Penn State Law Review

Volume 123 | Issue 1 Article 13

9-1-2018

The President vs. Some Old Goat: The Justiciability of War-Powers

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Comments

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ABSTRACT

"Where-ever law ends, tyranny begins . . . ."
– John Locke[1]

The Constitution of the United States divides the nation's war-powers between Congress and the President. Specifically, the Constitution vests Congress with the legislative power to declare war and the President with the executive power to conduct war. Recently, however, the President has dominated this constitutional framework. Congress has largely acquiesced to the President unilaterally engaging the nation's armed forces abroad, and as a result, the President now has quasi-unilateral war-making authority.

Notwithstanding the War Powers Resolution, Congressmen and service members alike have sought judicial intervention to enjoin the President from unilaterally engaging the nation's armed forces. They have argued that such unilateral engagement infringes upon both the War

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1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 202 (1689).

Powers Resolution and Congress's exclusive constitutional authority to declare war. However, courts have increasingly dismissed these suits based upon the political question doctrine, which instructs that certain issues are nonjusticiable because they are better left for either Congress or the President to resolve. Consequently, courts implicitly rule in the President's favor when they invoke the political question doctrine because the parties are left *status quo ante*.

In light of such judicial deference, this Comment will argue that federal courts must fulfill their Article III duties and preserve the constitutional limits of the President's war-powers. Although such power undoubtedly implicates political matters, the underlying issue is fundamentally a question of constitutional law. Moreover, our government was founded upon a democratic system of checks and balances. Therefore, because Congress is inept to protect its war-making authority from the President, courts must intervene and determine when the President has exceeded the scope of his constitutional authority.

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I. INTRODUCTION

President George H. W. Bush once said:

> Some people say, why can't you bring the same kind of purpose and success to the domestic scene as you did in Desert Shield and Desert Storm? And the answer is: I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait. That's the reason.[2]

The Framers of the United States Constitution (the "Constitution") divided the nation's war-powers between the two political branches of the government; Congress and the President of the United States (the "President").[3] The Constitution vests Congress with the power to declare war, as well as the power to regulate the nation's armed forces.[4] On the other hand, the Constitution vests the President with the role of Commander in Chief of the nation's armed forces.[5]

The textual separation of the nation's war-powers demonstrates that the Framers sought to curtail the nation's ability to go to war.[6] Indeed, in a speech delivered before the Pennsylvania ratifying convention, one of the Framers, James Wilson, advocated that the separation of war-powers

2. President George H. W. Bush, *Remarks at the Texas State Republican Convention in Dallas, Texas*, AM. PRESIDENCY PROJECT (June 20, 1992), http://www.presidency.ucsb.edu/ws/?pid=21125.

3. *See* U.S. CONST. art. II, § 2; U.S. CONST. art. I, § 8, cls. 11-13; *see also* Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 815 (1974) (noting that Congress and the President are considered the two political branches of the government).

4. *See* U.S. CONST. art. I, § 8, cls. 11-13. The Constitution also vests Congress with the power to make rules for the government and regulation of the armed forces; to organize, arm, and govern the militia; and to call forth the militia to execute the nation's laws, suppress insurrections, and repel invasions. *See* U.S. CONST. art. I, § 8, cls. 14-16.

5. *See* U.S. CONST. art. II, § 2.

6. *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., J.B. Lippincott 2d ed. 1901) (1836) (statement of Pennsylvania delegate James Wilson) [hereinafter DEBATES].

was intended to deter the nation from being drawn into war unless important national interests were at stake.[7] Specifically, James Wilson stated that:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in [Congress]; . . . from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.[8]

However, this collaborative framework, which envisioned Congress playing a pro-active role in matters of war,[9] has drastically transformed since the Constitution's adoption.[10]

In the modern era, the President is the nation's primary decision-maker in matters of war.[11] Armed with privileged information and the ability to act swiftly and decisively, the President often engages the nation's armed forces without obtaining congressional authorization.[12] Thus, the President has quasi-unilateral control over whether to "draw us into war."[13]

Contrary to the Framers' intentions, then, Congress has been forced to adopt a diminished, secondary role in matters of war.[14] Often, the President's unilateral actions present Congress with a *fait accompli*, which forces Congress to decide whether to retroactively authorize the President's actions.[15] However, as previously stated, the Constitution vests Congress with the power to declare war.[16] Thus, the Constitution does not permit the President to circumvent Congress and dominate the nation's

7. *See id.*
8. *Id.*
9. *See id.*
10. *See* Elia V. Pirozzi, *The War Power and A Career-Minded Congress: Making the Case for Legislative Reform, Congressional Term Limits, and Renewed Respect for the Intent of the Framers*, 27 SW. U. L. REV. 185, 214, 228 (1997).
11. *See* Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 854-55 (1999).
12. *See id.*; *see also* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 304 (1996).
13. *See* Moe & Howell, *supra* note 11, at 856; *see also* DEBATES, supra note 6, at 528 (statement of Pennsylvania delegate James Wilson).
14. *See* Moe & Howell, *supra* note 11, at 856.
15. *Id.*
16. *See* U.S. CONST. art. I, § 8, cl. 11.

war-making decisions.[17] The President's war-powers must be balanced against those of Congress.[18]

Who, then, is responsible for such balancing? Some commentators believe that the President and Congress must harmonize the issue themselves.[19] Courts share this view and frequently invoke the political question doctrine[20] to avoid hearing cases involving the allocation of war-powers.[21] However, the courts' hands-off approach prompted Congress to pass unsound legislation,[22] which resulted in even greater uncertainty regarding the scope of the President and Congress's war-powers.[23]

Accordingly, this Comment will argue that federal courts are constitutionally responsible for balancing the nation's war-powers between Congress and the President.[24] Courts should not invoke the political question doctrine to dismiss a war-powers case if a complaint alleges that the President exceeded the scope of his constitutional authority.[25]

Part II of this Comment will discuss the background of the nation's war-powers, beginning with how the Framers intended to allocate the nation's war-powers between Congress and the President.[26] Additionally, Part II will discuss how the President took control over the nation's war-powers during the Korean and Vietnam Wars,[27] how Congress enacted the

17. *See* Yoo, *supra* note 12, at 264.

18. *See id.*

19. *See id.* at 305; *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.6.2 (2d ed. 1994).

20. *See* Jesse Choper, *Introduction* to THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 1 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (explaining that the political question doctrine is a principle stating that courts should abstain from hearing certain constitutional issues because such issues are better left for either Congress or the President to resolve) [hereinafter THE POLITICAL QUESTION DOCTRINE]; *see* also Baker v. Carr, 369 U.S. 186, 217 (1962); Marbury v. Madison, 5 U.S. 137, 170 (1803); Nixon v. United States, 506 U.S. 224, 228-29 (1993). For an in-depth discussion regarding the political question doctrine, see *infra* Section III.A.

21. *See* Holtzman v. Schlesinger, 484 F.2d 1307, 1311 (2d. Cir. 1973) ("[T]he sharing of Presidential and Congressional [war-powers] . . . is a bluntly political and not a judicial question."); Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) ("The powers granted to [the President and Congress] . . . enable those branches to resolve the [war-powers] dispute themselves."); *see also* DONALD L. WESTERFIELD, WAR POWERS: THE PRESIDENT, THE CONGRESS, AND THE QUESTION OF WAR 26 (1996).

22. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2012 & Supp. 2015)).

23. *See infra* Section II.C.

24. *See infra* Part III.

25. *See infra* Part III.

26. *See infra* Section II.A.

27. *See infra* Section II.B.

War Powers Resolution in response,[28] and how courts have declined to adjudicate war-power cases.[29]

Part III of this Comment will then analyze how courts misapply the political question doctrine in war-power cases.[30] Additionally, Part III will propose a remedial procedure under the War Powers Resolution in which courts may intervene in war-power cases until the Supreme Court adjudicates the matter.[31] The remedial procedure will be demonstrated through a hypothetical scenario in which President Trump unilaterally engages the nation's armed forces against North Korea.[32] Finally, Part IV of this Comment will offer concluding statements on the issues above.[33]

II. BACKGROUND

The Articles of Confederation (the "Articles") was the first constitution of the United States;[34] however, it failed to adequately serve the nation.[35] One of the Articles' main failures was that it lacked a chief executive officer and an executive branch as a whole.[36] As a result, the Framers were prompted to draft a new constitution with a stronger federal government.[37]

A. The Framers' Allocation of the Nation's War-Powers

Although the Framers sought to strengthen the federal government,[38] they were wary of constitutionally committing the nation's war-powers to a single person, or even a single body.[39] Living as British colonials, the Framers witnessed the lengthy and costly wars that the British Crown had

28. *See infra* Section II.C.
29. *See infra* Section II.D.
30. *See infra* Part III.
31. *See infra* Section III.D.
32. *See infra* Section III.D.1.
33. *See infra* Part IV.
34. *See Challenges of the Articles of Confederation*, KHAN ACADEMY, https://www.khanacademy.org/humanities/ap-us-government-and-politics/foundations-of-american-democracy/challenges-of-the-articles-of-confederation/a/challenges-of-the-articles-of-confederation-article (last visited Sept. 23, 2018).
35. *Id.*
36. *Id.* (noting that an executive branch was necessary to enforce the nation's laws and to control the nation's armed forces, as the legislative branch was unable to do so independently).
37. *Id.*
38. *Id.*
39. *See* Pirozzi, *supra* note 10, at 207.

conducted.[40] Therefore, in order to strengthen the federal government and simultaneously restrict its ability to go to war, the Framers created the presidency under the new Constitution[41] and divided the nation's war-powers between Congress and the President.[42]

1. The Framers' Intent

Notwithstanding the separation of war-powers, the Framers intended Congress to remain in control over the nation's war-making decisions.[43] The power to declare war, as the Framers understood it, was the federal government's principal war-making instrument.[44] Accordingly, the Framers intended Congress to determine when the nation went to war[45] by vesting the nation's representative body with the exclusive power to declare war.[46]

In contrast, the President was intended to have limited policy input, if any, in deciding whether to declare war.[47] Indeed, Alexander Hamilton, one of the Framers, emphasized the considerable limitations placed on the President's constitutional war-powers:

> The [P]resident is to be [C]ommander in [C]hief of the [armed forces] of the United States. In this respect his authority would be nominally the same with that of the [K]ing of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the [armed forces], as first general and admiral of the [nation]: while that of the British [K]ing extends to the declaring of war, and to the *raising* and *regulating* of [the armed forces]; all which, by the [C]onstitution . . . would appertain to [Congress].[48]

Thus, subject to a few exceptions, the President's war-powers were limited to directing the nation's armed forces only *after* Congress had declared

40. *See id.*

41. *See* Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 844 (1972).

42. *See* U.S. CONST. art. II, § 2; U.S. CONST. art. I, § 8, cls. 11-13; *see also supra* notes 3–4 and accompanying text.

43. *See* Jonathan T. Menitove, Note, *Once More Unto the Breach: American War Power and A Second Legislative Attempt to Ensure Congressional Input*, 43 U. MICH. J.L. REFORM 773, 778 (2010).

44. *See* THE FEDERALIST NO. 41 (James Madison) ("Is the power of declaring war necessary? No man will answer this question in the negative.").

45. *See* THE FEDERALIST NO. 69 (Alexander Hamilton).

46. *See* U.S. CONST. art. I, § 8, cl. 11.

47. *See* THE FEDERALIST NO. 69 (Alexander Hamilton).

48. *Id.*

war.[49] The Framers believed that this constitutional framework would promote basic American principles such as "democratic responsibility, the theory of checks and balances in the exercise of shared powers, and civilian control of the military[.]"[50]

2. The Actual Results of the Framers' Allocation of War-Powers

Although the separation of war-powers was intended to limit the nation's ability to go to war,[51] over time, both Congress and the President pushed the bounds of their respective war-powers.[52] As a result, the Framers' conservative war-power framework developed into a liberal one.[53]

a. Congressional Military Spending

For example, the Framers intended Congress to control the size of the nation's armed forces through the Army Clause of the Constitution.[54] By requiring Congress to renew appropriations for the nation's armed forces every two years, the Army Clause was meant to restrain Congress against considerable military spending.[55] However, Congress has largely failed to use the Army Clause as the Framers intended.[56]

Indeed, the Framers would be surprised to learn that in 2017, the United States spent approximately $610 billion on military expenditures.[57]

49. *See id.*; *cf.* The Prize Cases, 67 U.S. 635, 668 (1862) (concluding that the President was authorized to exercise self-defense and repel sudden attacks without obtaining prior congressional authorization).

50. Rostow, *supra* note 41, at 844.

51. *See* DEBATES, *supra* note 6, at 528 (statement of Pennsylvania delegate James Wilson).

52. *See America Has Been At War 93% of the Time—222 Out of 239 Years—Since 1776*, WASH.'S BLOG (Feb. 20, 2015), http://www.washingtonsblog.com/2015/02/america-war-93-time-222-239-years-since-1776.html.

53. *See id.*

54. *See* U.S. CONST. art. I, § 8, cl. 12 (endowing Congress with the power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"); *see also* THE FEDERALIST NO. 26 (Alexander Hamilton).

55. *See* THE FEDERALIST NO. 26 (Alexander Hamilton).

56. *See* K.K. Rebecca Lai et al., *Is America's Military Big Enough?*, N.Y. TIMES (Mar. 22, 2017), https://www.nytimes.com/interactive/2017/03/22/us/is-americas-military-big-enough.html (noting that the United States currently boasts one of the largest military forces in the world with approximately 1.3 million active-duty troops and 865,000 in reserve).

57. *See* Nan Tian et al., *Trends in World Military Expenditure, 2017*, STOCKHOLM INT'L PEACE RESEARCH INST. (May 2018), https://www.sipri.org/sites/default/files/2018-04/sipri_fs_1805_milex_2017.pdf.; *see also* Lai et al., *supra* note 56 (noting that the next

Additionally, the United States Senate recently passed a $700 billion defense bill, which was $97 billion higher than what the President originally requested.[58] Accordingly, Congress's willingness to spend heavily on military expenditures has almost entirely circumvented the Framers' intent behind the Army Clause.[59]

b. The President's Role as Commander in Chief

Additionally, the Framers assumed that the President's role as Commander in Chief "of the army and navy of the United States, and of the militia *when called into actual service*" was too self-evident to warrant a detailed discussion.[60] During the nation's early days, however, the Supreme Court was called upon several times to define the scope of the President's war-powers.[61]

Moreover, the Framers simply brushed aside the notion that the President could usurp Congress's war-powers.[62] The Framers concluded that Congress would not be so "incautious" as to "vest in the [President] permanent funds for the support of an army."[63] However, over the course of the Korean and Vietnam Wars, the President accomplished exactly what the Framers believed to be improbable: the President usurped much of Congress's war-powers.[64]

B. The President's War-Powers Expanded During the Korean and

seven highest military-spending countries (including China, Russia, England, and France) combined for $567 billion on military expenditures in 2015).

58. *See* Sheryl G. Stolberg, *Senate Passes $700 Billion Pentagon Bill, More Money Than Trump Sought*, N.Y. TIMES (Sept. 18, 2017), https://www.nytimes.com/2017/09/18/us/politics/senate-pentagon-spending-bill.html.

59. *See* THE FEDERALIST NO. 26 (Alexander Hamilton).

60. *See* THE FEDERALIST NO. 74 (Alexander Hamilton) (emphasis in original). The Framers believed that "[t]he propriety of [the President as Commander in Chief] [was] so evident . . . that little need[ed] [to] be said to explain or enforce it." *Id.*

61. *See* Little v. Barreme, 6 U.S. 170, 176 (1804) (concluding that the President may not issue an executive order that supersedes or contradicts a congressional act even during war); *see also* The Prize Cases, 67 U.S. 635, 668 (1862) ("[T]he President is not only authorized but bound to [act in the nation's self-defense] . . . without waiting for any special legislative authority.").

62. *See* THE FEDERALIST NO. 26 (Alexander Hamilton).

63. *Id.* (noting that if the President did usurp Congress's war-powers, the Framers' simplistically recommended that the states engage in civil war).

64. *See* GUIDE TO THE PRESIDENCY 639-43 (Michael Nelson ed., Routledge 2d ed. 2015) (1996); *see also* MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 105 (2013).

Vietnam Wars

Prior to World War II, the President occasionally ordered small-scale military actions without congressional authorization in order to protect American citizens from "pirates" and "cattle rustlers" abroad.[65] The President unilaterally ordered these military actions because, due to their limited scope, they carried little risk of escalating into significant and prolonged combat.[66] However, since the conclusion of World War II, which was the last time the United States formally declared war, the President has increasingly relied on his inherent Commander in Chief powers to deploy substantial quantities of the nation's armed forces abroad.[67] In doing so, the President has resisted seeking congressional authorization.[68] The Korean and Vietnam Wars are two examples of situations in which the President declined to obtain congressional authorization before committing substantial quantities of the nation's armed forces abroad.[69]

1. The Korean War

In 1950, President Truman sent over 100,000 American troops to fight in Korea without a congressional declaration of war or express congressional authorization.[70] Throughout the Korean War, President Truman never sought congressional authorization to engage the nation's armed forces in Korea, and only met with congressional leaders *after* deploying armed forces in order to brief them on the developments in Korea.[71] Citing to several United Nations Security Council resolutions as his legal authority to engage the nation's armed forces in Korea,[72]

65. *See* JOHN C. YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 12 (2005); *see also* H.L. POHLMAN, CONSTITUTIONAL DEBATE IN ACTION: GOVERNMENTAL POWERS 163 (Rowman & Littlefield 2d ed. 2005) (1995).

66. *See* YOO, *supra* note 65, at 12; *see also* POHLMAN, *supra* note 65, at 163.

67. *See* YOO, *supra* note 65, at 12; *see also* POHLMAN, *supra* note 65, at 163.

68. *See* Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 33 (1995); *see also* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 319 (6th ed. 2016).

69. *See* YOO, *supra* note 65, at 12; *see also* DYCUS ET AL., *supra* note 68, at 319.

70. *See* YOO, *supra* note 65, at 12; *see also* POHLMAN, *supra* note 65, at 163–64 (noting that the Korean War lasted three years and cost the lives of approximately 36,000 American troops).

71. *See* Fisher, *supra* note 68, at 35.

72. *See* S.C. Res. 82 (June 25, 1950), http://unscr.com/en/resolutions/doc/82; S.C. Res. 83 (June 27, 1950), http://unscr.com/en/resolutions/doc/83.

President Truman claimed that he was conducting "a police action under the United Nations"[73] and announced to the American public that the United States was "not at war."[74]

From a constitutional standpoint, however, the United Nations Security Council resolutions alone were insufficient legal authority to enable President Truman to engage the nation's armed forces in Korea.[75] President Truman required congressional authorization in addition to the Security Council resolutions,[76] but Congress did not expressly authorize President Truman to engage the nation's armed forces in Korea.[77] Instead, Congress acquiesced to President Truman's decision to unilaterally engage the nation's armed forces in Korea.[78] By acquiescing, Congress implicitly ratified President Truman's unilateral prosecution of the Korean War.[79] As a result, Congress opened the door for the President to usurp control over the nation's armed forces in the future.[80]

2. The Vietnam War

Shortly after the Korean War, in 1963, President Kennedy unilaterally deployed approximately 16,500 American troops to South Vietnam.[81] The following year, President Johnson unilaterally ordered military action against North Vietnamese targets without express congressional authorization.[82] In doing so, President Johnson relied on his inherent Commander in Chief powers.[83] The United States Department of State issued a memorandum in support, which stated that:

73. Fisher, *supra* note 68, at 33-34.

74. *Id.* at 33.

75. *See* U.S. CONST. art. I, § 8, cl. 11; *see also* Fisher, *supra* note 68, at 35 ("[W]hen [Congress] agreed to the United Nations Charter[,] [it] never agreed to supplant [the] Constitution with the United Nations Charter. The power to declare and make war is vested in the representatives of the people, in the Congress of the United States.").

76. *See* Fisher, *supra* note 68, at 38.

77. *See id.*

78. *See id.*

79. *See* GUIDE TO THE PRESIDENCY, *supra* note 64, at 39-40.

80. *See id.*

81. *See* DYCUS ET AL., *supra* note 68, at 319 (noting that President Kennedy's deployment orders were countermeasures to a potential communist North Vietnamese invasion).

82. *Id.* at 320 (noting that President Johnson's military orders were in response to a North Vietnamese torpedo attack on a United States destroyer).

83. *See* Leonard C. Meeker, *The Legality of the United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484 (1966).

> Under the Constitution, the President . . . carr[ies] very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States . . . without formally consulting the Congress. . . . If the President could act in Korea without a declaration of war, *a fortiori* he is empowered to do so now in Viet-Nam.[84]

Notwithstanding the President's inherent Commander in Chief powers, President Johnson's advisors drafted a "standby congressional resolution," which was intended to be the functional equivalent of a congressional declaration of war.[85] This resolution, which came to be known as the Tonkin Gulf Resolution,[86] authorized the President to "take all necessary steps, including the use of armed force" and "all necessary measures to prevent further aggression" in Vietnam.[87]

By passing a broad resolution that the President's advisors drafted *after* the President had already ordered military action, however, Congress empowered the President to act unilaterally and seek congressional ratification *ex post facto*.[88] In other words, the President usurped Congress's war-making authority and established himself as the nation's primary decision-maker in matters of war.[89]

C. The War Powers Resolution: Congress's Attempt to Reclaim its War-Making Authority

In 1973, Congress enacted the War Powers Resolution in response to the President's expanded war-making authority.[90] The War Powers Resolution, which is still in effect, modifies the President's war-powers in three main ways.[91] First, the President can only engage the nation's armed forces pursuant to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by [an] attack upon the

84. *Id.* at 484-85, 488.
85. *See* DYCUS ET AL., *supra* note 68, at 320.
86. Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).
87. *Id*.
88. *See* GUIDE TO THE PRESIDENCY, *supra* note 64, at 639-43; *see also* ZEISBERG, *supra* note 64, at 105.
89. *See* GUIDE TO THE PRESIDENCY, *supra* note 64, at 639-43; *see also* ZEISBERG, *supra* note 64, at 105.
90. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2012 & Supp. 2015)); *see also* DYCUS ET AL., *supra* note 68, at 349.
91. *See* 50 U.S.C. §§ 1541, 1543-44.

United States . . . ."[92] Second, the President is required to submit various reports to Congress once he engages the nation's armed forces abroad.[93] Third, the President is given a 60-day window in which he can engage the nation's armed forces without express congressional authorization.[94]

The War Powers Resolution was intended "to give Congress both the knowledge and the mechanism needed to reclaim its constitutional power to declare war" and to "assure that [Congress be involved] in any future decision to commit the United States to [war] . . . ."[95] However, no President has accepted the War Powers Resolution's constitutionality nor fully complied with its provisions.[96] Likewise, many scholars believe that the War Powers Resolution is *prima facie* unconstitutional.[97] Although various proposals have been made to amend or repeal the War Powers Resolution, none have been passed thus far.[98]

D. The Courts' Stance on War-Power Cases

More than 40 years after its enactment, the War Powers Resolution's legal and practical effects remain in a state of uncertainty.[99] A main reason for this uncertainty is that courts decline to adjudicate cases involving the allocation of war-powers.[100] In order to dismiss such cases, courts frequently invoke the political question doctrine,[101] which is a principle stating that courts should abstain from hearing certain constitutional issues because such issues are better left for either Congress or the President to

92. *Id.* § 1541.

93. *See id.* § 1543 (requiring the President to submit written reports to Congress detailing the need for military action and the action's status).

94. *See id.* § 1544. Following this 60-day window, if Congress does not specifically ratify the President's military action, either statutorily or by declaration of war, the President is subsequently required to withdraw the armed forces on his own accord, or if Congress so directs by concurrent resolution. *Id.*

95. Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982).

96. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 2 (2007), https://www.hsdl.org/?abstract&did=712150.

97. *See* DYCUS ET AL., *supra* note 68, at 349, 354-55; *see also* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 119 (1984) (explaining that the War Powers Resolution is unconstitutional because it automatically suspends the President's executive authorities after 60 days without affirmative congressional legislation).

98. *See* GRIMMETT, *supra* note 96, Summary.

99. *See* DYCUS ET AL., *supra* note 68, at 349.

100. *See* WESTERFIELD, *supra* note 21, at 26.

101. *See* Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987); Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982); *see also* WESTERFIELD, *supra* note 21, at 26.

resolve.[102] As one court reasoned, "[m]eddling by the judicial branch in determining the allocation of constitutional [war-]powers . . . 'extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power.'"[103]

However, the nation has deviated from the Framers' intended division of war-powers.[104] The Framers intended Congress to be the nation's primary decision-maker regarding matters of war,[105] but instead, the President usurped Congress's war-making authority over the course of the Korean and Vietnam Wars.[106] Subsequently, Congress enacted the War Powers Resolution to reclaim its war-making authority,[107] though the resolution's legal effects are unclear because courts decline to adjudicate war-power cases.[108]

As a co-equal branch of the government,[109] however, courts must review the President's military actions in order to determine whether such actions are consistent with both congressional legislation and the Constitution. Otherwise, the President will continue to expand his war-powers at the expense of Congress's.[110] As one scholar notes, "[j]udicial deference ignores the evident truth that in our system a law that is not enforceable by adjudicatory process is no law at all."[111] Our democratic system of checks and balances tolerates no less.[112]

III. ANALYSIS

Article III of the Constitution provides courts with judicial power that extends to all cases and controversies arising under the Constitution, federal law, and treaties.[113] However, Article III is curiously silent on

102. *See* THE POLITICAL QUESTION DOCTRINE, *supra* note 20, at 1.
103. Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) (quoting Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 881 (D.C. Cir. 1981)).
104. *See supra* Section II.A.
105. *See supra* Section II.A.
106. *See supra* Section II.B.
107. *See supra* Section II.C.
108. *See* WESTERFIELD, *supra* note 21, at 26.
109. *See* Michael Gonchar, *Teaching and Learning About Governmental Checks and Balances and the Trump Administration*, N.Y. TIMES (Feb. 16, 2017), https://nyti.ms/2wWM7t1.
110. *See* Moe & Howell, *supra* note 11, at 855.
111. THOMAS M. FRANCK, POLITICAL QUESTIONS JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 8 (1992).
112. *See* Gonchar, *supra* note 109.
113. *See* U.S. CONST. art. III, § 2.

inter-branch disputes.[114] Specifically, Article III does not expressly grant or deny courts jurisdiction to resolve disputes regarding the allocation of shared constitutional powers between Congress and the President, such as war-powers.[115] Because there is little evidence of the Framers intent regarding such issues, courts have been forced into a self-defining role through employment of the common law.[116]

Chief Justice Marshall's renowned maxim in *Marbury v. Madison*,[117] that "[i]t is emphatically the province and duty of the judicial department to say what the law is[,]" suggests that courts have a fundamental duty to resolve unsettled questions of law.[118] In the same opinion, however, Chief Justice Marshall stated that some issues are political in nature, and therefore, cannot be judicially resolved.[119] This begs the inquiry: When is a question purely political? Or, more specifically: Is the allocation of war-powers a purely political question? Unfortunately, because the answers to these questions are unclear, courts have been historically inconsistent in determining whether the allocation of war-powers is purely political in nature, and thus, nonjusticiable.[120]

A. The Political Question Doctrine Was Intended to be Narrow

As previously stated, the political question doctrine is a principle under which courts abstain from hearing constitutional issues on the ground that such issues are better left for either Congress or the President to resolve.[121] The political question doctrine's roots can be traced back to *Marbury*, in which Chief Justice Marshall stated:

> The province of the court is . . . not to enquire how the [President], or [the President's] officers, perform duties in which they have . . .

114. *Id*.
115. *Id.*; *see also* Hamdi v. Rumsfeld, 316 F.3d 450, 463 (4th Cir. 2003) ("Article III contains nothing analogous to the specific powers of war carefully enumerated in Articles I and II.").
116. *See* DYCUS ET AL., *supra* note 68, at 135-36.
117. Marbury v. Madison, 5 U.S. 137 (1803).
118. *See id.* at 177.
119. *Id.* at 170.
120. *Compare* Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973) ("[W]e see [no] difficulty in a court facing up to the question as to whether . . . the President is or was without power to continue [a] war without [c]ongressional approval."), *with* Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) ("The powers granted to [the President and Congress] enable [them] to resolve the [war-powers] dispute themselves.").
121. *See* THE POLITICAL QUESTION DOCTRINE, *supra* note 20, at 1; *see also supra* Section II.D.

> discretion. Questions, in their nature political, or which are, by the [C]onstitution and laws, submitted to the [President], can never be made in this court.[122]

The issue in *Marbury* was whether President Adams's decision to appoint a federal judge during his final days as the President was lawful.[123] However, because the Constitution vests the President with the exclusive discretion to appoint federal judges,[124] Chief Justice Marshall concluded that courts could not intervene when the President exercised such discretion.[125] Thus, Chief Justice Marshall's conclusion implies that the political question doctrine was intended to be invoked under limited circumstances in which the Constitution vests the President with exclusive discretion.[126]

However, in *Baker v. Carr*,[127] Justice Brennan formulated an expansive test that courts could apply to invoke the political question doctrine.[128] Justice Brennan found that a nonjusticiable political question arose when there was a "textually demonstrable constitutional commitment of the issue to a coordinate political department[] or a lack of judicially discoverable and manageable standards for resolving [the issue]."[129] Subsequently, courts invoked the political question doctrine liberally in war-power cases on the ground that such cases satisfied the *Baker* test.[130] The courts concluded that (1) the Constitution textually committed the nation's war-powers to Congress and the President,[131] and

122. *Marbury*, 5 U.S. at 170.
123. *Id.* at 155.
124. *See* U.S. CONST. art. 2, § 2.
125. *See Marbury*, 5 U.S. at 170.
126. *See id.* at 165-66 ("[T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.").
127. Baker v. Carr, 369 U.S. 186 (1962).
128. *Id.* at 217.
129. *Id.* Justice Brennan also found that nonjusticiable political questions arose when the court was asked to make nonjudicial policy determinations; when the court's decision would disrespect or embarrass the other branches of the government; and when there was an unusual need to abide by a prior political decision. *Id.* However, most courts do not analyze these additional factors when applying the test to invoke the political question doctrine. *See* DYCUS ET AL., *supra* note 68, at 139.
130. *See* THE POLITICAL QUESTION DOCTRINE, *supra* note 20, at 130.
131. *See* Holtzman v. Schlesinger, 484 F.2d 1307, 1311 (2d. Cir. 1973); *see also* Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990); Sadowski v. Bush, 293 F. Supp. 2d 15, 21 (D.D.C. 2003).

that (2) there were no judicially discoverable and manageable standards for resolving war-power cases.[132]

B. Courts Misapply the Political Question Doctrine in War-Power Cases

Although courts have applied the *Baker* test liberally to dismiss war-power cases,[133] Justice Brennan emphasized the distinction between "political questions" and "political cases."[134] Specifically, Justice Brennan stated that "it is error to suppose that every case or controversy which touches [political matters] lies beyond judicial cognizance."[135] Further, Justice Brennan stated that the political question doctrine could not be invoked to dismiss "a bona fide controversy as to whether some action denominated 'political' exceed[ed] constitutional authority."[136]

Therefore, according to Justice Brennan, courts cannot invoke the political question doctrine simply because a case implicates sensitive political judgments, foreign affairs, or military actions.[137] Rather, a court's decision on whether to invoke the political question doctrine must depend on the legal issue presented.[138] Accordingly, courts should not invoke the political question doctrine when the legal issue presented is whether the President's military action has exceeded the scope of his constitutional authority.[139]

1. Courts Confuse the Legal Issue Presented in War-Powers Cases

Despite Justice Brennan's instructions in *Baker*, courts often confuse the legal issues in war-power cases and focus instead on the cases' political consequences.[140] Moreover, courts are aware that they may not have the

132. *See* Lowry v. Reagan, 676 F. Supp. 333, 340 n.53 (D.D.C. 1987); *see also* Campbell v. Clinton, 203 F.3d 19, 24-25 (D.C. Cir. 2000) (Silberman, J., concurring); Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982).

133. *See* THE POLITICAL QUESTION DOCTRINE, *supra* note 20, at 130.

134. *Baker*, 369 U.S. at 217.

135. *Id.*

136. *Id.*

137. *See* DYCUS ET AL., *supra* note 68, at 142.

138. *See id.*

139. *See id.*

140. *See* Ange v. Bush, 752 F. Supp. 509, 518 n.8 (D.D.C. 1990); *see also* Sadowski v. Bush, 293 F. Supp. 2d. 15, 20-21 (D.D.C. 2003) ("[Plaintiff] is asking the Court to determine whether President Bush's decision to go to war against Iraq was proper.").

necessary expertise to review the President's military actions.[141] Unsurprisingly then, courts often invoke the political question doctrine to dismiss war-power cases because they believe that they are being asked to substitute the President's judgment with their own judgment.[142]

For example, in *Ange v. Bush*,[143] the court dealt squarely with the Constitution's allocation of war-powers between Congress and the President.[144] In *Ange*, President H. W. Bush issued deployment orders to the Persian Gulf without congressional authorization.[145] One of the soldiers who received the orders sued President H. W. Bush on the grounds that the President had violated the War Powers Resolution and infringed upon Congress's exclusive authority to declare war.[146] Instead of hearing the case, the court invoked the political question doctrine and stated that "[i]n this court's view, . . . the decision as to whether to deploy United States troops is not a judicial function."[147]

As evidenced by the court's statement, however, the court incorrectly assumed that it was asked to determine whether the decision to deploy troops was proper. Rather, the legal issue presented was whether the President had exceeded the scope of his constitutional authority when he issued deployment orders without congressional authorization.[148] According to *Baker*, courts cannot invoke the political question doctrine to dismiss a case when the legal issue presented is whether Congress or the President exceeded their respective constitutional authority.[149] Therefore, had the court not confused the legal issue presented, it could have properly exercised its "judicial function" to determine whether President H. W. Bush had exceeded the scope of his constitutional authority when he issued deployment orders to the Persian Gulf without congressional authorization.[150]

141. *See* Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) ("In view of the knowledge, experience and positions held by [government officials] regarding military secrets, military planning and national security, [the government is] entitled to 'the utmost deference.'"); *see also* DYCUS ET AL., *supra* note 68, at 137.

142. *See* Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973); *see also* DYCUS ET AL., *supra* note 68, at 137.

143. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990).

144. *See id.* at 512.

145. *See id.* at 511-12.

146. *See id.* (noting that the plaintiff sued the President on the ground that the President failed to obtain congressional authorization to issue such deployment orders).

147. *Id.* at 518 n.8.

148. *See id.* at 511-12; *see also* DYCUS ET AL., *supra* note 68, at 143.

149. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

150. *See id.*; *see also* Campbell v. Clinton, 203 F.3d 19, 40-41 (D.C. Cir. 2000) (Tatel, J., concurring) (noting that the legal issue presented as to "whether the President possessed

C. Judicially Discoverable and Manageable Standards Exist to Resolve War-Power Cases

Even when courts correctly identify the legal issues presented in war-power cases, they often claim that there are no judicially discoverable and manageable standards to resolve such cases.[151] Specifically, courts claim that judicial standards or definitions do not exist to determine whether certain military actions constitute "hostilities" or "war."[152] Without such judicial standards or definitions, courts claim that they are unable to conclude whether the President's military actions infringed upon Congress's exclusive power to declare war, and thus, amounted to a constitutional violation.[153]

However, such reasoning is flawed for two reasons. First, Justice Jackson's renowned concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[154] provides a workable framework under which war-power cases can be analyzed. Second, the President's military actions are "no more standardless than any other question regarding the constitutionality of government action[,]" and therefore, courts can develop standards just as they have done for many other constitutional issues.[155]

1. Justice Jackson's Three-Category Framework

In *Youngstown*, Justice Jackson recognized that the President's powers "are not fixed[,] but fluctuate, depending upon their disjunction or conjunction with [Congress's powers]."[156] Justice Jackson then identified three categories under which the President's actions could be analyzed to

legal authority to conduct [certain] military operation[s] . . . [required the courts] to perform one of the most important functions of Article III courts: determining the proper constitutional allocation of power among the branches of government."); Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973) ("[W]e see [no] difficulty in a court facing up to the question as to whether . . . the President is or was without power to continue [a] war without Congressional approval.").

151. *See* Lowry v. Reagan, 676 F. Supp. 333, 340 n.53 (D.D.C. 1987); *see also* Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982); *Campbell*, 203 F.3d at 24-25 (Silberman, J., concurring).

152. *See Lowry*, 676 F. Supp. at 340 n.53; *see also Campbell*, 203 F.3d at 24-25 (Silberman, J., concurring); *Crockett*, 558 F. Supp. at 898.

153. *See Campbell*, 203 F.3d at 25 (Silberman, J., concurring); *see also Crockett*, 558 F. Supp. at 899.

154. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

155. *Campbell*, 203 F.3d at 37 (Tatel, J., concurring).

156. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

determine whether such actions were constitutional.[157] In the first category, the President has maximum authority when he acts pursuant to express or implied congressional authorization.[158] Under this category, the President's actions are afforded "the strongest of presumptions and the widest latitude of judicial interpretation."[159]

In the second category, the President operates in a "zone of twilight" when he has concurrent authority with Congress over a matter, such as war.[160] Under this category, if Congress fails to grant or deny the President certain authority, then the President may act pursuant to his own independent constitutional authority.[161] Thus, "congressional inertia, indifference or [ac]quiescence" may establish a constitutionally valid basis upon which the President can act independently.[162]

Finally, in the third category, the President's power "is at its lowest ebb" when he acts against Congress's express or implied will.[163] Under this category, Congress's constitutional powers supersede the President's unless the Constitution expressly affords the President exclusive discretion over the matter.[164] Thus, the President's powers "are in the least favorable . . . constitutional posture[]" and "are most vulnerable to attack" when they are analyzed under the third category.[165]

In *Youngstown*, Justice Jackson used this three-category framework to determine that President Harry Truman had exceeded the scope of his constitutional authority.[166] President Truman claimed that he had acted pursuant to his Commander in Chief powers when he issued an order directing his agents to seize the nation's steel mills.[167] However, Justice Jackson found that Congress had already passed legislation that was inconsistent with President Truman's seizure.[168] Thus, Justice Jackson analyzed President Truman's seizure under the third category and found that President Truman exceeded the scope of his constitutional authority

157. *Id.* at 635-38.
158. *Id.* at 635-37.
159. *Id.*
160. *See id.* at 637; *see also* U.S. CONST. art. II, § 2; U.S. CONST. art. I, § 8, cls. 11-13.
161. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
162. *Id.*
163. *Id.* at 637-38.
164. *Id.*
165. *Id.* at 640.
166. *Id.* at 637-55.
167. *Id.* at 583-84 (majority opinion) (noting that President Truman ordered the seizure to ensure that the government had enough steel to prosecute the Korean War).
168. *Id.* at 639 (Jackson, J., concurring).

because the Constitution did not expressly vest the President with the exclusive power to seize private property.[169]

Accordingly, Justice Jackson's three-category framework is well suited to resolve war-power cases because it provides a standard under which the President's constitutional powers can be balanced against Congress's.[170] The Constitution requires that Congress and the President cooperate in matters of war,[171] and thus, the President's military actions will necessarily fall under one of Justice Jackson's three categories.[172] In all likelihood, most war-power cases will not fall under the first category because war-power disputes are less likely to occur when Congress and the President act harmoniously.[173] Therefore, most war-power cases will fall under the second or third categories.[174]

Under the second category, courts can evaluate whether the President's military actions were facilitated based upon congressional acquiescence, such as during the Korean and Vietnam Wars.[175] If so, then the President's military actions would be deemed constitutional.[176] Likewise, under the third category, courts can evaluate whether the President's military actions were contrary to Congress's express or implied will.[177] If so, then the President's military actions would be deemed unconstitutional.[178]

2. Courts Can Develop Standards to Resolve War-Power Cases

Notwithstanding Justice Jackson's three-category framework, courts have claimed that they are ill-equipped to determine whether certain military actions constitute "hostilities" or "war."[179] However, not only are courts capable of determining when the nation is at war, they are also capable of developing standards to resolve war-power cases.[180] As Judge Tatel stated:

169. *Id.* at 640, 653.
170. *See id.* at 635-38.
171. *See* U.S. CONST. art. I, § 8, cls. 11-13; *see also* U.S. CONST. art. II, § 2.
172. *See Youngstown*, 343 U.S. at 635-638 (Jackson, J., concurring).
173. *See* DYCUS ET AL., *supra* note 68, at 46.
174. *See id.* at 47-50.
175. *See supra* Section II.B.
176. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
177. *See id.* at 637-38.
178. *See id.*
179. *See* Lowry v. Reagan, 676 F. Supp. 333, 340 n.53 (D.D.C. 1987); *see also* Campbell v. Clinton, 203 F.3d 19, 24-25 (D.C. Cir. 2000) (Silberman, J., concurring); Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982).
180. *See Campbell*, 203 F.3d at 37-40 (Tatel, J., concurring).

> I do not agree that courts lack judicially discoverable and manageable standards for "determining the existence of a 'war.'" . . . Whether [certain] military activity . . . amount[s] to "war" within the meaning of the [Constitution] is no more standardless than any other question regarding the constitutionality of government action. Precisely what police conduct violates the Fourth Amendment [protection] "against unreasonable searches and seizures?" When does government action amount to "an establishment of religion" prohibited by the First Amendment? When is an election district so bizarrely shaped as to violate the Fourteenth Amendment guarantee of "equal protection of the laws?" Because such constitutional terms are not self[-]defining, standards for answering these questions have evolved, as legal standards always do, through years of judicial decision[-]making.[181]

Indeed, the Supreme Court has determined whether the nation was at war in order to resolve war-power cases on several occasions.[182] For example, in *Bas v. Tingy*,[183] the Supreme Court determined that the nation was at war with France, even though Congress had not expressly declared so.[184] The Court found that the nation's aggressions with France were sufficient to constitute a war because Congress had built warships, dissolved the nation's treaty with France, and passed several statutes that authorized American citizens to use naval force against French vessels.[185] Similarly, in *The Prize Cases*,[186] the Supreme Court determined that President Lincoln's naval blockade of Confederate ports during the Civil War was "itself official and conclusive evidence . . . that a state of war existed."[187] The Supreme Court then interpreted the Constitution and determined that the President could exercise self-defense and repel sudden attacks without waiting for congressional authorization.[188]

In more recent cases, courts have taken judicial notice that the President's military actions could be of "such magnitude and significance as to present no serious claim that a war would not ensue if [the armed

181. *Id.*
182. *See* The Prize Cases, 67 U.S. 635, 670 (1862); *see also* Bas v. Tingy, 4 U.S. 37, 41 (1800); Talbot v. Seeman, 5 U.S. 1, 44-45 (1801).
183. Bas v. Tingy, 4 U.S. 37 (1800).
184. *Id.* at 41.
185. *Id.*
186. The Prize Cases, 67 U.S. 635 (1862).
187. *Id.* at 670.
188. *Id.* at 668.

forces] became engaged in combat."[189] For example, in *Dellums v. Bush*,[190] President H. W. Bush deployed approximately 230,000 troops to the Persian Gulf without congressional authorization.[191] Moreover, President H. W. Bush had obtained authorization from the United Nations Security Council to use military force against Iraq.[192] Under these circumstances, the court concluded that "an offensive entry into Iraq by several hundred thousand United States servicemen" would undoubtedly constitute a war that required congressional authorization.[193] Similarly, in *Mitchell v. Laird*,[194] the court concluded that the nation's hostilities in Vietnam constituted a war that required congressional authorization because the nation had suffered hundreds of thousands of casualties, spent billions of dollars to prosecute the armed conflict, and President Nixon had used the word "war" during his Inaugural Address.[195]

Furthermore, courts have taken judicial notice that certain military actions amounted to war in contexts other than war-power cases, such as contract claims.[196] Thus, courts are capable of developing standards to determine when the nation is at war in order to resolve war-power cases.[197] Although such determinations would be more difficult in situations where limited military force is used, Judge Tatel recognized that courts do not refrain from deciding First Amendment cases "simply because [they] can imagine a more difficult [case]."[198] Therefore, the fact that a case's subject matter involves a complex military action does "not justify abdicating [a court's] responsibility to construe the law and apply it to the facts of [the] case."[199]

189. Dellums v. Bush, 752 F. Supp. 1141, 1145 (D.D.C. 1990); *see also* Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973).
190. Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).
191. *Id.* at 1146.
192. *Id.*
193. *Id.*
194. Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).
195. *Id.* at 614.
196. *See* Campbell v. Clinton, 203 F.3d at 39 (Tatel, J., concurring); *see also* W. Reserve Life Ins. Co. v. Meadows, 261 S.W.2d 554, 559 (Tex. 1953) ("[T]o deny that the Korean military action is not war in its popularly accepted meaning is to deny the evidence of one's senses.") (quoting Beley v. Pa. Mut. Life Ins. Co., 95 A.2d 202, 213 (Pa. 1953)); Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992) ("[N]o one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq.").
197. *See Campbell*, 203 F.3d at 37-40 (Tatel, J., concurring).
198. *Id.* at 40.
199. *Id.*

D. Recommendation

The Supreme Court should ultimately rule that war-power cases are justiciable. Further, the Supreme Court should either adopt Justice Jackson's three-category framework or create its own standard under which courts can adjudicate war-power cases.[200] However, until the Supreme Court rules on this matter, courts should not invoke the political question doctrine in war-power cases. Instead, courts should allow Congress to seek injunctive relief under the War Powers Resolution if the President continues to order military action after the 60-day window expires.[201] Providing judicial relief at this juncture would not only permit the President to order military action within the 60-day window, as prescribed by the War Powers Resolution, it would also provide Congress with a remedy if it failed to pass legislation after the 60-day window expired.[202] To demonstrate this remedial procedure, a hypothetical scenario will be presented in which President Trump unilaterally orders military action against North Korea.

1. If President Trump Unilaterally Ordered Military Action Against North Korea

Recently, Kim Jong-un has vowed to denuclearize North Korea.[203] However, less than one year ago, Kim Jong-un and North Korea posed a serious threat to the United States.[204] Specifically, Kim Jong-un threatened that North Korea had nuclear warheads that were capable of reaching our nation's mainland.[205] In response, President Trump stated that further North Korean threats to our nation would be met with "fire and fury."[206] Such exchanges between Kim Jong-un and President Trump serve as a

200. *See supra* Section III.C.

201. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2012 & Supp. 2015)).

202. *See supra* Section II.D.1.

203. *See* Hyung-Jin Kim & Kim Tong-Hyung, *Kim Jong Un Vows Commitment to a Nuclear-Free Korea, North Korean Media Says*, TIME (Sept. 5, 2018), http://time.com/5388160/kim-jong-un-nuclear-free-korean-peninsula/.

204. *See* Choe Sang-Hun, *Kim Jong-un Offers North Korea's Hand to South, While Chiding U.S.*, N.Y. TIMES (Dec. 31, 2017), https://nyti.ms/2Nt9rZr.

205. *See id.*

206. *See* Peter Baker & Michael Tackett, *Trump Says His 'Nuclear Button' Is 'Much Bigger' Than North Korea's*, N.Y. TIMES (Jan. 2, 2018), https://nyti.ms/2MbdNA3.

reminder that North Korea and its active nuclear program remain an ongoing threat to the United States.[207]

Assuming, then, that denuclearization talks between the United States and North Korea break down and hostilities resurface between the two nations, President Trump may decide to strike first and unilaterally order non-nuclear military action against North Korea. If President Trump ordered such military action against North Korea, he would have to submit a written report to Congress pursuant to the War Powers Resolution.[208] Once President Trump submitted a written report to Congress, the 60-day window would begin to run in which President Trump could order military action against North Korea without express congressional authorization.[209] During the 60-day window, Congress would deliberate as to whether to endorse President Trump's military action against North Korea or terminate it.[210]

In the event that Congress decided to terminate President Trump's military action against North Korea, however, President Trump could still lawfully veto Congress's proposed legislation.[211] Thus, under this Comment's remedial procedure, Congress could avoid a potential veto and sue President Trump if he continued to order military action against North Korea after the 60-day window expired. Notwithstanding other procedural requirements, a court could then enjoin President Trump's military action and provide Congress with expeditious relief if it determined that President Trump exceeded the scope of his constitutional authority. A court-ordered injunction would give Congress the ability to reclaim its war-making authority and participate in matters of war as the Framers had originally intended. Such a remedial procedure would also provide the War Powers Resolution with a manageable framework that has been lacking since its passage.

207. *See Trump sees 'tremendous progress' on the Koreas where none exists*, THE WASHINGTON POST (Sept. 22, 2018), https://www.washingtonpost.com/opinions/global-opinions/trump-sees-tremendous-progress-on-the-koreas-where-none exists/2018/09/22/66760cc0-bcfa-11e8-b7d20773aa1e33da_story.html?utm_term=.47fba37043d3.

208. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2012 & Supp. 2015)).

209. *See* 50 U.S.C. § 1544.

210. *See id*.

211. *See* U.S. CONST. art. I, § 7.

IV. CONCLUSION

The Constitution requires that Congress and the President cooperate in matters of war.[212] Although the President was vested with the power of Commander in Chief of the nation's armed forces, the Framers intended Congress to have the exclusive power to decide whether the nation should go to war.[213] Over the course of the Korean and Vietnam Wars, however, the President established himself as the nation's primary decision-maker in matters of war.[214] Notwithstanding the War Powers Resolution, Congress has been unable to reclaim its war-making authority.[215]

In response to these developments, courts have decided to take a hands-off approach.[216] When presented with cases involving the allocation of the nation's war-powers, courts have frequently invoked the political question doctrine to dismiss such cases.[217] However, many war-power cases present justiciable issues.[218] Further, judicially discoverable and manageable standards exist to resolve war-power cases.[219] Therefore, courts should fulfill their Article III duties and adjudicate war-power cases if the legal issue presented is whether the President exceeded the scope of his constitutional authority. After all, in order to preserve our nation's democratic principles of checks and balances, "[c]ourts [must] be last, not first, to give them up."[220]

212. *See* U.S. CONST. art. I, § 8, cls. 11-13; *see also* U.S. CONST. art. II, § 2.
213. *See supra* Section II.A.1.
214. *See supra* Section II.B.
215. *See supra* Section II.C.
216. *See supra* Section II.D.
217. *See supra* Section III.B.
218. *See supra* Section III.B.
219. *See supra* Section III.C.
220. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 656 (1952) (Jackson, J., concurring).