



# Congressional Authority to Limit Military Operations

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## Summary

Controversy continues over the appropriate role that Congress should play in regulating U.S. military operations against foreign entities. U.S. action against Libya reignited consideration of long-standing questions concerning the President's constitutional authority to use military force without congressional authorization, as well as congressional authority to regulate or limit the use of such force. There may be a renewed focus in the 113<sup>th</sup> Congress on whether or to what extent Congress has the constitutional authority to legislate limits on the President's authority to conduct military operations in Afghanistan, Yemen, Somalia, or other locations.

This report begins by discussing constitutional provisions allocating war powers between Congress and the President, and presenting a historical overview of relevant court cases. It considers Congress's constitutional authority to end a military conflict via legislative action; the implications that the War Powers Resolution or the repeal of prior military authorization may have upon the continued use of military force; and other considerations which may inform congressional decisions to limit the use of military force via statutory command or through funding limitations. The report discusses Congress's ability to limit funding for U.S. participation in hostilities, examining relevant court cases and prior measures taken by Congress to restrict military operations, as well as possible alternative avenues to fund these activities in the event that appropriations are cut. The report then provides historical examples of measures that restrict the use of particular personnel, and concludes with a brief analysis of arguments that might be brought to bear on the question of Congress's authority to limit the availability of troops to serve in ongoing military operations. Although not beyond debate, such limitations appear to be within Congress's authority to allocate resources for military operations.

Portions of this report are taken from an earlier report, CRS Report RL33837, *Congressional Authority to Limit U.S. Military Operations in Iraq*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.

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## Introduction

Controversy continues over the appropriate role that Congress should play in regulating U.S. military operations against foreign entities.<sup>1</sup> U.S. action against Libya reignited consideration of long-standing questions concerning the President's constitutional authority to use military force without congressional authorization, as well as congressional authority to regulate or limit the use of such force. There may be a renewed focus on whether or to what extent Congress has the constitutional authority to legislate limits on the President's authority to conduct military operations in Afghanistan, Yemen, Somalia, or other locations. Congress may consider measures, for example, to repeal the authorization to use force in against those responsible for the terrorist attacks of 2001, to set deadlines for the withdrawal of U.S. forces, to prohibit some units from participating in certain ongoing military operations, or to make other requirements that could affect the deployment of the Armed Forces.<sup>2</sup>

It has also been suggested that, at least in certain circumstances, the President's role as Commander in Chief of the Armed Forces provides sufficient authority for his deployment of additional troops, and any efforts on the part of Congress to intervene could represent an unconstitutional violation of separation-of-powers principles. While even proponents of strong executive prerogative in matters of war appear to concede that it is within Congress's authority to terminate U.S. participation in hostilities by cutting off funding entirely for a military operation, a few have suggested that spending measures that restrict but do not end financial support for an armed conflict would be an infringement on executive power tantamount to an "unconstitutional condition."<sup>3</sup> The question may turn on whether the President's decisions on troop deployment and mission assignment are purely operational decisions committed to the President in his role as Commander in Chief, or whether congressional action to limit the availability of troops and the missions they may perform is a valid exercise of Congress's authority to allocate resources using its war powers and power of the purse.

## I. Constitutional Provisions

At least two arguments support the constitutionality of Congress's authority to limit the President's ability to continue military operations. First, Congress's constitutional power over the nation's Armed Forces arguably provides ample authority to legislate with respect to how they may be employed. Under Article I, Section 8, Congress has the power "To lay and collect Taxes ... to ... pay the Debts and provide for the common Defence," "To raise and support Armies," "To

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<sup>1</sup> Portions of this report are taken from an earlier report, CRS Report RL33837, *Congressional Authority to Limit U.S. Military Operations in Iraq*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.

<sup>2</sup> In the 112th Congress, a few proposals were introduced to limit or otherwise restrict continuing U.S. military operations in Afghanistan. *See, e.g.*, H.Amdt. 1103 to H.R. 4130 (proposed amendment to FY2012 defense authorization bill, which would have limited funds made available for ongoing U.S. operations in Afghanistan) (failed by recorded vote: 113 – 303); H.R. 780 (similar).

<sup>3</sup> For example, when Congress considered limiting funding for the deployment of troops in Iraq in 2007, some argued that such restrictions would infringe upon the executive's constitutional authority to determine when and how troops should be deployed during an authorized conflict. *See, e.g.*, David B. Rivkin Jr. and Lee A. Casey, *What Congress Can (And Can't) Do on Iraq*, WASH. POST (January 16, 2007) at A19; *see also* Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291(2006) (predicting arguments that would be made to oppose congressional funding restrictions).

provide and maintain a Navy,” “To make Rules for the Government and Regulation of the land and naval Forces,” and “To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” as well as “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” and “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.” Further, Congress is empowered “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ...” as well as “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

Secondly, Congress has virtually plenary constitutional power over appropriations, one that is not qualified with reference to its powers in Section 8. Article I, Section 9 provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” It is well established, as a consequence of these provisions, that “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress”<sup>4</sup> and that Congress can specify the terms and conditions under which an appropriation may be used,<sup>5</sup> so long as the restrictions do not impair power inherent solely in other branches or otherwise run afoul of constitutional restrictions on congressional prerogatives.<sup>6</sup>

On the executive side, the Constitution vests the President with the “executive Power,” Article II, Section 1, clause 1, and appoints him “Commander in Chief of the Army and Navy of the United States,” *id.*, §2, clause 1. The President is empowered, “by and with the Advice and Consent of the Senate, to make Treaties,” authorized “from time to time [to] give to the Congress Information on the State of the Union, and [to] recommend to their Consideration such Measures as he shall judge necessary and expedient,” and bound to “take Care that the Laws be faithfully executed.” *Id.*, §3. He is bound by oath to “faithfully execute the Office of President of the United States,” and, to the best of his “Ability, preserve, protect and defend the Constitution of the United States.” *Id.*, §1, clause 8.

It is clear that the Constitution allocates powers necessary to conduct war between the President and Congress. While the ratification record of the Constitution reveals little about the meaning of the specific war powers clauses, the importance of preventing all of those powers from accumulating in one branch appears to have been well understood,<sup>7</sup> and vesting the powers of the sword and the purse in separate hands appears to have been part of a careful design.<sup>8</sup>

It is generally agreed that some aspects of the exercise of those powers are reserved to the Commander in Chief, and that Congress could conceivably legislate beyond its authority in such a way as to intrude impermissibly into presidential power. The precise boundaries separating

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<sup>4</sup> *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

<sup>5</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). For a scholarly treatment of the Appropriations Clause, see Kate Stith, *Congress’ Power of the Purse*, 97 *YALE L. J.* 1343 (1988).

<sup>6</sup> *United States v. Klein*, 80 U.S. (8 Wall.) 128 (1872) (holding invalid an appropriations proviso that effectively nullified some effects of a presidential pardon and that appeared to prescribe a rule of decision in court cases); *United States v. Lovett*, 328 U.S. 303 (1946) (invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials).

<sup>7</sup> See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 7 (2d ed. 2004) (noting that allocation of war powers to Congress was a break with monarchical theories, under which all such powers belonged to the executive); *id.* at 8-12.

<sup>8</sup> See WILLIAM C. BANKS AND PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* 27-32(1994).

legislative from executive functions, however, remain elusive.<sup>9</sup> There can be little doubt that Congress would exceed its bounds if it were to confer exclusive power to direct military operations on an officer not subordinate to the President,<sup>10</sup> or to purport to issue military orders directly to subordinate officers.<sup>11</sup> At the same time, Congress's power to make rules for the government and regulation of the Armed Forces provides it wide latitude for restricting the nature of orders the President may give. Congress's power of appropriations gives it ample power to supply or withhold resources, even if the President deems them necessary to carry out planned military operations.<sup>12</sup>

## **Congress's War Powers**

The power "To Declare War" has long been construed to mean not only that Congress can formally take the nation into war, but also that it can authorize the use of the Armed Forces for military expeditions that may not amount to war.<sup>13</sup> While a restrictive interpretation of the power "To declare War" is possible, for example, by viewing the Framers' use of the verb "to declare" rather than "to make"<sup>14</sup> as an indication of an intent to limit Congress's ability to affect the course of a war once it is validly commenced,<sup>15</sup> Congress's other powers over the use of the military would likely fill any resulting void. In practice, courts have not sought to delineate the boundaries

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<sup>9</sup> It is frequently asserted that Congress has no authority to interfere with tactical decisions on the battlefield or to involve itself in the direction of military campaigns, but inasmuch as nearly any regulation of the Armed Forces could conceivably have some impact on the conduct of military operations, this formulation does not seem particularly useful. Scholars have attempted to formulate better doctrinal approaches, for example, by distinguishing "framework" statutes from detailed regulations, or statutes of general application from those enacted to address a specific military context. While the Supreme Court appears to agree that there are limits to Congress's powers, it has not adopted a judicial test for determining what legislation crosses the line. For an overview and criticism of various theories relating to the limits of Congress's war powers, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

<sup>10</sup> Congress has by statute provided that the President must issue orders to subordinate military commands through the appropriate chain of command rather than directly. See FRANCIS D. WORMUTH AND EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 93 (2<sup>nd</sup> ed. 1989) (citing the Command of the Army Act of 1867, 14 Stat. 485, 486-87, which required that "all orders and instructions relating to military operations" be "issued through the General of the Army," and made orders issued contrary to the provision punishable by prison sentence from two to twenty years). Congress has also authorized judges to issue orders directed to military commanders requiring them to provide military aid to marshals for the arrest of persons accused of crimes against the United States who were on board foreign ships in U.S. harbors. 2 Stat. 339 (1805).

<sup>11</sup> *But see* WORMUTH & FIRMAGE, *supra* footnote 10, at 93-94 (asserting that during the Reconstruction period following the Civil War, the "army was given its orders directly by Congress," and noting that President Andrew Johnson's efforts to circumvent the statute were cited in the ninth article of impeachment against him, although no proof was offered at trial).

<sup>12</sup> For a discussion of theories asserting the presidential prerogative to spend without appropriations when necessary for military operations, see generally Colonel Richard D. Rosen, *Funding "Non-traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998); *see also* Major Brian A. Hughes, *Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand*, 2005-AUG ARMY LAW. 1 (describing how fiscal law constrains military spending, sometimes impeding military operations).

<sup>13</sup> *Bas v. Tingy*, 4 U.S. 37 (1800).

<sup>14</sup> The Framers' decision to substitute "declare" for "make" has generally been interpreted to allow the President the authority to repel sudden attacks. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 318-19 (rev. ed. 1937) (explanation of James Madison and Elbridge Gerry on their motion to amend text).

<sup>15</sup> *Cf.* John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1669-71 (2002) (arguing that "to declare" means to formally recognize rather than to authorize or commence).

of each clause relating to war powers or identify gaps between them to find specific powers that are denied to Congress.<sup>16</sup>

Early exercises of Congress's war powers may shed some light on the original understanding of how the war powers clauses might empower Congress to limit the President's use of the Armed Forces. In the absence of a standing army, early presidents were constrained to ask Congress for support in advance of undertaking any military operations.<sup>17</sup> Congress generally provided the requested support and granted the authority to raise the necessary troops to defend the frontiers from deprivations by hostile Indians<sup>18</sup> and to build a navy to protect U.S. commerce at sea.<sup>19</sup> Congress, in exercising its authority to raise the army and navy, sometimes raised forces for specific purposes, which may be viewed as both an implicit authorization to use the forces for such purposes and as an implicit limitation on their use.<sup>20</sup> On the other hand, Congress often delegated broad discretion to the President within those limits, and appears to have acquiesced to military actions that were not explicitly authorized.<sup>21</sup>

In several early instances, Congress authorized the President to use military forces for operations that did not amount to a full war. Rather than declaring a formal war with France, Congress authorized the employment of the naval forces for limited hostilities. The Third Congress authorized the President to lay and enforce embargoes of U.S. ports, but only while Congress was not in session (and embargo orders were to expire 15 days after the commencement of the next session of Congress).<sup>22</sup> The Fifth Congress authorized the President to issue instructions to the

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<sup>16</sup> See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§1170 - 71 (1833) (stating that the powers to issue letters of marque and reprisal and to authorize captures are incidental to the power to declare war, implying their express mention was unnecessary, but noting that these "incidental" powers may also be employed during peace). *But see, e.g.*, J. Terry Emerson, *War Powers Legislation*, 74 W. Va. L. Rev. 53, 62 (1972) (arguing that early opinions related to the Quasi-War with France, often advanced for the proposition that Congress is empowered to regulate military operations that do not amount to war, should be read as strict interpretations of Congress's power to make rules for captures).

<sup>17</sup> See ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 116-17 (1976) (describing President Washington's efforts to obtain support for military efforts, including a build-up of military strength to preserve peace and maintain U.S. stature among nations).

<sup>18</sup> See, e.g., Act of March 3d, 1791, for raising and adding another Regiment to the Military Establishment of the United States, and for making further provision for the protection of the frontier, 1 Stat. 222; Act of March 5, 1792, 1 Stat. 241 (adding three regiments for three years or until peace with Indian tribes was established); Act of July 16, 1798, 1 Stat. 604 (authorizing the President to raise twelve additional regiments of infantry and six troops of light dragoons during the continuance of differences with the French Republic).

<sup>19</sup> See, e.g., Act of March 27, 1794, To provide a naval armament, 1 Stat. 351 ("Whereas the depredations committed by Algerine corsairs render it necessary..." authorizing the building and manning of six ships of specific types, until the establishment of peace with the Regency of Algiers) (amended in 1796 to remove restrictions so that vessels could be used for other purposes, 1 Stat. 453); Act of April 27, 1798, To provide an additional Armament for the protection of the Trade of the United States..., 1 Stat. 552; Act of June 22, 1798, 1 Stat. 569 (authorizing the President "to increase the strength of any revenue cutter, for the purposes of defence, against hostilities near the sea coast" by manning the vessels with up to 70 seamen and marines).

<sup>20</sup> Some proposals explicitly to limit how the vessels could be employed were stricken prior to enactment, but the congressional debates left unclear whether the majority of members thought the restrictions unconstitutional or merely unwise, or whether the absence of specific authority was meant to be a limitation. See SOFAER, *supra* footnote 17, at 147-54. The John Adams Administration interpreted the legislation restrictively, and instructed naval commanders accordingly that their authority was to be "partial and limited." See *id.* at 156.

<sup>21</sup> See *id.* at 129 (noting that offensive actions against Wabash Indians and against a British fort may have exceeded express statutory authorization but were authorized by implication through appropriations).

<sup>22</sup> Act of June 4, 1794, 1 Stat. 372. See also Act of June 5, 1794 §§7- 8, 1 Stat. 381, 384 (authorizing the President to use Armed Forces to detain violators and compel foreign ships to depart).

commanders of public armed ships to capture certain French armed vessels and to recapture ships from them,<sup>23</sup> and to retaliate against captured French citizens who had seized U.S. citizens and subjected them to mistreatment.<sup>24</sup> Congress also authorized U.S. merchant vessels to defend themselves against French vessels.<sup>25</sup> The Supreme Court treated these statutes as authorizing a state of “partial war” between the United States and France.<sup>26</sup> Such an undeclared war was described as an “imperfect” war, in which those who are authorized to commit hostilities act “under special authority,” as distinguished from a “Solemn” or “perfect” war, in which all members of one nation are at war with all members of the other nation.<sup>27</sup> This suggests an early understanding that Congress’s war powers extend to establishing the scope of hostilities to be carried out by the Armed Forces.

In the majority of cases, however, it appears that Congress has given broad deference to the President to decide how much of the Armed Forces to employ in a given situation. After Tripoli declared war against the United States in 1801 and U.S. vessels were already engaged in defensive actions against them, Congress did not enact a full declaration of war. Rather, it issued a sweeping authorization for the commissioning of privateers, captures, and other actions to “equip, officer, man, and employ *such of the armed vessels of the United States as may be judged requisite by the President of the United States*, for protecting effectually the commerce and seamen thereof on the Atlantic ocean, the Mediterranean and adjoining seas,” as well as to “cause to be done *all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.*”<sup>28</sup> In declaring war against Great Britain in 1812, Congress authorized the President to “use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper....”<sup>29</sup>

That Congress has traditionally left it up to the President to decide how much of the Armed Forces to employ in a given conflict need not imply that such deference is constitutionally mandated. The fact that Congress has seen fit to include such language may just as easily be read as an indication that Congress believes that the decision is its to delegate. Under this view, even in the case of a declaration of war, Congress retains the power to authorize the President to use only a portion of the Armed Forces to engage in a particular conflict, although some argue that such limitations must come at the initiation of an authorization to use force and cannot later be amended or repealed<sup>30</sup> On the other hand, some have argued that the President is authorized to

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<sup>23</sup> Act of May 28, 1798, 1 Stat. 561. *See also* Act of July 9, 1798, 1 Stat. 578.

<sup>24</sup> Act of March 3, 1799, 1 Stat. 743 (empowering and requiring the President to “cause the most rigorous retaliation to be executed on [French suspects who] have been or hereafter may be captured in pursuance of any of the laws of the United States”).

<sup>25</sup> 1 Stat. 572.

<sup>26</sup> *Bas v. Tingy*, 4 U.S.(Dall.) 37 (1800).

<sup>27</sup> *Id.* at 40. *See also* *Talbot v. Seeman*, 5 U.S.(Cranch) 1, 28 (1801) (“Congress may authorize general hostilities ... or partial hostilities.”).

<sup>28</sup> Act of February 6, 1802, 2 Stat.129 (emphasis added). For more examples of authorizations to use force and declarations of war, see CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, by Jennifer K. Elsea and Matthew C. Weed.

<sup>29</sup> Act of June 18, 1812, ch. 102, 2 Stat 755.

<sup>30</sup> *See* Adam Heder, *The Power to End War: The Extent and Limits of Congressional Power*, 41 ST. MARY’S L.J. 445 (2010) (arguing, in essence, that once war is declared or force is authorized, the authority to conduct hostilities belongs to the President, is plenary and cannot be repealed). The author posits that legislation passed pursuant to the Declare War Clause is different from “garden-variety” statutes that rely on other enumerated powers due to the existence of the (continued...)



deploy all of the Armed Forces as he sees fit, with or without an express authorization to use force or a declaration of war.<sup>31</sup> According to this theory, in essence, Congress can stop the deployment of military forces only by cutting appropriations or discharging the troops.<sup>32</sup>

Congress has also used its authority to provide for the organization and regulation of the Armed Forces to regulate how military personnel are to be organized and employed. The earliest statutes prescribed in fairly precise terms how military units were to be formed and commanded. For example, the 1798 act establishing the Marine Corps mandated the raising of a corps to consist of “one major, four captains, sixteen first lieutenants, twelve second lieutenants, forty-eight sergeants, forty-eight corporals, thirty-two drums and fifes, and seven hundred and twenty privates....”<sup>33</sup> Congress authorized the President to appoint certain other officers as necessary if he were to assign the Marine Corps or any part of it to shore duty, and to assign the detachment to duty in “forts and garrisons of the United States, on the sea-coast, or any other duty on shore.” Officers of the Marine Corps could be detached to serve on board frigates and other armed vessels. The Marine Corps was increased in size and reorganized in 1834 to be commanded by a colonel, with the proviso that no Marine Corps officer could be placed in command of a navy yard or vessel of the United States.<sup>34</sup>

It appears to have been understood that personnel and units authorized to perform certain duties could not be assigned to perform other duties without authorization from Congress.<sup>35</sup> In 1808, when Congress authorized eight new regiments of specific types and composition, it felt compelled to include language making members of the light dragoon regiment liable to “serve on foot as light infantry” until sufficient horses and other accouterments could be provided.<sup>36</sup> The Supreme Court later interpreted an 1802 statute providing for the establishment of the Corps of Engineers, although broadly worded to permit the President to direct that its members serve such duty in such places as he saw fit, to authorize only engineering duties:

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(...continued)

Commander-in-Chief Clause, which the author interprets as providing exclusive authority to conduct war to the President. *Id.* at 463-64. The author does not address whether the Vesting Clause should be similarly interpreted to give the President complete authority over the execution of laws passed under other enumerated congressional powers.

<sup>31</sup> See, e.g., Bradley Larschan, *The War Powers Resolution: Conflicting Constitutional Powers, The War Powers, and U.S. Foreign Policy*, 16 DENVER J. INT’L L. & POL’Y 33, 45 (1987) (arguing that once Congress has raised an army and appropriated funds for it, “it falls to the President to use the armed forces in his capacity to conduct foreign policy in situations short of war”). The author states that it is “clear that the Congress may prohibit the use of U.S. forces in certain areas by statute,” but that “it is the President who orders deployment of the troops.” *Id.* at 49.

<sup>32</sup> See Heder, *supra* footnote 30, at 476 (concluding that congressional options are limited to whatever restrictions Congress might impose at the outset, dissolving the army, or cutting funding, but that Congress has no other implied authority under the Constitution to terminate hostilities).

<sup>33</sup> 1 Stat. 594, 595 (1798).

<sup>34</sup> 4 Stat. 712, 713 (1834). For more examples of early legislation regulating the military establishment, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 956-58 (2008) [hereinafter “Barron & Lederman, *Constitutional History*”].

<sup>35</sup> *But see id.* at 991-93 (discussing possible exception when President Polk deployed in Mexico a regiment of riflemen that Congress had raised for the express purpose of protecting the frontier in Oregon, although Congress had not expressly restricted the deployment of the regiment for other uses, which occasioned a vigorous debate in Congress).

<sup>36</sup> 2 Stat. 481, 483 (1808).

But, however broad this enactment is in its language, it never has been supposed to authorize the President to employ the corps of engineers upon any other duty, except such as belongs either to military engineering, or to civil engineering.<sup>37</sup>

## **The Commander-in-Chief Clause**

Early in the nation's history, the Commander-in-Chief power was understood to connote "nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy."<sup>38</sup> Concurring in that view in 1850, Chief Justice Taney stated:

[The President's] duty and his power are purely military. As Commander-in-Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.<sup>39</sup>

This formula, taken alone, provides only an approximate demarcation of the line separating Congress's role from the President's. Advocates of a strong role for Congress might characterize a legislative effort to limit the number of troops available for a particular military operation as placing troops "by law" under the President's command, while proponents of a strong executive would likely view it as a limitation on the President's ability to "employ them in the manner" he sees fit. With respect to the latter argument, however, it should be noted that the particular question before the *Fleming* Court did not call into question the extent to which Congress could restrict the manner of employing troops once placed at the command of the President.

Other early cases demonstrate Congress's authority to restrict the President's options for the conduct of war. In *Little v. Barreme*,<sup>40</sup> Chief Justice Marshall had occasion to recognize congressional war power and to deny the exclusivity of presidential power. There, after Congress had authorized limited hostilities with France, a U.S. vessel under orders from the President had seized what its commander believed was a U.S. merchant ship bound from a French port, allegedly carrying contraband material. Congress had, however, provided by statute only for seizure of such vessels bound to French ports.<sup>41</sup> Upholding an award of damages to the ship's owners for wrongful seizure, the Chief Justice said:

It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seems to have prescribed

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<sup>37</sup> *Gratit v. United States*, 40 U.S. (15 Pet.) 336, 371 (1841) (finding that the President could contract for other services but must pay an additional stipend for them from other funds).

<sup>38</sup> *The Federalist*, No. 69 (Alexander Hamilton).

<sup>39</sup> *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

<sup>40</sup> 6 U.S. (2 Cr.) 170 (1804).

<sup>41</sup> 1 Stat. 613 (1799).

that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port.<sup>42</sup>

Accordingly, the Court held, the President's instructions exceeded the authority granted by Congress and were not to be given force of law, even in the context of the President's military powers and even though the instructions might have been valid in the absence of contradictory legislation.

In *Bas v. Tingy*,<sup>43</sup> the Court looked to congressional enactments rather than plenary presidential power to uphold military conduct related to the limited war with France. The following year, in *Talbot v. Seeman*,<sup>44</sup> the Court upheld as authorized by Congress a U.S. commander's capture of a neutral ship, saying that "[t]he whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry." During the War of 1812, the Court recognized in *Brown v. United States*<sup>45</sup> that Congress was empowered to authorize the confiscation of enemy property during wartime, but that absent such authorization, a seizure authorized by the President was void.<sup>46</sup>

The onset of the Civil War provided some grist for later assertions of unimpeded presidential prerogative in matters of war. In the *Prize Cases*,<sup>47</sup> the Supreme Court sustained the blockade of Southern ports instituted by President Lincoln in April 1861, at a time when Congress was not in session. Congress had at the first opportunity ratified the President's actions,<sup>48</sup> so that it was not necessary for the Court to consider the constitutional basis of the President's action in the absence of congressional authorization or in the face of any prohibition. Nevertheless, the Court approved the blockade five-to-four as an exercise of presidential power alone, on the basis that a state of war was a fact and that, the nation being under attack, the President was bound to take action without waiting for Congress.<sup>49</sup> The case has frequently been cited to support claims of greater presidential autonomy by reason of his role as Commander in Chief.

However, it should be recalled that where Lincoln's suspension of the Writ of Habeas Corpus varied from legislation enacted later to ratify it, the Court looked to the statute<sup>50</sup> rather than to the executive proclamation<sup>51</sup> to determine the breadth of its application in the case of *Ex parte*

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<sup>42</sup> 6 U.S. (2 Cr.) at 177-178.

<sup>43</sup> 4 U.S. (4 Dall.) 37 (1800).

<sup>44</sup> 5 U.S. (1 Cr.) 1, 28 (1801).

<sup>45</sup> 12 U.S. (8 Cr.) 110 (1814).

<sup>46</sup> Justice Marshall also noted that Congress's power over captures expressly covered the confiscation at issue, and implied that the Captures Clause applies to enemy persons as well as property. *Id.* at 126. For analysis of the Captures Clause, see Aaron D. Simowitz, *The Original Understanding of the Capture Clause*, 59 DEPAUL L. REV. 121 (2009); Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009).

<sup>47</sup> 67 U.S. (2 Bl.) 635 (1863).

<sup>48</sup> 12 Stat. 326 (1861) (ratifying all "acts, proclamations, and orders" done by the President "respecting the army and navy ... and calling out or relating to the militia").

<sup>49</sup> 67 U.S. (2 Bl.) at 668 ("[The President] does not initiate war, but is bound to accept the challenge without waiting for any special legislative authority."). The minority argued that only congressional authorization could stamp an insurrection with the character of war. Later, a unanimous Court adopted the majority view. *The Protector*, 79 U.S. (12 Wall.) 700 (1872).

<sup>50</sup> Act of March 3d, 1863, 12 Stat. 755 (authorizing the suspension of habeas corpus, but with limitations in Union states to those held as prisoners of war; all others were to be indicted or freed.)

<sup>51</sup> Proclamation of September 15, 1863, 13 Stat. 734 (suspending habeas corpus with respect to those in federal custody as military offenders or "as prisoners of war, spies, or aiders and abettors of the enemy").

*Milligan*.<sup>52</sup> In a partial concurrence to the majority's decision, Chief Justice Chase described the allocation of war powers as follows:

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President....<sup>53</sup>

The Chief Justice described the Commander-in-Chief power as entailing “the command of the forces and the conduct of campaigns,”<sup>54</sup> but nevertheless agreed that military trials of civilians accused of violating the law of war in Union states were invalid without congressional approval, despite the government's assertion that the “[Commander in Chief's] power to make an effectual use of his forces [must include the] power to arrest and punish one who arms men to join the enemy in the field against him.”<sup>55</sup>

On the other hand, the Supreme Court has also suggested that the President has some independent authority to employ the Armed Forces, at least in the absence of contrary congressional action. In the 1890 case of *In re Neagle*, the Supreme Court suggested, in dictum, that the President has the power to deploy the military abroad to protect or rescue persons with significant ties to the United States. Discussing examples of the executive lawfully acting in the absence of express statutory authority, Justice Miller approvingly described the Martin Koszta affair, in which an American naval ship intervened to prevent a lawful immigrant from being captured by an Austrian vessel, despite the absence of clear statutory authorization.<sup>56</sup> Only one federal court, in an 1860 opinion, has clearly held that in the absence of congressional authorization, the President has authority to deploy military forces abroad to protect U.S. persons (and property).<sup>57</sup> Nevertheless, there

<sup>52</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>53</sup> *Id.* at 139 (Chase, C.J., concurring and dissenting in part).

<sup>54</sup> *Id.* at 139 (“Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity...”).

<sup>55</sup> *Id.* at 17 (government argument).

<sup>56</sup> *In re Neagle*, 135 U.S. 1, 64 (1890) (describing the incident and rhetorically asking, “Upon what act of congress then existing can anyone lay his finger in support of the action of our government in this matter?”). For further discussion, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 347-348 (2<sup>nd</sup> ed. 2002); WORMUTH & FIRMAGE, *supra* footnote 10, at 154 (stating that the U.S. captain had acted against the President's orders, but that President Pierce justified the action to Congress, which later awarded the captain a medal). In an earlier opinion, the Court had also stated in dictum that one of the privileges of a U.S. citizen is “to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government.” *Slaughter-House Cases*, 83 U.S. 36, 79 (1872). It should be noted that Koszta was not a U.S. citizen, but a legal immigrant who had declared an intention to apply for citizenship. Accordingly, an 1868 statute authorizing the use of any means “not amounting to acts of war” to obtain the release of U.S. citizens was likely inapplicable. Expatriation Act of July 27, 1868, 15 Stat. 223.

<sup>57</sup> *Durand v. Hollins*, 8 Fed. Cas. 111 (C.C.S.D.N.Y. 1860) (Nelson, Circuit Justice) (holding that a Navy commander was not civilly liable for damages caused by his forces during an 1854 action to protect U.S. citizens and property in Greytown, Nicaragua). In an opinion by Circuit Justice Nelson, the court held that the commander was not liable because the military action was pursuant to a valid exercise of federal authority to be exercised by the President:

... as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled (continued...)

historically appears to be some support for this view by both the executive and legislative branches.<sup>58</sup> However, the scope of any such authority remains unclear, as does the degree to which it may be limited by an act of Congress.

The expansion of presidential power related to war, asserted as a combination of Commander-in-Chief authority and the President's inherent authority over the nation's foreign affairs, began in earnest in the 20<sup>th</sup> century. In *United States v. Curtiss-Wright Export Corp.*,<sup>59</sup> the Supreme Court confirmed that the President enjoys greater discretion when acting with respect to matters of foreign affairs than may be the case when only domestic issues are involved. In that case, Congress, concerned with the outside arming of the belligerents in the war between Paraguay and Bolivia, had authorized the President to proclaim an arms embargo if he found that such action might contribute to a peaceful resolution of the dispute. President Franklin Roosevelt issued the requisite finding and proclamation, and Curtiss-Wright and associate companies were indicted for violating the embargo. They challenged the statute, arguing that Congress had failed adequately to elaborate standards to guide the President's exercise of the power thus delegated.<sup>60</sup> Writing for the Court, Justice Sutherland concluded that the limitations on delegation in the domestic field were irrelevant where foreign affairs are involved, a result he based on the premise that foreign relations is exclusively an executive function combined with his constitutional model positing that internationally, the power of the federal government is not one of enumerated but of inherent powers, emanating from concepts of sovereignty rather than the Constitution. The Court affirmed the convictions, stating that:

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

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to protection as the citizen at home. *Id.* at 112.

<sup>58</sup> See GAO, Office of Compt. Gen., *President - Authority - Protection of American Lives and Property Abroad*, 55 Comp. Gen. 1081 (1975) (describing historical practice and the weight of scholarly authority as supporting the power of the President to order military rescue operations in the absence of congressional authorization); Dept. of Justice, Office of Legal Counsel, 4A U.S. OP. OFF. LEGAL COUNSEL 185, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization* (1980) (alleging presidential authority to deploy forces to protect, and retaliate for injuries suffered by, U.S. persons and property). For discussion of the deployment of military forces to protect U.S. persons or property, see FISHER, *supra* footnote 7, at 57-58 (describing historical practice, and noting mid-20<sup>th</sup> century study listing 148 examples of this occurrence); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 54-57 (rev. ed. 2004) (discussing mid-19<sup>th</sup> century instances where presidents unilaterally committed forces to protect U.S. persons or property). The number and degree to which these actions occurred without congressional authorization is the subject of some debate. See WORMUTH & FIRMAGE, *supra* footnote 10, at 135-51 (discussing and disputing validity of various lists of military actions compiled to demonstrate historical prevalence of presidential war-making). For example, some argue that President Jefferson's ordering of the Navy to protect American shipping from Barbary pirates was done without congressional approval, while others view these orders as having been issued pursuant to legislation providing for a "naval peace establishment." Compare Dept. of Justice, Off. of Legal Counsel, *supra*, at 187 (describing Jefferson's use of the Navy as a "famous early example" of President's acting without congressional authorization to protect U.S. interests) with FISHER, *supra* footnote 7, at 35-36 (characterizing the orders as being issued pursuant to congressional authorization, and noting that Jefferson denied having inherent authority to commit such acts). Whether such usage would legitimate the authority is also subject to debate. See WORMUTH & FIRMAGE, *supra* footnote 10, at 135.

<sup>59</sup> 299 U.S. 304 (1936).

<sup>60</sup> The Supreme Court had recently held that the Constitution required Congress to elaborate standards when delegating authority to the President. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.<sup>61</sup>

The case is cited frequently to support a theory of presidential power not subject to restriction by Congress, although the case in fact involved an exercise of authority delegated by Congress. *Curtiss-Wright* remains precedent admonishing courts to show deference to the President in matters involving international affairs, including by interpreting ambiguous statutes in such a manner as to increase the President’s discretion.<sup>62</sup> The case has also been cited in favor of broad presidential discretion to implement statutes related to military affairs.<sup>63</sup> To the extent, however, that Justice Sutherland interpreted presidential power as being virtually plenary in the realms of foreign affairs and national defense, the case has not been followed to establish that Congress lacks authority in these areas.

The constitutional allocation of war powers between the President and Congress, where Congress had not delegated the powers exercised by the President, was described by Justice Jackson, concurring in the *Steel Seizure Case*:

The Constitution expressly places in Congress power “to raise and support Armies” and “to provide and maintain a Navy.” This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement....

There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of “war powers,” whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him any army or navy to command.<sup>64</sup>

The Jackson opinion is commonly understood to establish that whatever powers the President may exercise in the absence of congressional authorization, the President may act contrary to an act of Congress only in matters involving exclusive presidential prerogatives.<sup>65</sup>

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<sup>61</sup> 299 U.S. at 319-20.

<sup>62</sup> See *Haig v. Agee*, 453 U.S. 280, 291, 293-294 & n. 24, 307-308 (1981); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (construing treaty and statutory provisions as not limiting presidential discretion in interdicting refugees on high seas in the light of the President’s “unique responsibility” in foreign and military affairs, citing *Curtiss-Wright*).

<sup>63</sup> See *Loving v. United States*, 517 U.S. 748 (1996).

<sup>64</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

<sup>65</sup> Justice Jackson’s concurrence took note of the fact that *Curtiss-Wright* did not involve a case in which the President took action contrary to an act of Congress. *Id.* at 635-36 &n.2. *Curtiss-Wright*, he said

involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. The constitutionality of the Act under which the President had proceeded was assailed on the ground that it delegated

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Presidents from Truman to Obama have claimed independent authority to commit U.S. Armed Forces to involvements abroad absent any congressional participation other than consultation and after-the-fact financing. In 1994, for example, President Clinton based his authority to order the participation of U.S. forces in NATO actions in Bosnia-Herzegovina on his “constitutional authority to conduct U.S. foreign relations” and as his role as Commander in Chief,<sup>66</sup> and protested efforts to restrict the use of military forces there and elsewhere as an improper and possibly unconstitutional limitation on his “command and control” of U.S. forces.<sup>67</sup> In March 2011, President Obama ordered U.S. military forces to take action as part of an international coalition to enforce U.N. Security Council Resolution 1973, which authorized U.N. Member States to take all necessary measures (other than through military occupation) to protect civilians from attacks by the Libyan government and to establish a no-fly zone over the country. Although these operations had not been authorized by legislation, the executive submitted a report to Congress which claimed that the President has the “constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad.”<sup>68</sup>

The executive branch has also, on occasion, claimed independent authority to detain, interrogate, and try belligerents captured in hostilities, and suggested that this authority may not be

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legislative powers to the President. Much of the Court’s opinion is *dictum*, but the *ratio decidendi* is contained in the following language:

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President’s action - or, indeed, whether he shall act at all - may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie v. Hare*, 239 U.S. 299, 311, ‘As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*’ (Italics supplied [by Justice Jackson]) *Id.*, at 321-322.

That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.

<sup>66</sup> 30 WEEKLY COMP. PRES. DOC. 406 (March 2, 1994).

<sup>67</sup> See Interview with Radio Reporters, 1993 PUB. PAPERS 1763-64; see also FISHER, *supra* footnote 7, at 184.

<sup>68</sup> Report to the House of Representatives on United States Activities in Libya, submitted June 15, 2011, available at [http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616\\_POWERS\\_DOC.html?ref=politics](http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616_POWERS_DOC.html?ref=politics), at 25. The Department of Justice’s Office of Legal Counsel issued a legal opinion which claimed that the President possessed independent constitutional authority to commence U.S. military operations in Libya without prior congressional authorization because these operations would be “limited” in scope and the President could “reasonably determine that such use of force was in the national interest.” Dept. of Justice, Office of Legal Counsel, *Authority to Use Military Force in Libya* (2011), at 1, available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>. The opinion stated that “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period” may generally require prior congressional authorization, but claimed that “historical practice of presidential military action without congressional approval precludes any suggestion that Congress’s authority to declare war covers every military engagement, however limited, that the President initiates.” *Id.* at 8.

circumscribed by Congress. In the context of what it described as the “Global War on Terror,” the George W. Bush Administration claimed that the President’s Commander-in-Chief authority entails inherent authority with respect to the capture and detention of suspected terrorists, authority he has claimed cannot be infringed by legislation,<sup>69</sup> meaning that even criminal laws prohibiting torture were deemed inapplicable to activities conducted pursuant to the President’s war powers.<sup>70</sup> In 2004, the Supreme Court avoided deciding whether Congress could pass a statute to prohibit or regulate the detention and interrogation of captured suspects, which the Bush Administration had asserted would unconstitutionally interfere with core Commander-in-Chief powers, by finding that Congress had implicitly authorized the detention of enemy combatants when it authorized the use of force in the aftermath of the September 11, 2001, terrorist attacks.<sup>71</sup> However, the Supreme Court in 2006 invalidated President Bush’s military order authorizing trials of aliens accused of terrorist offenses by military commission, finding that the regulations promulgated to implement the order did not comply with relevant statutes.<sup>72</sup> The Court did not expressly pass on the constitutionality of any statute or discuss possible congressional incursion into areas of exclusive presidential authority, which was seen by many as implicitly confirming Congress’s authority to legislate in such a way as to limit the power of the Commander in Chief.<sup>73</sup>

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<sup>69</sup> See, e.g. *Oversight of the Department of Justice: Hearing Before the Senate Judiciary Committee*, 107<sup>th</sup> Cong. (2002) (testimony of Attorney General John Ashcroft) (arguing that Congress has no constitutional authority to interfere with the President’s decision to detain enemy combatants); see also Reid Skibell, *Separation-of-Powers and the Commander in Chief—Congress’s Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183 (2004) (documenting Bush Administration’s claims with respect to Congress’s lack of power to legislate in matters related to the conduct of the war and arguing that these represent an expansion over prior administrations’ claims). The Obama Administration subsequently announced that, in litigation involving persons captured and detained as part of the conflict with Al Qaeda and Taliban, the legal arguments in support of the detention of an alleged enemy belligerent would be based upon the authority conferred by Congress pursuant to the 2001 Authorization to Use Military Force (P.L. 107-40), and the executive would “not rely on the President’s authority as Commander-in-Chief independent of Congress’s specific authorization.” Press release, Dept. of Justice, *Department of Justice Withdraws “Enemy Combatant” Definition for Guantanamo Detainees* (March 13, 2009), available at <http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html>.

<sup>70</sup> See Dept. of Justice, Office of Legal Counsel, *Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*, 2002 OLC LEXIS 19 (2002), available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>. (opining that “any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”). The Office of Legal Counsel subsequently withdrew this memo. See Dept. of Justice, Office of Legal Counsel, *Legal Standards Applicable under 18 U.S.C. §2340-2340A*, 2004 OLC LEXIS 4, (2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm>. Just before President Obama took office, the Office specifically confirmed that it no longer took the position that Congress lacks the power to regulate the interrogation and treatment of wartime prisoners (the earlier withdrawal memo had stated that the portion of the original memo dealing with congressional authority had been unnecessary and overbroad, but had not directly repudiated the position). See Dept. of Justice, Office of Legal Counsel, Memorandum for the Files from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, at 3-4 (2009)[hereinafter “Bradbury Memo”], available at <http://www.justice.gov/opa/documents/memostatusolcopinions01152009.pdf>. The Bradbury Memo expressly renounced portions of earlier OLC opinions that interpreted Congress’s Art. I power to regulate the Armed Forces as pertaining only to disciplining U.S. troops and not to their treatment of prisoners, and its power to regulate captures as pertaining only to property and not to enemy persons. See *id.* at 5.

<sup>71</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004).

<sup>72</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>73</sup> The Court adopted Chief Justice Chase’s formulation for allocating war powers, see *id.* at 591-592, and Justice Jackson’s framework for determining separation-of-powers disputes between the President and Congress, see *id.* at 593 n.23 (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. The Government does not argue otherwise.”) (citation omitted).



## II. Statutory Limitations on the Continued Use of Military Force

While it is well established that Congress and the President each possess authority on ending a military conflict, issues may arise if the political branches are in disagreement as to whether or how U.S. participation in an armed conflict should cease. Inter-branch disagreement regarding the cessation of hostilities has been a rare occurrence, but it is not unprecedented. While Congress appears to have the constitutional authority to compel the cessation of U.S. participation in hostilities via statutory command, efforts to compel the withdrawal of U.S. forces from an armed conflict over the opposition of the President have generally proven ineffective except when tied to funding restrictions. The following sections discuss Congress's constitutional authority to end a military conflict via statute, the implications that the War Powers Resolution or the repeal of prior military authorization have upon the continued use of military force, and other considerations which may inform congressional decisions to limit the use of military force via statutory command or through funding limitations.

### Historical Practice

Although the U.S. Constitution expressly empowers Congress to declare war, it is notably silent regarding which political body is responsible for returning the United States to a state of peace. Some evidence suggests that this omission was not accidental.<sup>74</sup> During the Constitutional Convention, a motion was made by one of the delegates to modify the draft document by adding the words "and peace" after the words "to declare war."<sup>75</sup> This motion, however, was unanimously rejected. Convention records do not clearly evidence the Framers' intent in rejecting the motion.

Some early constitutional commentators suggested that the motion failed because the Framers believed that the power to make peace more naturally belonged to the treaty-making body, as conflicts between nations were typically resolved through treaties of peace.<sup>76</sup> Although the Framers did not specifically empower Congress to make peace, they also did not expressly locate the power with the treaty-making body, perhaps because of a recognition that peace might sometimes be more easily achieved through means other than treaty.<sup>77</sup>

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<sup>74</sup> Up to that point, the shared American and English tradition suggested that the institution with the power to instigate war was also the body with the power to end it. Blackstone believed that under the English system, "wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 250 (1756). When America declared its independence, it also rejected the monarchical form of government. Nevertheless, the legal document that the Constitution was intended to replace, the Articles of Confederation, expressly accorded the national legislative body with "the sole and exclusive right and power of determining on peace and war." ARTICLES OF CONFEDERATION, art. IX, §1. Under the Articles, there was neither a national executive nor judicial body.

<sup>75</sup> FARRAND, *supra* footnote 14, at 319; *see also* 3 JAMES MADISON, THE PAPERS OF JAMES MADISON 1352 (Henry Gilpin, ed. 1840).

<sup>76</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §1173 (1833); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, 110-111 (2<sup>nd</sup> ed. 1929). It should be noted that at the time the proposal was rejected, the Framers had designated the Senate as the treaty-making body. The President was made part of the treaty-making body several weeks later. FARRAND, *supra* footnote 14, at 538.

<sup>77</sup> As a practical matter, a requirement that peace be achieved through a treaty between the warring parties would, in (continued...)

It has been suggested that the Framers did not allocate an exclusive body with peace-making authority because they believed “it should be more easy to get out of a war than into it.”<sup>78</sup> Given the failure to designate a single political branch responsible for returning the country from a state of war to a state of peace, the power to make peace was likely understood to be a shared power, with each branch having authority to terminate a military conflict.<sup>79</sup> The executive could return the country to a state of peace through a treaty with the warring party, subject to the Senate’s advice and consent. Congress could declare peace or rescind a previous authorization to use military force pursuant to its plenary authority to repeal prior enactments, its power to regulate commerce with foreign nations, or its power to make laws “necessary and proper” to effectuate its constitutional powers.<sup>80</sup>

Regardless of the Framers’ intent, the legislative and executive branches have historically treated peace-making as a shared power. Peace has been declared in one of three ways: (1) via legislation terminating a conflict, (2) pursuant to a treaty negotiated and signed by the executive and ratified following the advice and consent of the Senate, and (3) through a presidential proclamation.<sup>81</sup> All three methods have been recognized as constitutionally legitimate by the Supreme Court,<sup>82</sup> including most clearly in the 1948 case of *Ludecke v. Watkins*, where the Court plainly stated, “The state of war may be terminated by treaty or legislation or Presidential proclamation.”<sup>83</sup> Notably, the Court has recognized that the termination of a military conflict is a “political act,”<sup>84</sup> and it has historically refused to review the political branches’ determinations of when a conflict has officially ended.<sup>85</sup>

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certain circumstances, lead to odd results:

The President, who is the Commander-in-Chief...and a majority of both branches of Congress, which declares war and maintains the forces necessary for its prosecution, might desire peace yet be unable to obtain it because a third of the Senate plus one Senator were contrary minded. Or our erstwhile antagonist might be the contrary minded one. Or the war might have resulted in the extinction of said antagonist. Such, in fact, was the situation at the close of the Civil War, which accordingly could not be brought to an end in the legal sense by a treaty of peace....

Edward S. Corwin, *Power of Congress to Declare Peace*, 18 MICH. L. REV. 669, 672-673 (1920).

<sup>78</sup> *Id.* at 669. See also MADISON, *supra* footnote 75, at 1352 (quoting delegate Oliver Ellsworth in debate to give Congress the power to “make war”).

<sup>79</sup> See Corwin, *supra* footnote 77, at 673.

<sup>80</sup> *Id.* at 674.

<sup>81</sup> A listing of all instances where the Congress has formally declared war or authorized the use of military force, along with the date and means by which peace was declared or military authorization was terminated, can be found in CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, by Jennifer K. Elsea and Matthew C. Weed.

<sup>82</sup> *E.g.*, *Hijo v. United States*, 194 U.S. 315 (1904) (recognizing state of war with Spain as ending with ratification of peace treaty); *The Protector*, 79 U.S. 700 (1871) (relying on presidential proclamations to determine the beginning and ending date of the Civil War); *Commercial Trust v. Miller*, 262 U.S. 51, 57 (1923) (recognizing congressional act as ending war with Germany). It should be noted that the Civil War is the only “war” which was ended by presidential proclamation. It could be argued that the methods by which the political branches may signal the termination of a domestic insurrection are different than those by which they may end a conflict with a foreign nation.

<sup>83</sup> 335 U.S. 160, 168 (1948) (internal quotations omitted). There are potentially other ways in which peace could be made that were not contemplated by the *Ludecke* Court. See CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 79-80 (1970) (suggesting that a war could also be ended by, among other things, an executive agreement with or without specific congressional authorization).

<sup>84</sup> *Ludecke*, 335 U.S. at 168-169.

<sup>85</sup> *Baker v. Carr*, 369 U.S. 186, 213-214 (1962) (describing the Court’s refusal to review the political branches’ (continued...))

While historical practice and Supreme Court jurisprudence provide support for congressional authority to terminate an armed conflict via statutory enactment, it should be noted that in all instances where hostilities have been terminated through legislation, there has either been consensus between the political branches regarding the propriety of such action or acquiescence by one branch to the actions of the other to end hostilities. There is no instance where, for example, the courts have been asked to consider whether Congress may return the country to a state of peace via legislation passed over the objection of the President. However, the Constitution does not distinguish between the force and effect given to legislation signed into law by the President and laws which are enacted via the overriding of a presidential veto.<sup>86</sup> In any event, the executive's authority to continue waging war would be at its "lowest ebb," as he would be acting in contravention of the expressed will of Congress, meaning he could "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>87</sup>

### **Implications of the War Powers Resolution**

Enacted in 1973 over President Nixon's veto, the War Powers Resolution (WPR)<sup>88</sup> was an effort by Congress to reassert its role in matters of war—a role that many Members believed had been allowed to erode during the Korean and Vietnam conflicts. The WPR provides a mechanism by which Congress may ostensibly force the President to withdraw U.S. forces from hostilities which have not been authorized either pursuant to a declaration of war or specific statutory authorization. In the nearly four decades since its enactment, however, the WPR has never been successfully employed by Congress to compel the withdrawal of U.S. forces over the opposition of the President, and most, if not all, presidential administrations have viewed aspects of the WPR as unconstitutionally trenching upon the executive's constitutional authority in matters of war and foreign relations.<sup>89</sup>

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determination of when or whether a war has ended). See generally ROSSITER, *supra* footnote 83, at 83-89 (discussing Supreme Court jurisprudence upholding political branches' determinations as to the official end of a war, including in cases where actual hostilities ceased several years beforehand).

<sup>86</sup> U.S. CONST. art. I §7, cl. 2.

<sup>87</sup> *Youngstown*, 343 U.S. at 637-638 (Jackson, J., concurring) Justice Jackson's concurring opinion in *Youngstown* established a tripartite analytical framework that is often used by reviewing courts to assess the propriety of presidential action:

When the President acts pursuant to an express or implied authorization of Congress, his powers are at their maximum.... Congressional inertia, indifference or quiescence may ... invite, measures of independent Presidential responsibility.... When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

*Id.* at 635-638.

<sup>88</sup> P.L. 93-148 (1973) [hereinafter "War Powers Resolution" or "WPR"]. For further background and explanation of the War Powers Resolution, see CRS Report RL33532, *War Powers Resolution: Presidential Compliance*.

<sup>89</sup> See generally Dept. of Justice, Office of Legal Counsel, *Authority of the President under Domestic and International Law to Use Military Force against Iraq*, 26 Op. O.L.C. 1, 39-45 (2002)[hereinafter "2002 OLC Opinion"] (discussing presidential views and Dept. of Justice opinions concerning the constitutionality of the War Powers Resolution). The Department of Justice's Office of Legal Counsel (OLC) has noted that while it had "has long questioned the constitutionality of the WPR, ...[it had] not done so consistently." *Id.* at 43 n.18. Although OLC opinions are not legally binding, they are generally adhered to within the executive branch unless overruled by the President or the Attorney General.

The WPR requires the President to consult with Congress “in every possible instance” prior to introducing U.S. Armed Forces into hostilities and to report to Congress within 48 hours when, absent a declaration of war, U.S. Armed Forces are introduced into “hostilities or ... situations where imminent involvement in hostilities is clearly indicated by the circumstances.”<sup>90</sup> Section 5(b) of the act provides that after this report is submitted (or after such date that it was required to be submitted), U.S. troops be withdrawn from hostilities at the end of 60 days (90 days in certain circumstances),<sup>91</sup> unless Congress authorizes continued involvement by passing a declaration of war or some other specific authorization for continued U.S. involvement in hostilities.<sup>92</sup> Moreover, Section 5(c) provides a means by which Congress may, at any time, compel the withdrawal of U.S. forces from unauthorized hostilities occurring outside the United States by means of a concurrent resolution.

The constitutionality and efficacy of various aspects of the WPR have been the subject of long-standing debate. There does appear to be a general consensus that the constitutional validity of Section 5(c) is doubtful in the aftermath of the Supreme Court’s ruling in the 1983 case of *INS v. Chadha*.<sup>93</sup> In *Chadha*, the Court held that for a resolution to become a law, it must go through the bicameral and presentment process in its entirety.<sup>94</sup> Accordingly, concurrent or simple resolutions, which are not presented to the President for his signature, could not be used as “legislative vetoes” against executive action. Although the *Chadha* Court did not expressly find WPR Section 5(c) to be unconstitutional, it was listed in Justice White’s dissent as one of nearly 200 legislative vetoes for which the majority had sounded the “death knell,”<sup>95</sup> and most commentators have agreed with this assessment.<sup>96</sup> Thus, it seems highly unlikely that Section 5(c) of the WPR could be effectively used to limit U.S. military operations.

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<sup>90</sup> 50 U.S.C. §1543.

<sup>91</sup> *Id.* at §1544. The sixty-day period may be extended by no more than thirty additional days if the President certifies in writing to Congress that “unavoidable military necessity respecting the safety” of U.S. forces compels the continued use of such forces in the course of bringing about their withdrawal. *Id.*

<sup>92</sup> *Id.* See also 50 U.S.C. §1447(a)(1) (stating that authorization to introduce U.S. forces into hostilities shall not be inferred “unless such provision specifically authorizes the introduction of United States Armed Forces”). Congress has passed several measures authorizing the use of military force which describe themselves as constituting “specific authorization” under the WPR. See e.g., P.L. 107-40 (2001) (the authorization to use force against entities responsible for attacks of September 11, 2001 constituted specific authorization under the WPR); P.L. 107-243 (2002) (authorization to use force against Iraq constituted specific authorization under the WPR); P.L. 102-1 (1991) (authorization for first Persian Gulf conflict). The executive branch, however, has taken the position that the WPR does not bind future Congresses from impliedly authorizing hostilities, and took the position that Congress had authorized continuing hostilities against Yugoslavia via appropriations legislation, despite the fact that this legislation did not describe itself as constituting specific authorization under the WPR. See Dept. of Justice, Office of Legal Counsel, *Authorization for Continuing Hostilities in Kosovo*, 2000 OLC LEXIS 16 (2000), available at <http://www.justice.gov/olc/final.htm>.

<sup>93</sup> 462 U.S. 919 (1983).

<sup>94</sup> *Id.* at 951.

<sup>95</sup> *Id.* at 967, 1003 (White, J., dissenting).

<sup>96</sup> See, e.g., Senate Foreign Relations Comm. Rep., *Persian Gulf and the War Powers Resolution*, S.Rept. No. 106, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 6 (1987) (describing §5(c) as being “effectively nullified” by the *Chadha* decision); HENKIN, *supra* footnote 56, at 126-127 (recognizing invalidation of §5(c) by *Chadha* and describing arguments to the contrary as “plausible but not compelling”); WORMUTH AND FIRMAGE, *supra* footnote 10, at 222 (noting that the reasoning of *Chadha* “apparently invalidates section 5(c) of the War Powers Resolution”); Ronald D. Rotunda, *The War Powers Act in Perspective*, 2 MICH. L. & POL’Y REV. 1, 8 (1997) (claiming that most “scholars have concluded that... [§5(c)] is unconstitutional ever since *INS v. Chadha*). In contrast, some have argued that neither a declaration of war nor a subsequent rescission of authorization to use force constitutes an “ordinary” act of legislation falling under the requirements of the Presentment Clause. See Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 (continued...)

While the provision requiring the withdrawal of troops in Section 5(b) of WPR has also been criticized by some legal observers,<sup>97</sup> there appears to be greater support for the provision's constitutional validity,<sup>98</sup> including within the executive branch.<sup>99</sup> Nonetheless, even assuming that the provision is constitutionally valid, it may not always act as a statutory constraint to military action. As an initial matter, Section 5(b) establishes a requirement for the withdrawal of U.S. troops 60 days after Armed Forces are *introduced* without congressional authorization into a situation where hostilities are imminent, unless Congress enacts legislation providing authority for the use of force or extends the deadline.<sup>100</sup> Accordingly, this provision would not appear to supply a means by which Congress could compel the withdrawal of U.S. forces from military operations when the introduction of these forces had been done pursuant to congressional authorization, as is the case for ongoing U.S. operations in Afghanistan.<sup>101</sup> Indeed, even if Congress were to rescind statutory authorization for these conflicts, the legality of actions that had been taken pursuant to it would not be nullified so as to trigger the statutory deadline for troop withdrawal established under WPR Section 5(b).<sup>102</sup> Arguably, however, a substantial increase in troop levels that takes place subsequent to any repeal of the authorization for military operations in Afghanistan could trigger the requirements of WPR Section 5(b),<sup>103</sup> although it is

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VA. L. REV. 101, 130-132 (1984). The legitimacy of this argument is untested and highly controversial, as Congress has always presented a declaration of war or authorization to use military force to the president. Further, even assuming *arguendo* that a declaration of war does not need to be presented to the President, it is not necessarily clear that legislation ending hostilities would also not require presentment. See HENKIN, *supra* footnote 56, at 127, 379; Carter, *supra*, at 130-132 (describing weaknesses of argument against presentment requirement); see also J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 84-85 (1991) (discussing historical and scholarly view that presentment is necessary).

<sup>97</sup> See, e.g., Larschan, *supra* footnote 31, at 44-45 (1987) (arguing that Section 5(b) of the WPR is effectively "legislative veto" which is constitutionally impermissible post-*Chadha*, because it requires the President to terminate the use of military force in the event that Congress fails to take any legislative action).

<sup>98</sup> See, e.g., Carter, *supra* footnote 96, at 133 (characterizing Section 5(b) as "surely constitutional, even after *Chadha*," and characterizing the provision as a sunset law rather than an unconstitutional legislative veto); HENKIN, *supra* footnote 56, at 107-108 (taking the view that provisions of WPR other than Section 5(c) do not raise facial constitutional objections); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1392 (1988).

<sup>99</sup> In a 1980 opinion, the Department of Justice's Office of Legal Counsel stated its view that "Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by" the WPR. Dept. of Justice, Office of Legal Counsel, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 196 (1980). In an interview describing the Obama Administration's position that the WPR does not prohibit ongoing U.S. operations against Libya, Administration officials acknowledged that the 1980 OLC Opinion remains in effect, and also claimed that the Administration's position that the U.S. military operation was lawful was not premised on the view that the WPR is unconstitutional. Charlie Savage and Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011 (discussing interview with White House counsel Robert Bauer and State Department Legal Adviser Harold Koh). See generally Barron & Lederman, *supra* footnote 9, at 1071 n.529 (discussing views of various presidential administrations regarding the constitutionality of Section 5(b), and characterizing them as generally "complicated and equivocal").

<sup>100</sup> The requirement in Section 5(b) does not apply in cases in which Congress "is physically unable to meet as a result of an armed attack upon the United States." 50 U.S.C. §1554. The 60-day deadline is automatically extended for thirty days "if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

<sup>101</sup> P.L. 107-40, §2(b) (the authorization to use force against entities responsible for attacks of September 11, 2001 constituted specific authorization for purposes of the WPR).

<sup>102</sup> See *DaCosta*, 448 F.2d at 1369 (the repeal of Gulf of Tonkin resolution "did not wipe out its history nor could it have the effect of a *nunc pro tunc* action").

<sup>103</sup> P.L. 93-148, §§4(a), 5(b). The reporting requirement in §4(a), which begins the sixty-day withdrawal deadline, also (continued...)

unclear how large such an increase would need to be before it would be sufficiently “substantial.”<sup>104</sup> Congress has in the past enacted or considered legislation declaring the 60-day limit to have taken effect, although apparently with little practical effect.<sup>105</sup>

Moreover, disagreement may arise between the political branches regarding the scope of military activities covered by Section 5(b). The most prominent recent example of this occurring involves U.S. operations in support of the NATO-led mission against Muammar al Qadhafi’s regime in Libya. When U.S. operations continued beyond the 60-day deadline for unauthorized hostilities established by the WPR, some argued that Section 5(b) required their immediate termination unless authorization was obtained from Congress. The Obama Administration did not challenge the constitutionality of the WPR’s requirement that unauthorized hostilities be terminated within 60 days, but claimed that this requirement did not apply to ongoing U.S. operations. The continued engagement in manned and unmanned aerial attacks upon Libyan targets, in the Administration’s view, was sufficiently limited so as not to constitute “hostilities” under the WPR, because they “do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops.”<sup>106</sup>

While the Obama Administration’s interpretation of the War Powers Resolution’s application of U.S. military activity has been criticized by some observers as overly constrained,<sup>107</sup> it seems unlikely that the dispute will be definitively resolved by the courts. Although there have been several instances where Members of Congress have brought suit against the executive and argued that a particular military action contravenes the WPR or the constitutional allocation of war powers (including a challenge to the Libyan action which was dismissed on standing grounds),<sup>108</sup> in all cases where final rulings have been issued, these challenges have been dismissed without the reviewing court reaching the underlying merits of the litigants’ claims. The courts have variously relied on the political question doctrine, the equitable/remedial discretion doctrine, ripeness, mootness, and congressional standing concerns as grounds for dismissal.<sup>109</sup> The courts

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comes into effect in the event troops are introduced in “numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.” However, it appears that the deadline only applies if the report was made necessary due to circumstances described in §4(a)(1), where troops are initially introduced into hostilities. See MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 103 (1990) (explaining that the omission of a requirement for the President to specify whether a report is submitted pursuant to §4(a)(1) or §4(a)(2) or (3) makes it impossible to know whether the sixty-day time period has been triggered).

<sup>104</sup> In addition, it could be argued that even if Congress repealed the AUMF, the subsequent appropriation of funds in support of military operations would constitute legal authorization for such activity—at least in circumstances where Congress intended appropriations to support further hostilities, rather than simply to protect troops already in the field. See OLC Opinion on Hostilities in Kosovo, *supra* footnote 92, at \* 33-52 (discussing instances in which appropriations suggest a clear intent by Congress to authorize further hostilities, and arguing that the WPR “cannot be read to deny legal effect to...[the] clear intent” of Congress to use appropriations measures to authorize further hostilities).

<sup>105</sup> See GLENNON, *supra* footnote 103, at 104 (noting efforts with respect to Lebanon in 1983, P.L. 98-119, and Grenada, in which case no such final triggering legislation emerged, despite both houses having passed measures to that effect). The necessity for separate legislation to trigger the triggering provision, subject as it is to presidential veto, seems to defeat the purpose for §5(b). See *id.* at 105 (opining that the provision’s “central objective was to create a self-activating mechanism to control abuse of presidential discretion in the event Congress lacked the backbone to do so”).

<sup>106</sup> Presidential Report on Libya, *supra* footnote 68, at 25.

<sup>107</sup> For further discussion of the Obama Administration’s interpretation of the WPR and the criticisms raised against it, see CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, by Michael John Garcia.

<sup>108</sup> *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).

<sup>109</sup> See CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the* (continued...)

have made clear, however, that while formidable, none of the aforementioned procedural barriers constitutes an insurmountable obstacle to resolving the statutory or constitutional issues concerning war powers. All of the opinions to date indicate that the barrier to the exercise of jurisdiction stems from the posture of the cases, not some institutional shortcoming. Absent such an irreconcilable conflict,<sup>110</sup> however, many believe it is unlikely that the courts will venture into this politically and constitutionally charged thicket.

## **Rescinding Military Authorization Versus Cutting Appropriations: Procedural and Other Considerations**

As a procedural matter, it is more difficult for Congress to statutorily require the termination of a military conflict than to limit appropriations necessary for the continuation of hostilities. As in the case of ordinary legislation, congressional declarations of peace and rescissions of military authorization have historically taken the form of a bill or joint resolution passed by both houses and presented to the President for signature.<sup>111</sup> Like other legislation, such measures are subject to presidential veto, which Congress may override only with a two-thirds majority of each house.<sup>112</sup>

In contrast, Congress's ability to deny funds for the continuation of military hostilities is not contingent upon the enactment of a positive law, though such a denial may take the form of a positive enactment.<sup>113</sup> Although the President has the power to veto legislative proposals, he cannot compel Congress to pass legislation, including bills to appropriate funds necessary for the continuation of a military conflict. Thus, while a majority of both houses would be necessary to

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*War Powers Resolution*, by Michael John Garcia (discussing various challenges brought by Members of Congress to executive action which purportedly contravenes the War Powers Resolution). Lawsuits brought by private parties alleging that presidential action has violated the WPR have also proven unsuccessful. *See, e.g.,* Whitney v. Obama, 845 F.Supp.2d 136 (D.D.C. 2012) (rejecting on mootness grounds a challenge by private parties alleging that U.S. operations in Libya violated the WPR).

<sup>110</sup> *See* CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*. *See also* Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982) (dismissing on political question grounds a challenge by several members of Congress which claimed that executive's military assistance to the government of El Salvador violated the WPR and constitutional allocation of war powers, but suggesting that "were Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented"), *aff'd per curiam*, 720 F.2d 1355, 1357 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210-211 (D.C. Cir. 1985) (Ginsburg, Ruth Bader, J., concurring) (agreeing on ripeness grounds with the dismissal of suit filed by several members of Congress which challenged the Reagan Administration's provision of assistance to Nicaraguan Contra rebels, and emphasizing that political branches had not as yet reached "a constitutional impasse" requiring judicial resolution).

<sup>111</sup> *See* CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, by Jennifer K. Elsea and Matthew C. Weed; *see also* Sidak, *supra* footnote 96, at 81-86 (discussing historical operation of bicameralism and presentment in the war-making context, along with scholarly views concerning whether presentment is necessary).

<sup>112</sup> U.S. CONST. art. I §7, cl. (2)-(3).

<sup>113</sup> *See, e.g.,* P.L. 91-652, §7(a) (1971) (prohibiting funds appropriated from being used to introduce U.S. ground troops into Cambodia); P.L. 93-50, §307 (1973) (prohibiting appropriated funds from being used in U.S. combat activities in Indochina after August 15, 1973); P.L. 103-139, §8135 (1993) (barring appropriations from being used for combat forces in Somalia after March 31, 1994). For additional examples, *see* CRS Report RS20775, *Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments*, and CRS Report RL33803, *Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches*, by Amy Belasco et al.

terminate military authorization, and a super-majority of both houses would be required to override a presidential veto, a simple majority of a single house could prevent the appropriation of funds necessary for the continuation of a military conflict.<sup>114</sup> It should be noted, however, that legislation probably would be required to prevent the President from exercising statutory authority to transfer certain funds appropriated to other operations for use in support of the military conflict that Congress was attempting to limit. Like other positive legislation, such a measure would be subject to presidential veto.

While it may be procedurally easier for Congress to refuse appropriations for a military conflict than to rescind military authorization or establish a statutory deadline for the termination of U.S. participation in hostilities, policy considerations may sometimes make the latter option more appealing. For example, some Members of Congress who support the winding down of a military operation might nevertheless be reluctant to reduce the funds for troops on the battlefield. There might also be concerns over potential effects that a denial of appropriations might have on unrelated military operations. Although appropriations legislation can be crafted to effectively terminate hostilities while permitting funding of force protection measures during the orderly redeployment of troops from the battlefield, such legislation, like other positive enactments, would be subject to presidential veto. In 2007, for example, Congress passed a supplemental appropriations bill to fund the war in Iraq that contained conditions for further U.S. troop deployments and a deadline for ending some military operations.<sup>115</sup> The President vetoed the bill, arguing in part that these restrictions were unconstitutional because they “purport[ed] to direct the conduct of operations of war in a way that infringes upon the powers vested in the presidency by the Constitution, including as commander in chief of the Armed Forces.”<sup>116</sup> When an attempt to override the President’s veto failed, Congress passed another supplemental bill that provided no timetable for U.S. troop withdrawal from Iraq, which was signed into law by the President.<sup>117</sup>

In certain circumstances, a President may be more willing to agree to either a statutory limitation on the continuation of an armed conflict, or the rescission of prior statutory authorization for a military operation, than to an appropriations bill that limits the funding of military operations—particularly if these measures do not include a deadline for troop withdrawal. Indeed, during the Vietnam conflict, Congress was able to rescind military authorization at an earlier date than it was able to cut off appropriations. In 1971, Congress passed and President Nixon signed a measure rescinding the 1964 Gulf of Tonkin resolution, which had provided congressional authorization for U.S. military operations against North Vietnam.<sup>118</sup> The Mansfield Amendment, enacted later that year, called for the “prompt and orderly” withdrawal of U.S. troops from Indochina at the “earliest possible date.”<sup>119</sup> However, these measures did not include a deadline for troop withdrawal. Although U.S. troop presence in South Vietnam diminished considerably pursuant to the Nixon Administration’s “Vietnamization” strategy even prior to these enactments, the United

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<sup>114</sup> See Sidak, *supra* footnote 96, at 104-105.

<sup>115</sup> U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, H.R. 1591, 110th Cong. (2007) (as passed by House and Senate).

<sup>116</sup> Pres. George W. Bush, Message to the House of Representatives, 153 CONG. REC. H4315 (daily ed. May 2, 2007), also available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070502-1.html>.

<sup>117</sup> P.L. 110-28 (2007). For further discussion of the differences between the enacted and vetoed legislation, see CRS Report RL33900, *FY2007 Supplemental Appropriations for Defense, Foreign Affairs, and Other Purposes*, coordinated by Stephen Daggett, and CRS Report RL33837, *Congressional Authority to Limit U.S. Military Operations in Iraq*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.

<sup>118</sup> P.L. 91-672, §12 (1971).

<sup>119</sup> P.L. 92-156, §601(a) (1971).



States continued significant air bombing campaigns in the years following the rescission of military authorization. During this same period, President Nixon vetoed or threatened to veto a number of appropriations bills that would have either prohibited funds from being used for certain military operations in Southeast Asia or required a complete withdrawal of U.S. troops from Vietnam. In 1973, two years after rescinding military authorization, Congress was finally able to enact appropriations limitations, signed by the President, that barred combat operations in Indochina.<sup>120</sup> These appropriations measures were approved only after the signing of a cease-fire agreement with North Vietnam and the withdrawal of U.S. troops from South Vietnam, and served primarily to end the aerial bombing campaign in Cambodia and prevent U.S. forces from being reintroduced into hostilities.

In sum, in situations where Congress seeks to prevent the executive's continuation of military combat operations, it may be procedurally easier for Congress to deny appropriations than it would be to statutorily compel a withdrawal from hostilities. However, past experience suggests that, at least in certain circumstances, policy considerations may cause the two branches to view the rescission of military authorization as a more appealing alternative—postponing an inter-branch conflict on appropriations for a later date, enabling Congress to signal its interest in winding down a conflict, and (at least temporarily) preserving the President's discretion as to how the conflict is waged.

## **Legal Consequences of Congressional Rescission of Military Authorization, Absent Additional Congressional Action**

Although Congress has the power to rescind authorization of a military conflict or enact a declaration of peace, the practical effect that such an action might have on the President's ability to continue a military conflict may nevertheless remain difficult to predict. Historically, courts have been unwilling to interpret a congressional rescission of military authorization as barring the executive from continuing to wage a military campaign, *at least so long as Congress continues to appropriate money in support of such operations*. Although the War Powers Resolution, discussed *supra*, establishes procedures by which Congress may direct the withdrawal of U.S. troops from military conflicts that lack statutory authorization, the constitutionality and practical effects of these requirements have been questioned. Finally, even in the absence of express congressional authorization, the President may possess some inherent or implied power as Commander in Chief to continue to engage in certain military operations. The following sections explain these points in greater detail.

### **Judicial Interpretation**

Jurisprudence suggests that courts would not necessarily view a repeal of prior authorization, by itself, as compelling the immediate withdrawal of U.S. forces. As an overarching matter, courts

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<sup>120</sup> *E.g.*, P.L. 93-50, §§304-307 (1973) (preventing funding expenditures from being used “in or over . . . or off the shores of” Cambodia, Laos, North Vietnam and South Vietnam after August 15, 1973). For further background and examples of funding restrictions proposed and enacted, see CRS Report RS20775, *Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments*, by Richard F. Grimmett, Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments, and CRS Report RL33803, *Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches*, by Amy Belasco et al.

have been highly reluctant to act in cases involving national security, especially when they require a pronouncement as to the legality of a military conflict or the strategies used therein.<sup>121</sup> Many such cases have been dismissed without reaching the merits of the arguments at issue, including when they involve a political question that the judiciary considers itself ill-suited to answer.<sup>122</sup> Legal actions brought by Members of Congress challenging the lawfulness of military actions have had no greater success than suits brought by private citizens.<sup>123</sup> While the courts have suggested a willingness to intervene in disputes between the two branches that reach a legal (as opposed to political) impasse, they have yet to find an impasse on matters of war that has required judicial settlement. In other words, as long as Congress retains options for bringing about a military disengagement but has not exercised them, courts are unlikely to get involved.<sup>124</sup>

The Vietnam conflict is the lone instance where Congress repealed military authorization while major combat operations were still ongoing. Although the Nixon Administration significantly decreased the number of U.S. troops present in South Vietnam following the repeal of the Gulf of Tonkin Resolution and enactment of the Mansfield Amendment in 1971,<sup>125</sup> major combat

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<sup>121</sup> This is not to say that every legal challenge to a wartime activity is doomed to failure. In some circumstances, the courts have found unlawful certain military activities involving the seizure of property or the detention of enemy combatants, at least in instances such action was deemed to lack sufficient congressional authorization. *See, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804) (upholding damage award to owners of U.S. merchant ship seized during quasi-war with France, when Congress had not authorized such seizures); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, (1952) (finding unlawful the government seizure of property to settle labor dispute during Korean War); *Rasul v. Bush*, 542 U.S. 466 (2004) (finding that federal habeas statute applied to persons detained in Guantanamo Bay pursuant to the “war on terror”); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (persons deemed “enemy combatants” in the “war on terror” have right to challenge detention before a neutral decision-maker); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (finding that military tribunals convened by presidential order did not comply with the Uniform Code of Military Justice).

<sup>122</sup> In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court described situations where the political question doctrine was implicated:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

<sup>123</sup> For background and examples, see CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, by Michael John Garcia.

<sup>124</sup> *See, e.g.* *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D. D.C. 1999) (dismissing action seeking declaration that the President acted unlawfully in ordering air strikes in Kosovo and Yugoslavia without congressional authorization, because impasse had not been reached, as Congress had not barred introduction of U.S. forces or barred appropriations from being used for such purpose).

<sup>125</sup> In a statement upon signing into law legislation containing the Mansfield Amendment, President Nixon claimed that its instructions were non-binding and pledged to continue his own policies for ending the war. Courts reached different conclusions as to the binding nature of the Mansfield Amendment’s instructions for withdrawal. In 1972, a district court in the Second Circuit concluded, in an opinion affirmed without opinion by the court of appeals, that the Amendment “had binding force and effect on every officer of the Government...[and] illegalized the pursuit of an inconsistent executive or administration policy.” *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D.N.Y., 1972), *aff’d without opinion*, 456 F.2d 1335 (2<sup>nd</sup> Cir. 1972). A year later, however, the Second Circuit Court of Appeals, while not deciding the issue, suggested that the binding nature of the Amendment was unsettled, and noted that “weighty constitutional (continued...)”

operations continued into 1973, when Congress cut off all funding for military operations in Indochina.

During this period, federal courts heard a number of suits challenging the legality of continued hostilities in the absence of congressional authorization. None of these challenges proved successful, in large part because Congress continued to appropriate money for military operations. It is a well-established principle that Congress's appropriation of funds may serve in some circumstances to confer authority for executive action.<sup>126</sup> Reviewing courts have found this principle no less applicable concerning matters of war. The appropriation of billions of dollars in support of U.S. combat operations in Indochina, even after the repeal of the Gulf of Tonkin resolution, was viewed as congressional authorization for continued U.S. participation in hostilities,<sup>127</sup> regardless of whether some Members of Congress had a motivation for approving continued appropriations other than that reflected in the express language of the enacted legislation.<sup>128</sup>

Courts have also declined on political question grounds to examine the motives of Congress in choosing to appropriate funds after rescinding direct authorization for U.S. military activities.<sup>129</sup> In the words of one court, any attempt to assess Congress's intentions in appropriating funds, and determining whether such appropriations were truly meant to further continuing hostilities, would necessarily "require the interrogation of members of Congress regarding what they intended by their votes, and then synthesization of the various answers. To do otherwise would call for gross

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(...continued)

considerations which support the President in his duties as Commander-in-Chief preclude too hasty an adoption of the view" that the Amendment was binding. *DaCosta v. Laird*, 471 F.2d 1146, 1156-1157 (2<sup>nd</sup> Cir. 1973).

<sup>126</sup> *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947). *See also* *Berk v. Laird* 317 F. Supp. 715, 727-728 (D.C.N.Y. 1970) (discussing Supreme Court jurisprudence recognizing congressional appropriations as authorizing executive activity, and concluding that Congress's appropriations for ongoing military operations in Indochina constituted authorization of those activities). OLC Opinion on Hostilities in Kosovo, *supra* footnote 92, at \*14-33 (discussing judicial and scholarly recognition of appropriations statutes serving to authorize combat operations)

<sup>127</sup> *See* *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2<sup>nd</sup> Cir. 1971), *cert. denied*, 405 U.S. 979 ("In other words, there was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution."); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2<sup>nd</sup> Cir. 1971), *cert. denied*, 404 U.S. 869 ("The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia."); *Massachusetts v. Laird*, 451 F.2d 26, 34 (1<sup>st</sup> Cir. 1971) (finding that Constitution had not been breached when President acted with support of Congress, including through the appropriation of billions of dollars to support ongoing combat operations); *see also* *Berk v. Laird*, 317 F. Supp. 715 (E.D.N.Y.1970) (decided prior to repeal of Gulf of Tonkin resolution, but recognizing that continued appropriation of funds as authorization of conflict's continuation).

<sup>128</sup> *See* *Holtzman v. Schlesinger*, 484 F.2d 1307, 1313-1314 (2<sup>nd</sup> Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (finding appropriations legislation gave President sufficient authority to order the bombing of Cambodia, despite claim by some Members of Congress that legislation was "coerced" by presidential veto of appropriations bills that would have immediately cut off funding of such acts); *Drinan v. Nixon*, 364 F. Supp. 854 (D.C. Mass. 1973) (same).

<sup>129</sup> *Orlando*, 443 F.2d at 1043 (the decision to endorse military action through appropriations rather than direct authorization was "committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions"); *Sarnoff v. Connally*, 457 F.2d 809, 810 (9<sup>th</sup> Cir. 1972), *cert. denied*, 409 U.S. 929 ("Whether a plaintiff challenges the selective service system or the foreign aid and appropriations aspects of congressional cooperation in the present conflict, he presents a political question which we decline to adjudicate."); *Berk*, 317 F. Supp. at 728-729 (recognizing that method that Congress chooses to endorse or authorize action is a political question).

speculation in a delicate matter pertaining to foreign relations.”<sup>130</sup> Such an examination of Congress’s motivations was deemed beyond the scope of appropriate judicial scrutiny.<sup>131</sup>

Some argued that Congress’s termination of statutory authorization for ongoing hostilities and instruction that the conflict end at the soonest practical date barred the President, at the very least, from “escalating” hostilities. Though the Court of Appeals for the Second Circuit suggested in a 1971 case that this argument might be valid,<sup>132</sup> subsequent rulings indicated that the court would only be willing to consider this argument in very limited circumstances. Notably, in the 1973 case of *DaCosta v. Laird*,<sup>133</sup> the Second Circuit Court of Appeals dismissed a challenge to the President’s order to mine the harbors of North Vietnam, where it was argued that this order represented an unlawful escalation of hostilities in light of congressional enactments ordering the withdrawal of U.S. troops at the earliest practicable date. The circuit court dismissed this challenge because it raised a nonjusticiable political question. Deciding such a case would require the court to assess the strategy and tactics used by the executive to wind down a conflict, an assessment it was ill-equipped to make:

Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably determine whether a specific military operation constitutes an “escalation” of the war or is merely a new tactical approach within a continuing strategic plan. What if, for example, the war “de-escalates” so that it is waged as it was prior to the mining of North Vietnam’s harbors, and then “escalates” again? Are the courts required to oversee the conduct of the war on a daily basis, away from the scene of action? In this instance, it was the President’s view that the mining of North Vietnam’s harbor was necessary to preserve the lives of American soldiers in South Vietnam and to bring the war to a close. History will tell whether or not that assessment was correct, but without the benefit of such extended hindsight we are powerless to know.<sup>134</sup>

Though the circuit court did not completely rule out the possibility that a further escalation of hostilities could be deemed unlawful, the court suggested it would be willing to consider such arguments only in the most limited of circumstances. For example, the court suggested that a “radical change in the character of war operations—as by an intentional policy of indiscriminate bombing of civilians without any military objective—*might* be sufficiently measurable judicially to warrant a court’s consideration.”<sup>135</sup>

In *Holtzman v. Schlesinger*, decided later that year, the Second Circuit Court of Appeals reversed a lower court decision that had declared unlawful the continued bombing of Cambodia following the removal of U.S. troops and prisoners of war from Vietnam. The circuit court held that it was a nonjusticiable political question as to whether the bombing violated the Mansfield Amendment’s instruction that hostilities be terminated at the “earliest practicable date.” Comparing the situation with that at issue in *DaCosta*, the court found that the challenge raised “precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary.”<sup>136</sup> Further, even

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<sup>130</sup> *Atlee v. Laird*, 347 F. Supp. 689, 706 (D.C. Pa. 1972), *aff’d without opinion*, 411 U.S. 911 (1973).

<sup>131</sup> *Id.*; *Holtzman*, 484 F.2d at 1314 &n.4.

<sup>132</sup> *DaCosta*, 448 F.2d at 1370.

<sup>133</sup> *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973).

<sup>134</sup> *Id.* at 1155.

<sup>135</sup> *Id.* at 1156 (italics added).

<sup>136</sup> *Holtzman*, 484 F.2d at 1309-1310 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

assuming *arguendo* that the military and diplomatic issues raised by the bombing were judicially manageable, the circuit court found that Congress had authorized the bombing through continued appropriations.<sup>137</sup>

Taken together, these cases suggest that a reviewing court would probably not interpret a repeal of prior military authorization, or even a requirement that the executive terminate hostilities as soon as practicable, as necessarily requiring the immediate withdrawal of U.S. forces from ongoing hostilities. Further, courts may be reluctant to assess whether specific military tactics or strategies pursued by the executive contradict these statutory requirements and constitute an impermissible “escalation” of a conflict.<sup>138</sup> Accordingly, it does not appear that the termination of direct authorization to use force, or perhaps even a statutory requirement that the President take action to wrap up hostilities, would be interpreted by a reviewing court as constraining the executive’s ability to continue U.S. combat operations, absent additional action such as the denial of appropriations or possibly the inclusion of an unambiguous deadline for troop withdrawal.

### **Inherent Presidential Authority to Use Military Force Absent Congressional Authorization**

Even in the absence of express congressional authorization, it is recognized that the President may still employ military force in *some* circumstances pursuant to his powers as Commander in Chief and his inherent authority in the area of foreign affairs,<sup>139</sup> at least so long as no statute stands in his way. In the case of an armed conflict that had been initiated with congressional authorization, a President would likely argue that this inherent authority would permit him to instruct U.S. forces to engage in certain military operations, even if statutory authorization for U.S. participation in that conflict had been rescinded. Further, even if Congress were to enact legislation requiring the cessation of military operations after a specified date, it is highly unlikely that this measure would be interpreted to prohibit any and all military operations, specifically as they relate to rescue and evacuation missions. It appears understood, at least as a matter of historical practice, that such missions are not intended to be covered under legislation otherwise barring future participation in hostilities,<sup>140</sup> at least in the absence of clear statutory language to that effect.

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<sup>137</sup> *Id.* at 1313. Specifically, the court noted the language of §108 of the Joint Resolution Continuing Appropriations for Fiscal 1974, P.L. 93-52, which barred funding for military operations in and around Indochina after August 15, 1973. The Court inferred from this language that military activities at issue in the case before it, occurring before this deadline, were authorized.

<sup>138</sup> *See, e.g.,* Mottola v. Nixon, 318 F. Supp. 538, 540 (1970) (characterizing the extension of the conflict in Vietnam into Cambodia as a “necessary incidental, tactical incursion ordered by the Commander in Chief” that would be authorized so long as the military operations in Vietnam were found to be authorized), *rev’d on other grounds*, 464 F.2d 178 (9<sup>th</sup> Cir. 1972) (ordering district court to dismiss for lack of standing).

<sup>139</sup> *See supra* at “The Commander-in-Chief Clause.”

<sup>140</sup> For example, even after Congress enacted legislation cutting off funding for all combat operations in Indochina, President Ford’s subsequent use of military forces to evacuate U.S. citizens and third country nationals was not seriously questioned, nor was a subsequent authorization of an operation to rescue the crew of the *Mayaguez* from Cambodian territory (a mission which was reported to Congress following the procedures of the War Powers Resolution, but only after the operation was completed). For background on congressional attitudes towards these rescue missions, see FISHER, *supra* footnote 7, at 157-158. *See also* Rappenecker v. United States, 509 F. Supp. 1024, 1030 (D.C. Cal. 1980). The *Rappenecker* case involved a civil suit by former crewmen of the *Mayaguez* for injuries they received during their rescue. Although the President ordered their rescue in the absence of prior congressional authorization, the Court assumed that the order was constitutionally valid. *Id.*

### III. Use of the Power of the Purse to Restrict Military Operations

Congress has used its spending power to restrict the deployment and use of the Armed Forces in the past.<sup>141</sup> In 1973, for instance, after other legislative efforts failed to draw down U.S. participation in combat operations in Indochina,<sup>142</sup> Congress effectively ended it by means of appropriations riders prohibiting use of funds. Section 307 of the Second Supplemental Appropriations Act for Fiscal Year 1973, P.L. 93-50 (1973), stated that, “None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose.” Section 108 of the Continuing Appropriations Resolution for Fiscal Year 1974, P.L. 93-52 (1973), provided that, “Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.” A year later, Congress passed an authorizing statute, Section 38(f)(1) of the Foreign Assistance Act of 1974, P.L. 93-559 (1974), which set a total ceiling of U.S. civilian and military personnel in Vietnam of 4,000 six months after enactment and a total ceiling of 3,000 within one year of enactment.

A provision of an authorization act, Section 404 of the International Security Assistance and Arms Export Control Act of 1976, P.L. 94-329 (1976), comprehensively prohibited using funds for military and paramilitary operations in Angola. It stated that:

Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting, augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola, unless and until Congress expressly authorizes such assistance by law enacted after the date of enactment of this section.

This section added that if the President determined that the prohibited assistance to Angola should be furnished, he should submit to the Speaker of the House and the Senate Committee on Foreign Relations a report describing recommended amounts and categories of assistance to be provided and identities of proposed aid recipients. This report also was to include a certification of his determination that furnishing such assistance was important to U.S. national security interests and an unclassified detailed statement of reasons supporting it.

Section 109 of the Foreign Assistance and Related Programs Appropriations Act for Fiscal Year 1976, P.L. 94-330 (1976), signed the same day as P.L. 94-329, provided that, “None of the funds

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<sup>141</sup> For examples of such measures and a discussion of the context in which they were enacted, see CRS Report RS20775, *Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments*, by Richard F. Grimmett, and CRS Report RL33803, *Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches*, by Amy Belasco et al. See also, e.g., Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L. L. 758 (1989), and Tiefer, *supra* footnote 3.

<sup>142</sup> See P.L. 91-672, §12, 84 Stat. 2053 (repealing Gulf of Tonkin Resolution); P.L. 92-156, §601(a), 85 Stat. 423, 430 (Mansfield Amendment); see also P.L. 92-156, §501(a), 85 Stat. 423, 427 (1971) (Fullbright proviso).

appropriated or made available pursuant to this act shall be obligated to finance directly or indirectly any type of military assistance to Angola.”

In the 1980s, various versions of the Boland Amendment were enacted to prohibit using funds for various military activities in or around Nicaragua.<sup>143</sup> For example, Section 8066 of the Department of Defense Appropriations Act included in the Continuing Appropriations Resolution for Fiscal Year, 1985, P.L. 98-473, 98 Stat. 1935 (1984), stated that

During Fiscal Year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose, or which would have the effect of supporting, indirectly or indirectly, military or paramilitary operation in Nicaragua by any nation, group, organization, movement or individual.

This provision stated that after February 28, 1985, the President could expend \$14 million in funds if the President made a report to Congress which specified certain criteria, including the need to provide further assistance for military or paramilitary operations prohibited by the Boland Amendment, and if Congress passed a joint resolution approving such action.

In the 1990s, Congress enacted Section 8151 of the DOD Appropriations Act for Fiscal Year 1994, P.L. 103-139 (1993), which approved using Armed Forces for certain purposes including combat in a security role to protect United Nations units in Somalia, but cut off funding after March 31, 1994, except for a limited number of military troops to protect American diplomatic personnel and American citizens unless further authorized by Congress. Section 8135 of the DOD Appropriations Act for Fiscal Year 1995, P.L. 103-335 (1994), provided that, “None of the funds appropriated in this act may be used for the continuous presence in Somalia of United States military personnel, except for the protection of United States personnel, after September 30, 1994.” In title IX of the DOD Appropriations Act for Fiscal Year 1995, P.L. 103-335 (1994), Congress provided that, “No funds provided in this act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.”

These examples reveal the approaches that Congress has employed to prohibit or restrict using military force. They have ranged from the least comprehensive “none of the funds appropriated in this act may be used” to the most comprehensive “notwithstanding any other provision of law, no funds may be used.” The phrase “none of the funds appropriated in this act” limits only funds appropriated and made available in the act that carries the restriction, but not funds, if any, that may be available pursuant to other appropriations acts or authorizing statutes. To restrict funds appropriated and made available not only in the act that carries the restriction, but also pursuant to other appropriations acts, Congress has used the phrase “none of the funds appropriated in this act or any other act may be used.” The most comprehensive restriction is “notwithstanding any other provision of law, no funds may be used.” This language precludes using funds that have been appropriated in any appropriations acts as well as any funds that may be made available pursuant to any authorizing statutes including laws that authorize transfers of appropriated or nonappropriated funds.<sup>144</sup>

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<sup>143</sup> *E.g.*, P.L. 98-473, §8066, 98 Stat. 1904, 1935 (1984); *see* 133 Cong Rec. 15664-15701 (June 15, 1987) (detailing various forms of the Boland Amendment that were enacted).

<sup>144</sup> *See, e.g.*, 31 U.S.C. chap. 15, subchap. III “Transfers and Reimbursements” for provisions that authorize transfers of funds, including the Economy Act, 31 U.S.C. §§1535 and 1536, which allows an agency to transfer funds to another (continued...)

## Procedural Considerations

There is a parliamentary impediment to including the phrases “none of the funds appropriated in this act or any other act may be used” or “notwithstanding any other provision of law, no funds may be used” in a general appropriations bill.<sup>145</sup> House Rule XXI, clause 2, makes subject to a point of order language that changes existing law (i.e., legislation) in a general appropriations bill (i.e., a regular or supplemental appropriations bill providing appropriations for several agencies, but not a continuing resolution).<sup>146</sup> A bill that appropriates funds for a single purpose or a single agency is not a general appropriations bill to which this restriction applies. The intent of Rule XXI, clause 2 is to separate the legislative vehicles for authorizations and appropriations.

Nevertheless, a practice has developed that just as the House may decline to appropriate funds for a purpose that has been authorized by law, it may by limitation prohibit the use of appropriated funds in a general appropriations bill for part of a purpose while appropriating funds for the remainder of it. Such a limitation “... may apply solely to the money of the appropriation under consideration” and “... may not apply to money appropriated in other acts.”<sup>147</sup> Thus, the phrase “none of the funds appropriated *in this act* may be used” would not be subject to a point of order, but the phrase “none of the funds *in this or any other act* may be used” generally would be subject to a point of order under Rule XXI, clause 2 because it would extend the effect of the limitation to money appropriated in other acts and would be considered legislation. To avoid a point of order, a limitation in a general appropriations bill may not impose new or additional duties on an executive official and may not make an appropriation contingent upon (i.e., “unless” or “until”) the occurrence of an event not required by law.<sup>148</sup> If a Member raises a point of order that language in a general appropriations bill violates Rule XXI, clause 2, and the point of order is sustained by the chair, the legislative language is stricken.

Although legislation in a general appropriations bill is subject to a point of order under Rule XXI, clause 2, House rules are not self-enforcing. Consequently, legislation may be included in a general appropriations bill and become law if no point of order is raised, if a point of order is overruled, or if the House either suspends the rules or agrees to a special order rule reported from the Committee on Rules that waives the point of order against including such legislation.<sup>149</sup>

Similarly, Senate Standing Rule XVI prohibits amendments in a general appropriations bill,<sup>150</sup> if offered by either the Committee on Appropriations or an individual Senator, that would propose

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(...continued)

agency if the receiving agency can provide or get by contract goods or services less expensively or more conveniently than the ordering agency can get goods or services by a contract with a commercial enterprise. Transfer authority also is included in some other provisions of the United States Code that apply to individual departments and agencies and sometimes in appropriations acts.

<sup>145</sup> See CRS Report R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues*, by Jessica Tollestrup for a more detailed discussion.

<sup>146</sup> Wm. Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, chap. 4, Section 6, at 79 (2003).

<sup>147</sup> See John V. Sullivan, Parliamentarian, *Constitution, House Rules and Manual: One Hundred Twelfth Congress*, H.R. DOC. NO. 111-157 §1053 (2011).

<sup>148</sup> See *id.* §§1053-57 for an explanation of limitations.

<sup>149</sup> *Id.* at §1058.

<sup>150</sup> Floyd M. Riddick, Senate Parliamentarian Emeritus, and Alan S. Frumin, Senate Parliamentarian, *Riddick's Senate Procedure: Precedents and Practices*, S. DOC. NO. 101-28 at 159 (1992) (hereinafter Riddick).



legislation.<sup>151</sup> The Senate rule, however, does permit legislation to be included if it is germane to the subject matter of the bill under consideration. If a point of order that an amendment constitutes legislation on an appropriations bill is raised, the proponent of the language may defend it by asserting that it is germane. The presiding officer makes an initial determination as to whether there is any House language to which the amendment conceivably could be germane. If such language is found, the question of germaneness is submitted to the Senate. If a majority of Senators vote that the amendment in question is germane, the point of order falls and the amendment remains under consideration. If the Senate does not vote that the amendment is germane, the presiding officer sustains the point of order and the amendment falls.<sup>152</sup>

As mentioned earlier, the intent of these House and Senate rules is to separate authorizing and appropriating functions. Prohibiting use of funds for a purpose or purposes does not contravene the House or Senate rule provided that the prohibition applies only to funds appropriated in the bill being considered.

Because an appropriations act generally funds programs for a fiscal year, each provision contained in the act is presumed to be in effect only until the end of the fiscal year. “A provision contained in an annual appropriation act is not to be construed as permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses language indicating futurity or if the provision is of a general character bearing no relation to the object of the appropriation. . . . The most common word of futurity is ‘hereafter’ and provisions using this term have often been construed to be permanent.”<sup>153</sup> Other words of futurity include “after the date of approval of this act,” “henceforth,” and specific references to future fiscal years.<sup>154</sup>

While including a word or words of futurity has the effect of making a provision extend beyond the fiscal year covered by an appropriations act, such a provision would constitute legislation that would appear to be subject to a point of order under House Rule XXI, clause 2 and Senate Standing Rule XVI during congressional consideration. If the parliamentary impediments can be overcome, however, such legislation may be enacted and become valid law.

## **Availability of Alternative Funds**

A fundamental principle in appropriations law is that appropriations may not be augmented with funds from outside sources without statutory authority:

As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. When Congress makes an appropriation, it also is establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to

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<sup>151</sup> Senate Standing Rule XVI, paragraphs 2 and 4.

<sup>152</sup> Riddick at 161 *et seq.*

<sup>153</sup> GOVERNMENT ACCOUNTABILITY OFFICE, OFFICE OF GENERAL COUNSEL, I PRINCIPLES OF APPROPRIATIONS LAW 2-34 (3d ed. 2006) (footnotes omitted).

<sup>154</sup> *Id.* at 2-36.

prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.<sup>155</sup>

While no statute in precise terms expressly prohibits augmenting appropriations, the concept is based on some appropriations laws. The Miscellaneous Receipts Statute, 31 U.S.C. Section 3302(b), requires that a government official who receives money for the government from any source must deposit it in the U.S. Treasury as soon as practicable without deduction for any charge or claim. Under the Purpose Statute, 31 U.S.C. Section 1301, appropriated funds may be used only for the purposes for which they are appropriated. A criminal provision, 18 U.S.C. Section 209, prohibits supplementing the salary of an officer or employee of the government from any source other than the United States government.<sup>156</sup>

An example of a statute permitting gift funds from other countries to finance a war is Section 202 of the Continuing Resolution for Fiscal Year 1991, P.L. 101-403 (1990), passed before the first Gulf war. Section 202 added a new Section 2608 to title 10 of the United States Code to authorize any person, foreign government, or international organization to contribute money or real or personal property for use by the Department of Defense. However, before the Department of Defense could spend the funds, they had to be first appropriated by Congress.

The Purpose Statute states that funds may be used only for purposes for which they have been appropriated; by implication it precludes using funds for purposes that Congress has prohibited. When Congress states that no funds may be used for a purpose, an agency would violate the Purpose Statute if it should use funds for that purpose; it also in some circumstances could contravene a provision of the Antideficiency Act, 31 U.S.C. Section 1341. Section 1341 prohibits entering into obligations or expending funds in advance of or in excess of an amount appropriated unless authorized by law. If Congress has barred using funds for a purpose, entering into an obligation or expending any amount for it would violate the act by exceeding the amount—zero—that Congress has appropriated for the prohibited purpose.<sup>157</sup>

To determine whether an agency has violated the Antideficiency Act, it would be necessary to review the language in an appropriations act or authorizing statute that includes a prohibition on using funds for a specific purpose. If an appropriations act prohibits using funds “in this act” for a purpose, for example, expending any amount from that act for the prohibited purpose would appear to contravene the Antideficiency Act because Congress has appropriated zero funds for it. Entering into obligations or expending funds, if any, that may be available from a different appropriations act or other fund for that purpose, however, would not appear to be prohibited by the Antideficiency Act; an agency would be able to use funds from sources other than the appropriations act that contains the prohibition or limitation.

Violating the Antideficiency Act would be significant because it has notification and penalty provisions not found in the Purpose Statute. The Purpose Statute does not expressly provide for penalties; it generally is enforced by imposing administrative sanctions on the officer or employee who violates the statute.<sup>158</sup> The Antideficiency Act, by contrast, not only contains a

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<sup>155</sup> GOVERNMENT ACCOUNTABILITY OFFICE, OFFICE OF GENERAL COUNSEL, II PRINCIPLES OF APPROPRIATIONS LAW, 6-162 (3d ed. 2006).

<sup>156</sup> *Id.* at 6-163.

<sup>157</sup> *Id.* at 6-62.

<sup>158</sup> *Id.* at 6-78.

provision that provides for administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office, 31 U.S.C. Section 1349, but also one that requires an immediate report of a violation to the President and Congress, 31 U.S.C. Section 1351. Moreover, the Antideficiency Act has a criminal penalty provision: Section 1350 of title 31 provides that an officer or employee who “knowingly and willfully” violates the act “shall be fined not more than \$5,000, imprisoned for not more than two years, or both.” Although the act has a criminal provision, no one appears to have been prosecuted or convicted for violating it.<sup>159</sup> Another criminal provision, 18 U.S.C. Section 435, not part of the Antideficiency Act, makes punishable by a fine of \$1,000, imprisonment of not more than one year, or both, knowingly contracting to erect, repair, or furnish any public building or for any public improvement for an amount more than the amount appropriated for that purpose.

The Antideficiency Act prohibits entering into obligations or expending funds in advance of or in excess of an amount appropriated *unless authorized by law*. One law that authorizes entering into obligations in advance of appropriations is the Feed and Forage Act. Also referred to as Revised Statute 3732, the Feed and Forage Act is part of and an express exception to the Adequacy of Appropriations Act, 41 U.S.C. Section 6301. Section 6301 generally states that no government contract or purchase may be made unless it is authorized by law or is under an appropriation adequate to its fulfillment. The Feed and Forage Act exception authorizes the Department of Defense and the Department of Homeland Security with respect to the Coast Guard when it is not operating as service in the Navy to make contracts in advance of appropriations for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies. Obligations entered into pursuant to Feed and Forage Act authority must not exceed the necessities of the current year. The Secretary of Defense and the Secretary of Homeland Security immediately must advise Congress of the exercise of this authority and report quarterly on the estimated obligations incurred pursuant to it.<sup>160</sup> Although the Feed and Forage Act authorizes *entering into obligations* such as contracts, *actual expenditures* are not permitted pursuant to this authority until Congress appropriates the necessary funds.<sup>161</sup>

## IV. Limiting Deployment of Military Personnel

The Constitution accords Congress with ample authority to regulate the use of military personnel. Among other things, Congress is designated with the power “To raise and support Armies;” “To provide and maintain a Navy;” “To make Rules for the Government and Regulation of the land and naval Forces;” and “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”<sup>162</sup> Some have argued that congressional action limiting the use of particular troops during wartime would, at least in certain circumstances, infringe upon the President’s authority as Commander in Chief to conduct a military campaign in a manner that he deems appropriate.<sup>163</sup>

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<sup>159</sup> *Id.* at 6-141.

<sup>160</sup> 41 U.S.C. §6301(d). See LOUIS FISHER, PRESIDENTIAL SPENDING POWER 238-247 (1975) for an explanation of the Feed and Forage Act.

<sup>161</sup> See U.S. Department of Defense, Office of the Under Secretary of Defense (Comptroller)/ CFO, Budget Execution: Processes and Flexibility 17 (March 2009), available at [http://comptroller.defense.gov/execution/Budget\\_Execution\\_Tutorial.pdf](http://comptroller.defense.gov/execution/Budget_Execution_Tutorial.pdf) under Feed and Forage Act.

<sup>162</sup> U.S. CONST. art. I, §8.

<sup>163</sup> See Rivkin and Casey, *supra* footnote 3 (“Congress cannot, in other words, act as the president’s puppet master, and (continued...)”).

As a matter of historical practice, Congress has occasionally imposed limitations and other requirements on the deployment of U.S. troops, including during wartime. These limitations have been effectuated either through a statutory prohibition on the use of military personnel for a particular purpose, or via the denial of appropriations in support of a particular operation. The following are examples in which Congress has limited the President's ability to use particular military personnel for certain purposes:

- **1915**—The Army appropriations act restricted Army tours of duty in the Philippines to two years and tours in the Canal Zone to three years, unless a servicemember requested otherwise or in cases of insurrection or actual or threatened hostilities.<sup>164</sup> The restriction was amended in 1934 to provide for two-year tours in both areas as well as at certain other foreign duty stations.<sup>165</sup> The restriction was repealed in 1945,<sup>166</sup> and replaced with a requirement for the Secretary of Defense to report twice annually to the Armed Services committees regarding regulations governing the lengths of tours of duty for the Army and Air Force outside the continental United States.
- **1933**—The Treasury and Post Office Appropriation Act for FY1934,<sup>167</sup> provided that “Assignments of officers of the Army, Navy, or Marine Corps to permanent duty in the Philippines, on the Asiatic Station, or in China, Hawaii, Puerto Rico, or the Panama Canal Zone shall be for not less than three years. No such officer shall be transferred to duty in the continental United States before the expiration of such period unless the health of such officer or the public interest requires such transfer, and the reason for the transfer shall be stated in the order directing such transfer.”
- **1940**—The Selective Training and Service Act of 1940 provided that “Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands.”<sup>168</sup>
- **1945**—In an act extending the Selective Training and Service Act until the end of World War II, as determined by the earlier of dates proclaimed by the President or by concurrent resolution by both houses of Congress, provided that no inductee under the age of 19 “shall be ordered into actual combat service until after he has been given at least six months of [appropriate] military training....”<sup>169</sup>
- **1948**—The Selective Service Act of 1948 provided that 18- and 19-year old enlistees for one-year tours could not be assigned to land bases outside the continental United States.<sup>170</sup>

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so long as currently authorized and appropriated funding lasts, the president can dispatch additional troops to Iraq with or without Congress's blessing.”)

<sup>164</sup> 38 Stat. 1078.

<sup>165</sup> P.L. 73-266, 48 Stat. 815, 816.

<sup>166</sup> P.L. 80-436, 62 Stat. 70-71.

<sup>167</sup> 47 Stat. 1516, §12.

<sup>168</sup> P.L. 76-783, §3(e), 54 Stat. 885, 886.

<sup>169</sup> P.L. 79-54, §2, 59 Stat. 166-67.

<sup>170</sup> P.L. 80-759, §4(h), 62 Stat. 604, 608.

- **1951**—The Universal Military Training and Service Act of 1951 required inductees, enlistees, and other persons called to active duty to receive at least four months’ “full and adequate” training prior to deployment overseas, and prohibited the expenditure of funds to transport or maintain a servicemember overseas in violation of the provision.<sup>171</sup>
- **1956**—10 U.S.C. Section 6015 prohibited assignment of female servicemembers to duty on combat aircraft and all vessels of the Navy.<sup>172</sup> 10 U.S.C. Section 6018 prohibited the assignment of Navy officers to shore duty not explicitly authorized by law.<sup>173</sup>
- **1985**—The National Defense Authorization Act, 1985 prohibited the expenditure of funds to support an end strength of U.S. Armed Forces personnel stationed in NATO countries above a level of 326,414.<sup>174</sup> The measure was later modified to reduce the level further but to provide waiver authority to the President to increase the force level to up to 311,855, upon notification to Congress, if he determined the national security interests required exceeding the ceiling.<sup>175</sup>
- **1992**—The National Defense Authorization Act for FY1992 prohibited the use of appropriated funds to support an end strength level of members of the Armed Forces of the United States assigned to permanent duty ashore in nations outside the United States at any level in excess of 60 percent of the end strength level of such members on September 30, 1992, with exceptions in the event of declarations of war or emergency.<sup>176</sup>

The precise scope of Congress’s ability to limit the deployment of U.S. military forces has not been ruled upon by the courts, and it is therefore unclear whether legislative measures limiting the use of particular military personnel during wartime would ever be deemed an unconstitutional infringement upon the President’s authority as Commander in Chief.<sup>177</sup> Nonetheless, historical practice suggests that, at least in some circumstances, Congress may oblige the President to comply with certain requirements on the deployment of particular military personnel, including during periods of armed conflict.

## V. Analysis and Conclusion

Much of the historical debate over war powers has taken place in the context where a President has initiated the use of military force with ambiguous or no congressional authorization.<sup>178</sup> There

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<sup>171</sup> P.L. 82-51, §1(d), 65 Stat. 75, 78.

<sup>172</sup> 70A Stat. 375-76.

<sup>173</sup> 70A Stat. 376.

<sup>174</sup> 98 P.L. 525, §1002(c)(1), 98 Stat. 2575.

<sup>175</sup> P.L. 101-510, 104 Stat. 1546 (1990).

<sup>176</sup> P.L. 102-484, §1302, 106 Stat. 2545.

<sup>177</sup> For example, some have suggested that Congress could not bar the President from using military force to respond to a foreign invasion. *See Sidak, supra* footnote 96, at 51-55.

<sup>178</sup> The focus on the respective powers of the President and Congress to control the initiation of war has in recent years given way to a much broader analysis of the branches’ respective powers to control the conduct of war. *See, e.g.,* Barron & Lederman, *supra* footnote 9; Barron & Lederman, *Constitutional History, supra* footnote 34; Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. (continued...)

is no obvious reason, however, to suppose that Congress's constitutional power to limit hostilities depends on whether the hostilities were initiated with Congress's express approval at the outset.<sup>179</sup> Likewise, it does not seem consistent to suggest that Congress's authority to limit the scope of hostilities may be exercised validly only at the initiation of hostilities, without opportunity for changing course once troops are engaged.

In modern times, federal courts have been reticent to decide cases involving war powers on the merits,<sup>180</sup> including those involving appropriations measures.<sup>181</sup> However, in discussing whether a particular challenge raises non-justiciable political questions involving matters textually committed to the political branches by the Constitution,<sup>182</sup> courts have generally reiterated the understanding of a shared allocation of war powers.<sup>183</sup> That is, it is generally agreed that Congress cannot "direct campaigns," but that Congress can regulate the conduct of hostilities, at least to some degree, and that Congress can limit military operations without the risk of a presidential veto by refusing to appropriate funds.

In 1970, in response to a challenge related to the Vietnam conflict, a federal district court expounded on the theme of congressional authority, with particular reference to Congress's appropriations power:

The power to commit American military forces under various sets of circumstances is shared by Congress and the Executive.... The Constitutional expression of this arrangement was not agreed upon by the Framers without considerable debate and compromise. A desire to facilitate the independent functioning of the Executive in foreign affairs and as commander-in-chief was tempered by a widely shared sentiment opposing the concentration of unchecked military power in the hands of the president. Thus, while the president was designated commander-in-chief of the armed forces, Congress was given the power to declare war. However, it would be shortsighted to view Art. I, §8, cl. 11 as the only limitation upon the Executive's military powers.... [I]t is evident that the Founding Fathers

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L.J. 391 (2008); David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477 (2008); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008).

<sup>179</sup> See Tiefer, *supra* footnote 3, at 310-12 (outlining possible arguments for differentiating between authorized and unauthorized wars).

<sup>180</sup> See Jonathan L. Entin, *The Dog That Rarely Barks: Why the Courts Won't Resolve the War Powers Debate*, 47 CASE W. RES. L. REV. 1305 (1997) (explaining paucity of court decisions regarding war powers).

<sup>181</sup> See Stith, *supra*, footnote 5, at 1387 (noting that courts have declined to enforce executive compliance with appropriations limitations, "particularly in areas where the Executive's powers constitutional are significant").

<sup>182</sup> *Baker v. Carr*, 369 U.S. 186, 211-12 (1962) (noting that justiciability of a foreign affairs matter is determined "in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action"); *Powell v. McCormack*, 395 U.S. 486, 521 (1969) (making "a textually demonstrable constitutional commitment of the issue to a coordinate political department" the dominant factor for determining justiciability).

<sup>183</sup> *Massachusetts v. Laird*, 451 F.2d 26, 31-32 (1<sup>st</sup> Cir. 1971) ("The Congress may without executive cooperation declare war, thus triggering treaty obligations and domestic emergency powers. The executive may without congressional participation repel attack, perhaps catapulting the country into a major conflict. But beyond these independent powers, each of which has its own rationale, the Constitutional scheme envisages the joint participation of the Congress and the executive in determining the scale and duration of hostilities."). Another court found justiciable the question of whether military operations were constitutional, proclaiming the test to be "whether there is any action by the Congress sufficient to authorize or ratify the military activity in question." *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971). The same court, however, found a determination of the effects of Congress's repeal of the Gulf of Tonkin Resolution to be a non-justiciable political question. *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), *cert. denied* 405 U.S. 979 (1972).

envisioned congressional power to raise and support military forces as providing that body with an effective means of controlling presidential use thereof. Specifically, the House of Representatives ... was viewed by the Framers as the bulwark against encroachment by the other branches. In *The Federalist* No. 58 (Hamilton or Madison), we find:

The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.<sup>184</sup>

Despite Congress's well-established authority over appropriations, some have argued that the power of the purse cannot be wielded in such a way as to fetter the discretion of the Commander in Chief.<sup>185</sup> Congress's power of the purse is subject to the same constitutional restrictions as any other legislative enactment, including those that affect allocation of powers among the three branches.<sup>186</sup> That is, Congress cannot use appropriations measures to achieve unconstitutional results, although it might, in some circumstances, achieve a similar result simply by failing to appropriate money.<sup>187</sup> The doctrine of "unconstitutional conditions" generally applies to laws conditioning benefits for states or private citizens on their relinquishment of constitutional rights, but some have argued that it applies as well to legislation authorizing executive branch expenditures.<sup>188</sup> This notion, however, adds little to the analysis. If Congress has ample constitutional authority to enact legislation that restricts the scope of military operations, as relevant judicial opinions suggest, then it can also use the appropriations process for that purpose. The larger question remains whether any limitation enacted amounts to an unconstitutional usurpation of the actual conduct of war.

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<sup>184</sup> *Davi v. Laird*, 318 F.Supp. 478, 480 (W.D. Va. 1970).

<sup>185</sup> See Rivkin and Casey, *supra* footnote 3; see also Rosen, *supra* footnote 12, at 14-18 (outlining theories but questioning their validity).

<sup>186</sup> *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803) (Congress may not enlarge the original jurisdiction of the Supreme Court); *United States v. Klein*, 80 U.S. (8 Wall.) 128 (1872) (Congress may not nullify effects of a presidential pardon or prescribe a rule of decision in a court case); *United States v. Lovett*, 328 U.S. 303 (1946) (Congress may not create a bill of attainder by means of an appropriations measure denying money to pay salaries of named officials); *Reid v. Covert*, 354 U.S. 1 (1957) (Congress may not displace judicial role by subjecting civilians to military courts-martial during time of peace); *INS v. Chadha*, 462 U.S. 919 (1983) (Congress may not invalidate executive decisions by one-house "legislative veto").

<sup>187</sup> For example, in *United States v. Klein*, the Supreme Court invalidated a statute that prohibited the Court of Claims from receiving evidence of a presidential pardon in support of a claim against the government, finding the law interfered with the judicial power and the President's pardon power. However, the Court upheld a statute that prohibited payment of the same claims out of the Treasury. *Hart v. United States*, 118 U.S. 62 (1886). Congress's failure to appropriate funds for constitutionally mandated activities might itself be unconstitutional, but neither the courts nor the President would have the authority in such a case to mandate the expenditure of funds from the Treasury for the activity. See Stith, *supra*, footnote 5, at 1351.

<sup>188</sup> See, e.g., John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 145 & n25 (1988) ("Congress cannot condition funding or authority for the President to act in the foreign affairs arena upon the President's surrender of his own constitutionally grounded duties and privileges.")

Some commentators agree that Congress has the authority to cut off funds for military operations entirely, but assert that a partial cut-off or limitation on the use of funds in an ongoing conflict would amount to an unconstitutional interference with the President's authority to conduct battlefield operations.<sup>189</sup> There has been some suggestion in the past that the President's responsibility to provide for troops in the field justifies further deployments without prior authorization from Congress,<sup>190</sup> with some arguing that the President has an independent implied spending power to carry out these responsibilities.<sup>191</sup> These arguments do not easily square with Congress's established prerogative to limit the scope of wars through its war powers, and do not conform with Congress's absolute authority to appropriate funds. Moreover, the persuasiveness of such arguments may depend upon whether or not U.S. participation in hostilities has been authorized by Congress.

Congress has frequently, although not invariably, acceded to presidential initiatives involving the use of military force. While a history of congressional acquiescence may create a gloss on the constitutional allocation of powers,<sup>192</sup> such a gloss will not necessarily withstand an express statutory mandate to the contrary. It does not appear that Congress has developed a sufficiently consistent or lengthy historical practice to have abandoned either its war power or its authority over appropriations. The executive branch has objected to legislative proposals it views as intrusive into presidential power, including limitations found in appropriations measures.<sup>193</sup> And it remains possible to construe the function of "conducting military operations" broadly to find impermissible congressional interference in even the most mundane statutes regulating the Armed Forces. To date, however, no court has invalidated a statute passed by Congress on the basis that it impinges the constitutional authority of the Commander in Chief,<sup>194</sup> whether directly or

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<sup>189</sup> See Rivkin and Casey, *supra* footnote 3 ("Under our constitutional system ... the power to cut off funding does not imply the authority to effect lesser restrictions, such as establishing benchmarks or other conditions on the president's direction of the war.").

<sup>190</sup> See Tiefer, *supra* footnote 3, at 314-15 (describing the Nixon Administration's legal rationale for expanding the Vietnam conflict into Cambodia and Laos).

<sup>191</sup> See Rosen, *supra* footnote 12, at 14-18 (summarizing theories).

<sup>192</sup> See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (executive agreements settling claims with Iran subsequent to the 1979-1981 hostage crisis held to be within President's power, in part because of unbroken historical practice of Congress acceding to Presidential settlement of foreign claims by executive agreement).

<sup>193</sup> See H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 565-75 (1999) (surveying historical examples of disagreements involving commander-in-chief powers).

<sup>194</sup> In one case, the Supreme Court agreed with the Court of Claims that a law passed pursuant to Congress's authority to regulate the Armed Forces could not restrict a President's commander-in-chief powers, and interpreted the statute accordingly. In *Swaim v. United States*, 165 U.S. 553 (1897), an officer challenged his court-martial on the grounds that it had been ordered by the President himself, where contemporary statute provided for the convening of courts-martial by certain commanders. The Court held the President had the inherent authority to convene courts-martial, citing with approval the legislative record describing the Articles of War as "not [intended] to exclude the inherent power residing in the president of the United States under the Constitution." *Id.* at 557. The Senate Committee explained further:

In this state of the history of legislation and practice, and in consideration of the nature of the office of commander in chief of the armies of the United States, the committee is of opinion that the acts of congress which have authorized the constitution of general courts-martial by an officer commanding an army, department, etc., are, instead of being restrictive of the power of the commander in chief, separate acts of legislation, and merely provide for the constitution of general courts-martial by officers subordinate to the commander in chief, and who, without such legislation, would not possess that power, and that they do not in any manner control or restrain the commander in chief of the army from exercising the power which the committee think, in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised.

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indirectly through appropriations. In contrast, presidential assertions of authority based on the Commander-in-Chief Clause, in excess of or contrary to congressional authority, have been struck down by the courts.<sup>195</sup>

On the other hand, Presidents have sometimes deemed such limitations to be unconstitutional or merely precatory, and have at times not given them the force of law.<sup>196</sup> In other words, Administrations have relied on an argument based on the assumption that a given spending measure unconstitutionally impinges on the President's Commander-in-Chief authority to justify the President's failure to adhere to a limitation on national security spending while continuing to spend the funds,<sup>197</sup> sometimes employing the "canon of constitutional avoidance" to construe a statute in conformity with its own view of its inherent powers.<sup>198</sup> While the avoidance canon does not appear to have been employed by the courts to resolve separation-of-powers conflicts between the President and Congress, such issues seem unlikely to be resolved by the courts in any event.<sup>199</sup>

In sum, it seems that under the constitutional allocation of powers Congress has the prerogative of placing a legally binding condition on the use of appropriations to regulate or end the deployment of U.S. Armed Forces. Such a prohibition seems directly related to the allocation of resources at the President's disposal, and would therefore not appear to interfere impermissibly with the President's ability to exercise command and control over the U.S. Armed Forces. Although not beyond question, such a prohibition would arguably survive challenge as an incident both of Congress's war power and of its power over appropriations.

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*Id.* at 557-58. Even recognizing the inherent power of the President to convene courts-martial, however, the Court proceeded to explore whether the Articles of War had been properly applied. The case appears to demonstrate that Congress may regulate the exercise of inherent commander-in-chief powers as long as it does not extinguish them completely.

<sup>195</sup> See *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>196</sup> See Powell, *supra* footnote 193, at 552-53.

<sup>197</sup> See Tiefer, *supra* footnote 3, at 312 (providing examples of the "say no, but keep the dough" approach for circumventing appropriations limitations viewed as unconstitutional); Powell, *supra* note 181, at 553 (describing executive branch formula for determining the effect on an appropriation of an invalid condition to be based on "whether Congress's main purpose in enacting the appropriation was to create a means of forcing the congressional policy embodied in the condition on the President").

<sup>198</sup> As formulated by the Supreme Court, the avoidance canon means that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The executive branch has employed the canon to construe various legislative measures as advisory in nature based on its view that such measures would, if viewed as mandatory, raise grave constitutional questions regarding the separation of powers. For examples and analysis of the issue, see H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 *IND. L.J.* 1313 (2006); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 *COLUM. L. REV.* 1189 (2006).

<sup>199</sup> See Morrison, *supra* footnote 198, at 1228.

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