06; *Atlee*, 347 F. Supp. at 703-04; *Mottola*, 318 F. Supp. at 550-54; FRIEDMAN & NEUBORNE, *supra* note 87, at 23-50; Ratner & Cole, *supra* note 9, at 727.

the decision was committed to *both* political branches.[97] These courts held that "the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war."[98] Accordingly, the question of whether Congress had played any role in the decision to wage war was not a political question, but a classic constitutional question susceptible to judicial resolution.

These cases, and others echoing the same constitutional requirement that Congress play a role in war-making decisions,[99] substantially undercut the argument that history illustrates the existence of unilateral presidential war power. There is, however, another aspect of these decisions that is more relevant to analysis of the legality of the War Powers Resolution. In every one of the cases finding a justiciable issue, the courts ultimately dismissed the challenge as presenting a nonjusticiable political question.[100] Although this may seem contradictory, a closer examination of the process that led to these decisions illustrates the critical point.

In each case that survived the initial political question challenge—that is, where the court agreed to hear the question of whether domestic legal authority existed by virtue of congressional support—the plaintiffs argued that the orders sending them to Vietnam were unconstitutional because Congress had not properly authorized the war.[101] It was this issue that was routinely dismissed as a political question. The common theme of these decisions is that while the Constitution requires meaningful congressional involvement in the decision to wage war, the method Congress chooses to manifest its support is not mandated by the Constitution, and is therefore a political question to be worked out

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97. *See, e.g.*, *Holtzman*, 484 F.2d at 1312; *DaCosta*, 471 F.2d at 1157; *Laird*, 451 F.2d at 31-34; *Orlando*, 443 F.2d at 1043-44; *Berk*, 429 F.2d at 305-06; *Atlee*, 347 F. Supp. at 703-07; *Mottola*, 318 F. Supp. at 548-54; *see also* Corn, *Presidential War Power*, *supra* note 21, at 186-96 (discussing the justiciability of war power issues).

98. *Orlando*, 443 F.2d at 1042.

99. *See generally* Corn, *Presidential War Power*, *supra* note 21, at 196-238 (detailing the "analytical framework" of cases arguing that Congress must authorize a decision to go to war).

100. *See Holtzman*, 484 F.2d at 1309-12; *Dacosta*, 471 F.2d at 1155-57; *Orlando*, 443 F.2d at 1042-44; *Berk*, 429 F.2d at 305-06; *Atlee*, 347 F. Supp. at 705-07; *see also* FRIEDMAN & NEUBORNE, *supra* note 87, at 23-50; Ratner & Cole, *supra* note 9, at 727.

101. *See supra* note 92-93 and accompanying text.

between Congress and the President.[102] Thus, Congress's failure to declare war did not mean the war was automatically unconstitutional. The Courts only required that the evidence demonstrate congressional support for the war, and therefore a congressional role in authorizing the war.[103] Once such evidence was adduced, further inquiry into the propriety of the method used by Congress was rejected.[104]

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102. *See* sources cited *supra* note 97. This conclusion was clearly enunciated by the First Circuit as follows:

> As to the power to conduct undeclared hostilities beyond emergency defense, then, we are inclined to believe that the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation. In arriving at this conclusion we are aware that while we have addressed the problem of justiciability in the light of the textual commitment criterion, we have also addressed the merits of the constitutional issue.

Laird, 451 F.2d at 33 (citation omitted). In the last case related to the legality of the Vietnam War, Justice Marshall also echoed this position:

> "[A]s a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval—except, perhaps, in the case of pressing emergency or when the President is in the process of extricating himself from a war which Congress once authorized."

Holtzman, 414 U.S. at 1311-12.

103. In the conclusion to their book on the *Berk* and *Orlando* litigation, Leon Friedman and Burt Neuborne noted that:

> [T]he myth of inherent presidential authority to wage war was utterly destroyed. The grandiose view of the Executive's inherent power to wage war was rejected categorically by every judge who passed upon it. The inherent-power argument was so lacking in intellectual justification that it was able to flourish only in the absence of judicial review. As soon as it came under judicial scrutiny, it was laughed out of court.
>
> . . . Congress was put on notice that it could no longer avoid its constitutional responsibilities by abdicating them. *Berk* and *Orlando* established without question that primary congressional responsibility for war and peace was firmly embedded in the Constitution, and that Congress could not avoid its responsibilities simply by deferring to the Executive. The cases had established that congressional involvement in presidentially initiated hostilities was inevitable-in the form of appropriations bills. Thus, whether Congress wished it or not, the *Berk* and *Orlando* courts had created a Rubicon which future congressmen would have to cross. No longer could critics of a war be dissuaded from debating its merits during the appropriations process by assurances that paying the bills for a war did not constitute its approval.

FRIEDMAN & NEUBORNE, *supra* note 87, at 273-74.

104.

> [W]e are inclined to believe that the Constitution, in giving some essential

This method of assessing the legality of a decision by the President to initiate and maintain combat operations provides great flexibility to the political branches. Throughout our history, congressional support for combat operations covers the spectrum from explicit authorization to implied consent, including declarations of war, specific statutes and joint resolutions authorizing conflicts, raising armed forces to prosecute a conflict, or funding combat operations, and possibly even merely voting down measures to stop conflicts.[105] This point was emphasized by Judge Judd in the case of *Berk v. Laird*:

> 1. From the early days of our republic there has been a recognized distinction between a "perfect war" or total war, initiated by a formal declaration of war, and an "imperfect war" or partial war, which involves military action authorized by Congress without a formal declaration of war.
>
> 2. There is no doubt that Congress has authorized the President to send members of the armed forces to South Vietnam to engage in hostilities.
>
> 3. The question whether Congress should declare total war or rely on some other mode of authorizing military action is a political question.
>
> . . . .
>
> Having found that Congress authorized the sending of American troops to Vietnam, the court would be entering the realm of politics in saying that the authorization should have been couched in different language.
>
> . . . .
>
> In the years since World War II, Congress has authorized the President, by a series of Resolutions, to use the armed forces as he might deem necessary to protect Formosa and the Pescadores against armed attack, to assist any nation in the Middle East requesting assistance against armed communist aggression, to prevent the "Marxist-Leninist regime in Cuba" from extending its aggressive or subversive activities to any

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powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation.

Laird, 451 F.2d at 33.

105. *See* DOCUMENTS RELATING TO THE WAR POWER, *supra* note 85; WORMUTH & FIRMAGE, *supra* note 84, at 336-38; Stromseth, *War Powers Today*, *supra* note 6, at 865-86.

> part of this hemisphere, and to prevent any violation by the Soviet Union of the right of access to Berlin. The Senate Foreign Relations Committee stated that "the exact line of authority between the President and Congress" had been "in doubt for the past 160 years."
>
> . . . .
>
> . . . Congress may use a variety of methods in authorizing military activities . . . . [106]

Thus, the "executive practice, long pursued to the knowledge of the Congress and never before questioned"[107] has been to rely on a variety of manifestations of congressional support, or any combination thereof, to conclude that a decision to engage in conflict is supported by the legislature.

It is also important to note the relationship between this flexible model for manifesting constitutionally mandated support for a President and nonjusticiability doctrines that courts have used to dismiss challenges to presidential exercise of war powers. In the two most recent cases addressing presidential war powers, *Dellums v. Bush* and *Campbell v. Clinton,* federal courts relied upon the ripeness doctrine and the legislative standing doctrine, respectively, as grounds for dismissal.[108] In analyzing these decisions in previous articles, I illustrated how the existence of some evidence of congressional support was the sine qua non to application of these doctrines.[109] In those cases, application of nonjusticiability doctrines was contingent on the conclusion that there was no conflict between the position of the Congress and the actions of the President.[110] Thus, although not explicitly stating so, these cases also reflect an

106. Berk v. Laird, 317 F. Supp. 715, (E.D.N.Y. 1970) (Memorandum and Order Granting Summary Judgment for Defendants), *reprinted in* FRIEDMAN & NEUBORNE, *supra* note 87, at 116-26.

107. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1951) (Frankfurter, J., concurring).

108. Campbell v. Clinton, 203 F.3d 19, 20-24 (D.C. Cir. 2000); Dellums v. Bush, 752 F. Supp. 1141, 1149-52 (D.D.C. 1990).

109. *See* Corn, *Presidential War Power*, *supra* note 21, at 231-38 (analyzing Dellums v. Bush); Major Geoffrey S. Corn, Campbell v. Clinton, *The "Implied Consent" Theory of Presidential War Power is Again Validated*, 161 MIL. L. REV. 202, 207 (1999) [hereinafter Corn, *Implied Consent Theory*].

110. *See* Corn, *Presidential War Power*, *supra* note 21, at 231-38; Corn, *Implied Consent Theory*, *supra* note 109, at 213-14 (referring to a lack of "impasse" between Congress and the President).

endorsement of the flexible support theory of authorizing military operations, and the permissibility of presidential reliance upon such support.

PART III: THE WAR POWERS RESOLUTION AND THE REJECTION OF THE FLEXIBLE SUPPORT THEORY OF WAR POWERS

In 1973, at the height of the Watergate investigation and in the aftermath of the Vietnam War, Congress mustered the will to finally prevail over a presidential veto.[111] That veto override vote resulted in the War Powers Resolution, which has become the subject of intense scholarly debate.[112] In practice, however, although it would be an overstatement to assert that the War Powers Resolution has had no significance, it certainly has not had the impact the enacting Congress intended.[113] The Resolution's failure to achieve its stated purpose is most dramatic with regards to the type of legislative authority necessary for the initiation of combat operations.

The War Powers Resolution has several components, but its core purpose is to prevent the President from ordering the initiation of combat operations absent the express consent of Congress. To this end, the Resolution states that:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) *specific statutory authorization*, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[114]

As is clear from this language, with the exception of an emergency response to an attack against the United States or its armed forces, the Resolution purports to prohibit the initiation of any other

111. *See* Fisher & Adler, *supra* note 8, at 4.

112. *See, e.g., id.* at 8; Glennon, *supra* note 10; Rolph, *supra* note 13; Turner, *supra* note 13; Vance, *supra* note 9.

113. *See* Fisher & Adler, *supra* note 8, at 16-18.

114. 50 U.S.C. § 1541(c) (1994) (emphasis added).

combat operation by the President until express congressional authorization for the operation is obtained. This prohibition clearly contradicts the flexible mode of congressional participation in the decision to conduct combat operations validated by the Vietnam-Era decisions.[115] Thus, it appears that Congress was attempting to preempt future presidential reliance on the type of implied support held constitutionally sufficient by these cases. This conclusion is further validated by Section 1547, *Interpretation of Joint Resolution*:

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred -
>
> (1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.[116]

The War Powers Resolution is clear: Only express legislative support for combat operations may be regarded as constitutionally sufficient.

PART IV: POST-RESOLUTION PRACTICE AND THE CONTINUED VALIDATION OF THE FLEXIBLE AUTHORIZATION THEORY

Since 1973, there have been arguably eleven combat operations conducted at the direction of the President: Mayaguez, the Iran hostage rescue mission, Lebanon, Grenada, protection of Persian Gulf shipping, the air strikes against Libya, Panama, Somalia, the Persian Gulf War,[117] Operation Desert Fox, and Operation Allied

115. *See supra* notes 81-110 and accompanying text.

116. 50 U.S.C. § 1547 (emphasis added).

117. I include Operations Northern and Southern Watch—the continuing enforcement of no-fly zones in Iraq—within the scope of the Persian Gulf War because of the U.S. view that these operations stem from the same authorizations, domestic and international, that authorized the conflict. *See* Michael N. Schmitt, *Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement*, 20 LOY. L.A. INT'L & COMP. L.J. 727, 733-37 (1998) (discussing the

Force.[118] Of these eleven, only three—Mayaguez, the Iran hostage rescue mission, and Panama—can be categorized as responses to an attack on U.S. territory or its armed forces.[119] Contrary to the stated purpose of the War Powers Resolution, however, only one—the Persian Gulf War—was preceded by express statutory authorization,[120] and only two others—the Lebanon mission[121] and Operation Restore Hope in Somalia[122]—received such authorization after initiation.

Each of these operations contributes to the landscape of post-War Powers Resolution history for review in analyzing the existence of constitutional authority to order combat operations. In each of these operations, the President who ordered the use of force did so based on a theory of unilateral executive authority.[123] The circumstances surrounding these operations, however, also reflect a continued application of the flexible model for authorizing combat operations.

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argument that, although U.N. Security Council Resolution 688, commonly cited as the basis for the no-fly zones, does not explicitly authorize affirmative enforcement action, Resolution 678's endorsement of the use of force to bring Iraq into compliance with U.N. resolutions covers subsequent resolutions, including 688).

118. I do not include within this list the 1998 air strikes against Afghanistan and Sudan following the bombings of U.S. embassies in Kenya and Tanzania. These operations can arguably be characterized as acts of preemptive self-defense rather than nondefensive combat operations, and therefore within the Executive's vested authority. *See* Steven Lee Myers, *U.S. Says Raids Worked and may Stall Terror Attacks*, N.Y. TIMES, Aug. 22, 1998, at A1 ("Despite the risks, the Administration defended the strikes; citing the nation's right, as defined in the United Nations Charter, to defend itself."); *supra* note 21 and accompanying text (discussing the constitutional difference between defensive and nondefensive combat operations).

119. An argument can be made that operations to protect Persian Gulf shipping were responses to attacks against U.S. territory under the theory that a flag ship is the territory of the flag state for purposes of determining prescriptive jurisdiction under international law. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571, 585 (1953) (noting, in the context of determining criminal jurisdiction over personnel of a merchant ship: "[t]his Court has said that the law of the flag supersedes the territorial principle . . . because it 'is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty'" (third alteration in original) (quoting United States v. Flores, 289 U.S. 137, 155-59 (1933) and citing *In re* The S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 9)).

120. *See* Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3, 3-4 (1991), *reprinted in* 50 U.S.C. § 1541 note at 175-176 (1994).

121. *See* Ratner & Cole, *supra* note 9, at 745-49.

122. *See* 139 Cong. Rec. H274 (daily ed. May 25, 1993).

123. *See* Stromseth, *War Powers Today*, *supra* note 6, at 878-909 (discussing the asserted legal bases for several contemporary combat operations).

Unfortunately for proponents of either theory of constitutional power, until 1999, the analytical value of each operation was undercut by one critical factor: time.

Under the War Powers Resolution,

> Within sixty calendar days . . . the President shall terminate any use of United States Armed Forces . . . unless Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.[124]

Some commentators have argued that the sixty-day clock allows the President to conduct offensive military operations for up to sixty days without obtaining authorization.[125] Regardless, prior to 1999, no operation exceeded this sixty-day "twilight zone" without a grant of express congressional authorization.[126] Thus, proponents of unilateral executive power could assert that these operations validate their claim, only to be countered with the argument that they were merely applications of an inadvertent or implied grant of limited authority to the President through the War Powers Resolution.[127] This landscape has now changed.

In March of 1999, President Clinton ordered the initiation of air and missile strikes against the Federal Republic of Yugoslavia.[128] His stated purpose was to force the Yugoslavian government to accept the presence of NATO forces in the province of Kosovo.[129] No U.S. territory or armed forces had been attacked, nor had Congress granted authority for the operation. In his message to Congress, President Clinton asserted that the operation was constitutional based on his authority as Chief Executive and Commander in Chief.[130]

Not long thereafter, a member of Congress, Representative Tom Campbell, announced his intent to invoke the War Powers

124. 50 U.S.C. § 1544(b) (1994).
125. *See, e.g.*, Fisher & Adler, *supra* note 8, at 1.
126. *See id.* at 10-12.
127. *See id.* at 16-17.
128. *See* Letter to Congressional Leaders, *supra* note 86, at 527-28.
129. *See id.*
130. *See id.*

Resolution to force an up or down vote in Congress on providing express authorization for the combat operations.[131] The failure of Congress to grant such express authority led Representative Campbell and other members of Congress to seek a judgment from the United States District Court for the District of Columbia declaring the war unconstitutional.[132] His primary basis for the challenge was that the Constitution required prior express authorization from Congress.[133] He also invoked the War Powers Resolution on the theory that, should the conflict persist, even the sixty-day argument would not save the President from judgment, because the clock had expired without specific statutory authorization.[134]

Immediately after this announcement, Representative Campbell introduced two pieces of legislation related to the war.[135] The first was a declaration of war. This was defeated by a vote of 427 to 2.[136] The second was a resolution demanding the immediate termination

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131. *See* Press Release, Statement by Congressman Campbell on Kosovo, *at* http://www.house.gov/campbell/990324.htm (Mar. 24, 1999):

> Under the provisions of the War Powers Resolution of 1973, passed over President Nixon's veto, the President is obliged sixty days after "United States Armed Forces are introduced into hostilities or into situations where imminent involvement of hostilities is clearly indicated by the circumstances," or ninety days thereafter under very limited circumstances, to withdraw those forces "unless the Congress has declared war or has enacted a specific authorization for such use of United States Armed Forces." If President Clinton fails to follow that statutory requirement, then it is in order for any Member of Congress to introduce a resolution to compel the withdrawal of U.S. forces.
>
> I will introduce such a resolution sixty days from today, unless the President has by then withdrawn U.S. forces from hostilities in and around Kosovo, or has obtained the permission of Congress to keep them there.

Id.

132. *See* Campbell v. Clinton, 52 F. Supp. 2d 34, 39-40 (D.D.C. 1999); Press Release, Congressman Campbell Files Lawsuit to Reassert Congress' Constitutional War Power Authority, *at* http://www.house.gov/campbell/990427.htm (Apr. 30, 1999) [hereinafter Press Release, Campbell Files Lawsuit].

133. *See Campbell*, 52 F. Supp. 2d at 39; Press Release, Campbell Files Lawsuit, *supra* note 132.

134. *See Campbell*, 52 F. Supp. 2d at 39.

135. *See* Press Release, Whether for or Against Military Action in Kosovo, Congress Must Exercise its Constitutional War Powers Authority, *at* http://www.house.gov/campbell/990414.htm (Apr. 13, 1999).

136. *See* Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000); H.R.J. Res. 44, 106th Cong. (1999); 145 CONG. REC. H2427-41 (daily ed. Apr. 28, 1999).

of the operation. This was also defeated in the House.[137] On the same day, however, the House voted on a concurrent resolution authorizing continued air and missile strikes against the Federal Republic of Yugoslavia, which failed to pass by a vote of 213 to 213.[138] By forcing these votes, Representative Campbell set the stage for his lawsuit. As the conflict surpassed the sixty-day mark, he could assert, for the first time in the history of the War Powers Resolution, that not only had the Constitution been violated, but there was no plausible argument that the conflict was consistent with the War Powers Resolution.[139]

In response to the lawsuit filed by Campbell and his colleagues, the President argued that the case was a political question.[140] This argument was quickly avoided by the court.[141] Instead, the district court dismissed the challenge on the basis that the plaintiffs lacked legislative standing.[142] Applying the standard set forth in *Raines v. Byrd*,[143] the district court required Campbell to allege "'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"[144] Under *Raines*, legislative standing is established where legislators' votes are "completely nullified" by an executive act,[145] or "virtually held for naught."[146] This, in turn, requires a "true 'constitutional impasse'" between the President and Congress.[147] In *Campbell*, the evidence

137. *See Campbell*, 203 F.3d. at 20; H.R. Con. Res. 82, 106th Cong. (1999); 145 CONG. REC. H2414-27 (daily ed. Apr. 28, 1999).

138. *See Campbell*, 203 F.3d at 20 (2000); S. Con. Res. 21, 106th Cong. (1999); 145 CONG. REC. H2441-52 (daily ed. Apr. 28, 1999).

139. *See* Corn, *Implied Consent Theory*, *supra* note 109, at 203-04.

140. *See Campbell*, 52 F. Supp. 2d at 39; Corn, *Implied Consent Theory*, *supra* note 109, at 205-06.

141. *See Campbell*, 52 F. Supp. 2d at 40 & n.5; Corn, *Implied Consent Theory*, *supra* note 109, at 212-13. The district court did not actually reach the political question issue, although the judge "went out of his way to reject the per-se application of the doctrine espoused by the Justice Department." Corn, *Implied Consent Theory*, *supra* note 109, at 213. "To the extent that the President is arguing that *every* case brought by a legislator alleging a violation of the War Powers Clause raises a nonjusticiable political question, he is wrong." *Campbell*, 52 F. Supp. 2d at 40 n.5.

142. *See Campbell*, 52 F. Supp. 2d at 41-45; Corn, *Implied Consent Theory*, *supra* note 109, at 209-12.

143. 521 U.S. 811 (1997).

144. *Campbell*, 52 F. Supp. 2d at 41 (quoting *Raines*, 521 U.S. at 818).

145. *See Raines*, 521 U.S. at 823; *Campbell*, 52 F. Supp. 2d at 43.

146. Coleman v. Miller, 307 U.S. 433, 438 (1939); *Campbell*, 52 F. Supp. 2d at 43.

147. Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring in the

of continued congressional support for the conflict, manifested in the defeat of the resolution calling for an immediate termination of operations and by the continued funding of those operations, was the key to the decision.[148] According to the district court, "[c]ongressional reaction to the air strikes has sent distinctly mixed messages, and that congressional equivocation undermines plaintiffs' argument that there is a direct conflict between the branches."[149] Having dismissed the case for lack of standing, the district court failed to address Representative Campbell's claim that the President had violated the War Powers Resolution.[150]

Based on its failure to address the War Powers Resolution, the plaintiffs appealed the decision of the district court. Although the conflict had already been terminated, the Court of Appeals for the District of Columbia Circuit granted the appeal and on February 18, 2000, issued its opinion.[151] The D.C. Circuit upheld the action of the district court, and agreed that the case was barred by the doctrine of legislative standing.[152] Unlike the district court opinion, however, the D.C. Circuit addressed head-on the applicability of the War Powers Resolution.[153] In three separate opinions, each judge came to the conclusion that the dismissal was proper.[154] Although each judge focused on a slightly different theory to support his conclusion, all shared a common theme: The continued evidence of implied support from the Congress throughout the conflict was sufficient to satisfy all legal requirements, the War Powers Resolution notwithstanding.[155] Thus, the congressmen lacked standing to challenge the war, even based on the War Powers Resolution, because the lack of express opposition from the Congress meant that they could not assert that any of their votes

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judgment); *Campbell*, 52 F. Supp. 2d at 43.

148. *See Campbell*, 52 F. Supp. 2d at 43-45; Corn, *Implied Consent Theory*, *supra* note 109, at 209-12.

149. *Campbell*, 52 F. Supp. at 44.

150. *See* Corn, *Implied Consent Theory*, *supra* note 109, at 213-14.

151. Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).

152. *See id.* at 20-24.

153. *See id.* at 22-23.

154. *See id.* at 20-24 (Silberman, J., delivering the opinion of the court); *id.* at 28-33 (Randolph, J., concurring); *id.* at 37 (Tatel, J., concurring).

155. *See id.* at 22-23 (Silberman, J., delivering the opinion of the court); *id.* at 28-33 (Randolph, J., concurring); *id.* at 37 (Tatel, J., concurring). Regarding Judge Randolph's opinion, see *infra* note 159.

had been nullified by the President. According to the opinion of the court:

> Here the plaintiff congressmen, by specifically defeating the War Powers Resolution authorization by a tie vote and by defeating a declaration of war, sought to fit within the *Coleman* exception to the *Raines* rule [to the legislative standing barrier]. This parliamentary tactic led to an extensive argument before us as to exactly what the Supreme Court meant by a claim that a legislator's vote was completely "nullified."
>
> . . . As the government correctly observes, appellants' statutory argument, although cast in terms of the nullification of a recent vote, essentially is that the President violated the quarter-century old War Powers Resolution. Similarly, their constitutional argument is that the President has acted illegally—in excess of his authority—because he waged war in the constitutional sense without a congressional delegation. Neither claim is analogous to a *Coleman* nullification [referring to the type of vote nullification required to trigger the *Coleman v. Miller*[156] exception to the bar against legislator standing established by the Supreme Court in *Raines v. Byrd.*[157]].
>
> We think the key to understanding the Court's treatment of *Coleman* and its use of the word nullification is its implicit recognition that a ratification vote on a constitutional amendment is an unusual situation. It is not at all clear whether once the amendment was "deemed ratified," the Kansas Senate could have done anything to reverse that position. . . . In other words, they had no legislative remedy. Under that reading—which we think explains the very narrow possible *Coleman* exception to *Raines*—appellants fail because they continued, after the votes, to enjoy ample legislative power to have stopped prosecution of the "war."
>
> In this case, Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign; indeed, there was a measure—albeit only a concurrent resolution—introduced to require the President to withdraw U.S. troops. Unfortunately, however, for those congressmen who, like appellants, desired an end to U.S. involvement in Yugoslavia, this measure was *defeated* by a 139 to 290 vote.[158]

156. 307 U.S. 433, 438 (1939).
157. 521 U.S. 811, 823 (1997).
158. *Campbell*, 203 F.3d at 22-23.

Although based on the doctrine of legislative standing, *Campbell* must also be viewed as an endorsement of the "implied consent" theory of constitutional war powers.[159] The indication that Congress at all times retained the power to terminate the combat operations against Yugoslavia, even potentially with a concurrent resolution, must be viewed as a rejection of the "inherent executive war power" argument. Instead, the court clearly focused on the fact that Congress had not only declined to explicitly oppose the operation, but had even sent signals of support to the President, both in the form of emergency appropriations and the defeat of the resolution calling for the immediate termination of combat operations. Thus, once again, from a constitutional standpoint it was more significant

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159. Admittedly, Judge Randolph's opinion is the least explicit on this point. On Campbell's constitutional claim that the President nullified their defeat of a declaration of war, Judge Randolph noted that:

> The vote against declaring war followed immediately upon the vote not to require immediate withdrawal. Those who voted against a declaration of war did so to deprive the President of the authority to expand hostilities beyond the bombing campaign and, specifically, to deprive him of the authority to introduce ground troops into the conflict.

Id. at 30-31 (Randolph, J., concurring in the judgement). Randolph's statement appears to be premised on a rule that offensive combat operations can be initiated with congressional authorization short of a declaration of war. On Campbell's statutory claim that the President violated the War Powers Resolution, however, Judge Randolph rejected the majority's reliance on Congress's decision to continue to authorize funding for Operation Allied Force, noting that the funding could not satisfy the express authorization requirements of the War Powers resolution, and that Congress "may pass such legislation, not because it is in favor of continuing the hostilities, but because it does not want to endanger soldiers in the field." *Id.* at 32 n.10. According to Randolph, the majority "confused the right to vote in the future with the nullification of a vote in the past." *Id.* at 32. Instead, Randolph argued that the "legislative action" Campbell had voted against did not go "into effect":

> Congressional authorization simply did not occur. The President may have acted as if he had Congress's approval, or he may have acted as if he did not need it. Either way, plaintiffs' real complaint is not that the President ignored their votes; it is that he ignored the War Powers Resolution, and hence the votes of an earlier Congress, which enacted the law over President Nixon's veto.

Id. at 31. Under Randolph's logic, no legislative standing will ever exist so long as "the President never maintain[s] that he [is] prosecuting the war with the House's approval." *Id.* at 29. Accordingly, anything short of a conflict between an affirmative vote to demand the cessation of an operation will fail to secure legislative standing, thereby obviating the War Powers Resolution's automatic termination provision. *See infra* text accompanying note 160. This is the most extreme example of implied consent, and the conclusion that Congress can authorize conflict with something other than a declaration is consistent with the entire history of judicial review of war making.

that Congress seemed to be supporting the President implicitly than that Congress had failed to do so explicitly.

What makes *Campbell* so profound under this analysis is that the court did not treat the War Powers Resolution, with its requirement for express legislative authority, as a bar to the conclusion that the legislators lacked standing. Thus, the implied support of the Congress in session during Operation Allied Force took precedence over the mandate of a Congress that sat twenty-seven years earlier. In the words of Judge Randolph:

> The President may have acted as if he had Congress's approval, or he may have acted as if he did not need it. Either way, plaintiff's real complaint is not that the President ignored their votes; it is that he ignored the War Powers Resolution, and hence the votes of an earlier Congress, which enacted the law over President Nixon's veto. It is hard for me to see that this amounts to anything more than saying: "We, the members of Congress, have standing because the President violated one of our laws." To hold that Members of Congress may litigate on such a basis strikes me as highly problematic, not only because the principle is unconfined but also because it raises very serious separation-of-powers concerns.[160]

Thus, once again, and this time in the face of an apparent violation of the War Powers Resolution, the implied consent theory of war power was confirmed. As in so many prior incidents involving the use of force, the President took initiative, Congress, at worse, acquiesced, or at best, implicitly supported the initiative, and a court, although acknowledging Congress's ability to take affirmative action to restrain the President, concluded that the President had not violated the Constitution through his action.

PART V: AN ALTERNATE CONSTITUTIONAL ATTACK ON THE WAR POWERS RESOLUTION

When President Nixon vetoed the War Powers Resolution,[161] he noted several components of the Resolution that he believed to be

160. *Id.* at 31 (Randolph, J., concurring).

161. *See* Veto of the War Powers Resolution, *supra* note 3.

unconstitutional. One objectionable component was the mandate that:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) *specific statutory authorization*, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[162]

According to the President, this mandate violated the Constitution by intruding upon the unilateral constitutional power of the President to commit U.S. forces to combat.[163] With the exception of acknowledging the power of the President to respond to attacks on the United States or its armed forces, the Resolution indisputably restricts the power of the President to order U.S. armed forces into combat. The argument that the Act is unconstitutional because it impermissibly intrudes upon the President's inherent and unilateral authority, however, is disputable. In fact, the validity of this argument has been the focus of the bulk of writing related to the Resolution.[164] Whether the President has unilateral or inherent constitutional authority to order combat operations outside the scope of response to attack remains unresolved. I believe the quoted provision was, and remains unconstitutional today, however, because of an alternate theory.

Since the inception of the Republic, presidents have been ordering the U.S. armed forces into combat.[165] The vast majority of these operations have not been preceded by express congressional authorization, and most could not properly be categorized as responding to attacks on the United States or its armed forces.[166]

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162. 50 U.S.C. § 1541(c) (1994) (emphasis added).

163. *See* Veto of the War Powers Resolution, *supra* note 3.

164. *See, e.g.*, Ford, *supra* note 12; Glennon, *supra* note 10; Ides, *supra* note 12; Ratner & Cole, *supra* note 9; Zablocki, *supra* note 12; Rushkoff, *supra* note 12; Spaid, *supra* note 12.

165. *See* WORMUTH & FIRMAGE, *supra* note 84, at 145-51; Monaghan, *supra* note 84, at 25-31.

166. For a discussion of military operations undertaken without congressional authorization, see ELY, *supra* note 83, KOH, *supra* note 15, and Corn, *Presidential War*

However, no operation has ever been conducted contrary to the express will of Congress, and some evidence of implied congressional support for the President has always existed.[167] As the cases arising from the conflict in Vietnam indicate, although the Constitution requires congressional support, the manner in which Congress chooses to manifest that support is a political decision left to the two political branches and is not subject to judicial review.[168] Later cases dismissing war power challenges based on the ripeness or standing doctrines reflected the same fundamental conclusion: that Congress is free to choose the means to support war-making initiatives, and the President is justified in relying on implied congressional support.[169]

This history satisfies the historical gloss requirement established by Justice Frankfurter in *Youngstown Sheet & Tube Co. v. Sawyer*, and validated by Justice Rehnquist in *Dames & Moore v. Regan*.[170] Executive reliance on implied manifestations of support for war-making initiatives thus amounts to

> a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, [which] may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[171]

As I have demonstrated in previous articles, this conclusion provides a foundation for numerous judicial decisions sustaining the exercise of war power by presidents.[172] Although none of these cases explicitly cited historical gloss as the basis for decision, they

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Power, *supra* note 21.

167. *See* Corn, *Presidential War Power*, *supra* note 21, at 244.

168. *See supra* notes 81-110 and accompanying text.

169. *See* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990); *see also* Corn, *Presidential War Power*, *supra* note 21 (discussing cases dealing with Presidential war power authority); Corn, *Implied Consent Theory*, *supra* note 109 (discussing *Campbell*).

170. *See supra* notes 27-80 and accompanying text.

171. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

172. *See* Corn, *Presidential War Power*, *supra* note 21, at 214-15; Corn, *Implied Consent Theory*, *supra* note 109, at 236-38.

remain extremely relevant. This is because they implicitly validate presidential reliance on virtually any manifestation of support from Congress. The clear tenor of the message these cases send to the executive branch is that nonjusticiability doctrines enable the President to take and sustain war-making initiatives when Congress is on notice of the action and declines to act in opposition to it. In the inverse, the President can initiate action and continue to prosecute action when Congress continues to express some support, either express or implied, for the action.

This pattern of executive initiative, congressional acquiescence, and judicial abstention has been identified by one prominent war powers scholar as the "operational code of competence."[173] In a short but pragmatic article, Professor Reisman analyzed the practice of war making from a de facto perspective, irrespective of the de jure legitimacy of the "code." Accordingly, he noted:

> Behind the legal bickering, a complex, but unstated, operational code has developed, allocating competence to initiate, direct and terminate different types of coercion among the branches.
>
> . . . .
>
> A constitutional common law developed early with regard to the use of force short of war. The President used the military instrument at his disposal in a variety of settings in which war had not been declared and for which the Senate or Congress as a whole had not voted specific authorization . . . . Congress, as a whole, rather than being an obstacle and competitor to the Executive's expanded role in foreign policy, was often accommodating and compliant. That trend was matched and validated by the judiciary.
>
> . . . .
>
> The following propositions reflect, in my view, the expectations of effective actors, domestic and foreign, about the way national competence to use force is distributed.
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> 1. War, in its traditional international legal and constitutional sense, may only be declared by Congress. The operational code assigns preponderant power to the Executive for the initiation of action but, in comparison with the past, somewhat greater power to Congress in its implementation and termination.

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173. W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777 (1989).

> 2. Reactive nuclear war is a matter of presidential competence. . . .
>
> 3. Other overt military actions short of national war are matters of *initial* presidential competence, subject to a condition subsequent: continuing congressional political support.
>
> 4. As regards low-level, protracted ground operations requiring repeated congressional allocations, Congress will enjoy broader power in defining their scope, somewhat less in their termination and virtually none in their initiation.[174]

Professor Reisman avoids attributing legal significance to his "code of competence." Yet the same history that leads him to his conclusions also supports the existence of a constitutional gloss of authority in the area of war making. While some scholars attempt to downplay the legal significance of this history, as Professor Reisman illustrates, it is a history that has led to a pragmatic understanding and exercise of war power under the Constitution. The continuation of this pattern during Operation Allied Force provides powerful support for the argument that this history creates a constitutional gloss. As demonstrated above, this operation has an even more profound impact on such an analysis because of the apparent conflict between the authority for the President to conduct the operation and the express terms of the War Powers Resolution.[175]

CONCLUSION

As noted above, President Clinton did not assert a historical gloss of relying upon the implied consent of the Congress in support of his executive authority to order the initiation of Operation Allied Force. Instead, he cited the independent authority of the President as Commander in Chief and Chief Executive as the legal basis to support his action, and argued that Representative Campbell's lawsuit presented a nonjusticiable political question.[176] In so doing, President Clinton followed a pattern that has been occurring since the end of World War II. This certainly seems to be the conventional approach taken by White House lawyers providing legal support for

174. *Id.* at 777-83 (citations omitted).

175. *See supra* notes 117-39 and accompanying text.

176. *See supra* notes 130, 140.

presidential combat initiatives,[177] an approach enjoying the support of strong proponents of such a theory of executive authority.

I believe, however, that a historical gloss theory of legitimate reliance on implied congressional support is more defensible for two primary reasons. First, as illustrated above, it is supported by history—history derived from the kind of precise analysis Justice Frankfurter demonstrated was essential to claiming the existence of such a gloss.[178] This history, and particularly the fact that it has continued even after the enactment of the War Powers Resolution, establishes the unconstitutional nature of that Act's provisions prohibiting future Congresses from implicitly supporting combat initiatives, and future Presidents from relying on such support. In contrast, precision historical analysis fails to support the existence of inherent or unilateral executive power to conduct such military operations. While there have been many examples of Presidents asserting such power, the critical missing element is a validation or ratification of an assertion in the face of express congressional opposition.[179] Only such an example would clearly demonstrate the existence of a unilateral executive power. As numerous judicial decisions have illustrated, there is virtually no support for such a proposition.[180] It is a fair assertion that some evidence of congressional support for presidential war-making initiatives has been the key element in every case legally sustaining such initiatives.[181]

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177. *See* Stromseth, *War Powers Today*, *supra* note 6, at 872-75.

178. *See supra* text accompanying notes 43-50.

179. *See* Corn, *Presidential War Power*, *supra* note 21, at 244; Stromseth, *War Powers Today*, *supra* note 6, at 876-77.

180. *See generally* Corn, *Presidential War Power*, *supra* note 21, at 205-38 (discussing cases since 1800).

181. *See id.* at 244-46. It is interesting to note that even one of the strongest proponents of executive war power, Professor Robert Turner, seems to acknowledge that such power is not independent in the sense that it would not withstand express congressional opposition. In his article *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's* War and Responsibility, Professor Turner, in a discussion of the original intent of the Framers of the Constitution, indicates that:

> the power to declare war vested in Congress by the Constitution is limited in scope and pertains only to the authorization of such offensive initiation of military force as would have required a formal declaration of war at the time the Constitution was drafted. It was, in essence, an additional safeguard to prevent the Commander in Chief from endangering the lives of America's youth and the solvency of the national treasury by launching painful and costly wars over political, diplomatic, or economic grievances or from a belief that

The second reason why a historical gloss theory of executive war-making authority based on reliance on implied congressional support is beneficial is because of what it does not purport to do: disable Congress. Unlike an assertion of independent or unilateral executive war-making authority, such a theory in no way can be interpreted as disabling Congress from the war-making process. Indeed, by making evidence of congressional support the sine qua non for a constitutionally valid executive initiative, the role of Congress is clearly confirmed. Unlike the War Powers Resolution, however, Congress retains the prerogative to decide exactly how to manifest such support, and the President is permitted to rely on implied manifestations. As Professor Reisman noted, this modus operandi is consistent with over two centuries of war-making practice.[182] This history proves that an implied consent methodology is not only practicable, but constitutional. As such, it was not effectively trumped by the War Powers Resolution. Any doubt as to this assertion was finally settled when President Clinton and the Congress, in direct contravention of the War Powers Resolution, once again reverted to this modus operandi during Operation Allied Force. The refusal by reviewing courts to condemn this practice only added to its significance.

The conclusion that the history of war making establishes a constitutional gloss vesting the President with the authority to rely upon the implied consent of the Congress as evidence of requisite support for war-making initiatives may not be popular with proponents of congressional power. Concededly, such an approach envisions a certain degree of ambiguity as to what constitutes

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> geographic expansion by military conquest would serve the people's interests. Each House of Congress was given a "veto" over such a decision as a part of our unique system of checks and balances.

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, 914 (1994).

In a footnote describing what is meant by the term "veto" in the preceding quotation, Professor Turner indicated that "[i]t was common in the early period to describe the congressional power to declare war and the Senate's role in blocking diplomatic appointments and treaties as 'negatives' or 'vetoes.' This is useful conceptually to emphasize that the initiative in all of these matters was to be with the executive." *Id.* at 914 n.52. This explanation seems to indicate that Professor Turner acknowledges that express congressional opposition to executive war-making initiative would disable the President. If this is the case, then it is hard to reconcile such a theory with an assertion of independent or unilateral executive war-making authority.

182. *See* Reisman, *supra* note 173, at 781-83.

sufficient support for an operation. The key, however, is that history demonstrates that ambiguity of this nature weighs in favor of the President. Thus, such an approach is both pragmatic and consistent with the doctrine of checks and balances, for it preserves for the Congress the power to play a decisive role in war-making policy. Such a role, however, requires affirmative congressional action. It is perhaps fitting to close this Article with a quote from Judge Dooling's decision in *Orlando v. Laird*, a case involving a challenge to the constitutional authority of the President to order the deployment of a soldier to the conflict in Southeast Asia.[183] Judge Dooling reminds us that Congress is never a victim of this theory, but a knowing participant:

> It is passionately argued that none of the acts of the Congress which have furnished forth the sinew of war in levying taxes, appropriating the nation's treasure and conscripting its manpower in order to continue the Vietnam conflict can amount to authorizing the combat activities because the Constitution contemplates express authorization taken without the coercions exerted by illicit seizures of the initiative by the presidency. But it is idle to suggest that the Congress is so little ingenious or so inappreciative of its powers, including the power of impeachment, that it cannot seize policy and action initiatives at will, and halt course of action from which it wishes the national power to be withdrawn. Political expediency may have counseled the Congress's choice of the particular forms and modes by which it has united with the presidency in prosecuting the Vietnam combat activities, but the reality of the collaborative action of the executive and the legislative required by the Constitution has been present from the earliest stages.[184]

Operation Allied Force represents conclusive proof that Judge Dooling's vision of the constitutional significance of implied congressional support for presidential combat initiatives remains valid today. The War Powers Resolution purports to limit the constitutional significance of such implied support, and the operable provisions designed to accomplish that purpose themselves contradict the deeply embedded modus operandi for cooperative

183. 317 F. Supp. 1013, 1014 (E.D.N.Y. 1970).
184. *Id.* at 1019.

war-making decisions. The War Powers Resolution is therefore an unconstitutional attempt to restrict future Congresses from supporting executive initiatives with something less than express authorization. More importantly, it is an impermissible restriction on the constitutional right of future presidents to rely upon such implied support or consent as a basis to conclude that war-making initiatives enjoy constitutionally requisite support.

As demonstrated above, this practice of implied-consent-based war making has continued ever since the passage of the War Powers Resolution. Only with Operation Allied Force, however, did the conflict between the continued use of this modus operandi and the War Powers Resolution become absolutely irreconcilable. The President took the initiative, the conflict was not defensive or responsive, and the Congress, although providing implied support, declined to expressly authorize the operation, which exceeded the sixty-day "twilight-zone" established by the War Powers Resolution. When the case reached the courts, as in past cases, evidence of congressional support proved to be the ultimate barrier to justiciability, in spite of the War Powers Resolution. Thus, the pre-Resolution practice of the President relying on the implied support of Congress, Congress allowing the President to take war-making initiatives and manifesting its consent through less than express authorization, and courts declining to intervene so long as such support was evident, was reconfirmed. This course of action stands as powerful proof that this historical practice was no accident, but a reflection of the proper constitutional process for making war. This practice provides the political branches of the government with the flexibility needed to make decisions in such a realm, and gives Congress the ever-present ability to affirmatively assert its power under the Constitution to alter the course of action selected by the President.