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## Perpetual Warfare: Proposing a New American Constitutional Amendment for the War Powers

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## Notes

### PERPETUAL WARFARE: PROPOSING A NEW AMERICAN CONSTITUTIONAL AMENDMENT FOR THE WAR POWERS

#### I. INTRODUCTION

Since September 11, 2001 (“9/11”), the United States of America has used its military as a bedrock of American foreign policy, leading some to claim that the United States remains in a state of perpetual war, which neither controlling political party—Democratic or Republican—seems willing to change.<sup>1</sup> For instance, former President Obama used past military actions to defend his diplomatic stance in a diplomatic outreach to Iran.<sup>2</sup> But his sentiments run contrary to post-Cold War sentiments: namely, war and peace are separate.<sup>3</sup>

After the Cold War, the United States relied on its military as its foreign policy cornerstone.<sup>4</sup> Its use of military power led to debatable actions: (1) the Balkans; (2) Afghanistan and Iraq; (3) Libya; and (4) the Islamic State of Iraq and the Levant (“ISIL”).<sup>5</sup> Instead of peace as the normal condition, the United States continues to rely on its military regardless of cost.<sup>6</sup>

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<sup>1</sup> See Alex Emmons, *Fifteen Years After 9/11, Neverending War*, INTERCEPT [hereinafter Emmons, *Neverending War*] (Sept. 10, 2016, at 9:10 PM) <https://theintercept.com/2016/09/10/fifteen-years-after-911-neverending-war/> [<https://perma.cc/EY3Q-Z6EM>] (arguing that U.S. military engagement in the Middle East seems a perennial component of American foreign policy).

<sup>2</sup> See Glenn Greenwald, *To Defend Iran Deal, Obama Boasts That He’s Bombed Seven Countries*, INTERCEPT [hereinafter Greenwald, *To Defend Iran Deal*] (Aug. 6, 2015, at 8:15 AM), <https://theintercept.com/2015/08/06/obama-summarizes-record/> [<https://perma.cc/3SKK-3XJX>] (noting that President Obama has defended such a diplomatic stance, turning to his bellicosity as justification for his toughness in this foreign policy realm).

<sup>3</sup> See HENRY KISSINGER, *DIPLOMACY* 39–40 (1994) [hereinafter KISSINGER, *DIPLOMACY*] (writing before 1994 that Americans were “[a] people brought up in the belief that peace is the normal condition”).

<sup>4</sup> See Stephen Walt, *The Broken Policy Promises of W. Bush, Clinton, and Obama*, FOREIGN POL’Y [hereinafter Walt, *Broken Policy*] (Sept. 18, 2016), <https://foreignpolicy.com/2016/09/18/broken-foreign-policy-promises-bush-clinton-obama-iraq-syria/> [<https://perma.cc/WUZ9-V5FV>] (noting the mistakes of Clinton, George W. Bush, and Obama and the contradictions among their promises, urging less interventionism at home, while pursuing abroad military interventionist policies).

<sup>5</sup> See *id.* (chronicling the military interventionism contradictions of Clinton, George W. Bush, and Obama and their failures).

<sup>6</sup> See Emmons, *Neverending War*, *supra* note 1 (arguing that U.S. Middle East foreign policy is akin to permanent war); Greenwald, *To Defend Iran Deal*, *supra* note 2 (noting

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In 2016, Captain Nathan Smith filed suit against then-President Obama.<sup>7</sup> Smith alleged that President Obama overstepped his constitutional bounds.<sup>8</sup> But President Obama countered *inter alia* that Congress granted him power through the first Authorization for the Use of Military Force (AUMF), providing him with the requisite justification for military force in Iraq and Syria.<sup>9</sup>

Smith sought declaratory relief, asking the court to call President Obama's actions unconstitutional.<sup>10</sup> Smith's suit was quixotic.<sup>11</sup> Although

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President Obama's reliance on military action to justify diplomatic actions); Walt, *Broken Policy*, *supra* note 4 (highlighting the mistakes of Clinton, W. Bush, and Obama and the contradiction between their promises for less interventionism at home while pursuing the presidency contrasted with their interventionist policies involving the use of military force); KISSINGER, *DIPLOMACY*, *supra* note 3 (noting the belief that prior to 1994, peace was viewed as the normal state of affairs).

<sup>7</sup> See Compl., *Smith v. Obama*, (No. 1:16-cv-00843), 2016 WL 2347065 (D.D.C. 2016) (alleging President Obama's violation of the War Powers Resolution). See also *Smith v. Obama*, No. CV 16-843, 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (finding that Captain Smith's suit is dismissed based on standing and political question).

<sup>8</sup> See Compl., *Smith v. Obama*, No. 1:16-cv-00843, 2016 WL 2347065 (D.D.C. 2016) (claiming President Obama's use of military force against ISIL and reliance on the first AUMF violated the War Powers Resolution and seeking declaratory judgment). See also *Smith v. Obama*, No. CV 16-843, 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (dismissing Captain Smith's suit on the grounds of lack of standing and political question).

<sup>9</sup> See Barack Obama, *Letter from the President – War Powers Resolution Regarding Iraq*, (Sept. 23, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq> [<https://perma.cc/L92Q-D5DV>] [hereinafter *Obama, Regarding Iraq*] (declaring that the two previous AUMFs were sufficient authority for President Obama to undertake military operations in Iraq against ISIL). See also *Exploring the President's Draft AUMF*, NAT. SECURITY L. BRIEF OF AMER. U. COLLEGE OF LAW, (Mar. 1, 2015), <http://www.nationalsecuritylawbrief.com/exploring-the-presidents-draft-aumf/> [<https://perma.cc/AL3R-JQC6>] [hereinafter *Exploring the Draft AUMF*, AMERICAN UNIVERSITY] (discussing a draft AUMF dealing with ISIL proposed by President Obama, but to date never acted upon).

<sup>10</sup> See Compl., *Smith v. Obama*, No. 1:16-cv-00843, 2016 WL 2347065 (D.D.C. 2016) (alleging President Obama's violation of the War Powers Resolution based on President Obama's orders of military action in Iraq). See also *Smith v. Obama*, No. CV 16-843, 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (ruling that Captain Smith's suit is dismissed based on (1) Captain Smith lacked standing because his specific legal injury in his complaint was not sufficiently concrete or particularized, and (2) that Captain Smith's complaint raised a non-justiciable political question).

<sup>11</sup> Compare Jens David Ohlin, *The 9/11 AUMF does not cover ISIS*, OPINIO JURIS (Sept. 11, 2014, 9:26 AM) <http://opiniojuris.org/2014/09/11/911-aumf-cover-isis/> [<https://perma.cc/599K-38BF>] (arguing that the first AUMF is not a blank check and does not cover operations in Iraq and Syria targeting ISIL), with Rebecca Ingber, *The ISIS Lawsuit and the Perverse Effects of National Security Litigation*, LAWFARE (May 13, 2016, 2:12 PM) <https://lawfareblog.com/isis-lawsuit-and-perverse-effects-national-security-litigation> [<https://perma.cc/FKS7-H6PS>] (arguing that the lawsuit by CPT Smith could perversely undermine the law and weaken checks on the President due to the nature of declaratory judgment). See also Bruce Ackerman, *The War Against ISIS is Unconstitutional*, LAWFARE (May 5, 2016, 2:10 PM) <https://lawfareblog.com/war-against-isis-unconstitutional>

dismissed for a lack of standing – or, alternatively, a political question – Smith’s suit provides an opportunity to assess the use of the military, not only perpetual warfare but also complex policy implications thereof.<sup>12</sup> The War Powers Resolution and the AUMF create a permanency of war; as a remedy, the Constitution requires a new amendment, limiting the President’s war powers, by obligating Congress to advise, fund, and permit the President to use the military while reinserting the judiciary into war power decision-making.<sup>13</sup>

Part II of this Note presents a background that explains how the United States declares war, the current problematic state of using military force, and the three branches of government.<sup>14</sup> Next, Part III of this Note analyzes the problem, leading to the conclusion that a constitutional amendment is the solution.<sup>15</sup> Finally, Part IV of this Note proposes a model constitutional amendment.<sup>16</sup>

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[<https://perma.cc/UY8T-V2UK>] (arguing that President Obama’s actions in Iraq against ISIL are unconstitutional); Marty Lederman, *Why Captain Smith’s suit to enforce the War Powers Resolution won’t be a big deal*, JUST SECURITY (May 9, 2016, at 8:42 AM) <https://www.justsecurity.org/30949/captain-smiths-suit-enforce-war-powers-resolution-big-deal/> [<https://perma.cc/MMV3-NYP8>] [hereinafter Lederman, *Captain Smith’s Suit*] (describing how CPT Smith’s suit will fail); Jack Goldsmith, *Analysis of Lawsuit Challenging War Against ISIL*, LAWFARE (May 4, 2016, at 1:03 PM), <https://www.lawfareblog.com/analysis-lawsuit-challenging-war-against-isil> [<https://perma.cc/H84A-J27B>] [hereinafter Goldsmith, *Analysis of Lawsuit*] (arguing that CPT Smith’s lawsuit will fail due to the political question doctrine and standing problem); *Smith v. Obama*, CV 16-843 (CKK), 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (holding that CPT Smith’s suit deserved dismissal because (1) CPT Smith lacked standing and (2) that CPT Smith’s complaint produced a political question which is non-justiciable).

<sup>12</sup> See Emmons, *Neverending War*, *supra* note 1 (arguing that U.S. military engagement in the Middle East seems to be a perennial part of American foreign policy); Walt, *Broken Policy*, *supra* note 4 (noting the mistakes of Clinton, George W. Bush, and Obama and the contradiction between presidential pursuit of interventionist policies grounded in the use of military force while previously promising less interventionist policies). See also *Smith v. Obama*, CV 16-843 (CKK), 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (holding that CPT Smith’s suit was dismissed due to lack of standing or alternatively on the political question doctrine); U.S. Army War College, *2013 Strategy Conference Panel 1-Is American Foreign Policy Overly Militarized?*, YOUTUBE (Apr. 11, 2013) <https://www.youtube.com/watch?v=XvEjzIQsy4> [<https://perma.cc/296L-96DK>] [hereinafter U.S. Army War College, *2013 Strategic Conference*] (presenting a debate between Dr. Daniel Drezner and Mr. Nathan Frier in which both Professor Drezner and Mr. Frier agree that the U.S. foreign policy is excessively militarized and relies heavily on the military to accomplish U.S. foreign policy goals).

<sup>13</sup> This statement is the author’s opinion and thesis statement.

<sup>14</sup> See *infra* Part II (establishing the background, including declarations of war, the current status of the AUMF, the war powers of the three branches, and the process of a constitutional amendment).

<sup>15</sup> See *infra* Part III (analyzing the current problems with the AUMF, the pathologies of the three branches of government with the conclusion that change to the state of perpetual war will not emerge from the three branches of government).

<sup>16</sup> See *infra* Part IV (providing a model constitutional amendment to the War Powers).

## II. BACKGROUND

The history of the War Powers is how the United States came to its current position with its use of military force.<sup>17</sup> To begin, Part II.A is the history of the War Powers from the founding until the modern day, and the change after WWII from an interbranch decision, vice an interagency to use military force or declare war.<sup>18</sup> Then, Part II.B comprises how the Legislative, Executive, and Judicial Branches contribute to the current state of affairs.<sup>19</sup> Finally, Part II.C surveys the implications and the process of amending the U.S. Constitution.<sup>20</sup>

### A. *Historical Synopsis of the War Powers: How the United States Got Here*

Part II.A.1 describes the history of declarations of war.<sup>21</sup> Part II.A.2 presents the Gulf of Tonkin Resolution and its aftermath, the War Powers Resolution.<sup>22</sup> Part II.A.3 brings the reader to the modern era after 9/11 to the present day.<sup>23</sup>

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<sup>17</sup> See *supra* Part II (describing the historical background of how the United States uses its military and got to the current legal status of today, looking at the three branches of government and their actions related to the War Powers and War Powers Resolution, and concluding with an overview of the policy implications and the process to amend the U.S. Constitution).

<sup>18</sup> See *infra* Part II.A.1 (outlining the pre-WWII history of the use of military force). See also STEPHEN GRIFFIN, LONG WARS AND THE CONSTITUTION 17 (2013) [hereinafter GRIFFIN, LONG WARS] (coining the term “interbranch” to describe the dialogue between the Legislative and Executive Branches, which characterized the use of military force and declarations of war and made the distinction between the previous interbranch deliberation process and the interagency deliberation as decided within the Executive Branch); *infra* Part II.A.2 (detailing the emergence of the War Powers Resolution in the wake of the Gulf of Tonkin Resolution); *infra* Part II.A.3 (presenting the modern era and the AUMFs in the wake of 9/11 and the War on Terror with the AUMF’s subsequent allowance of military force as an interagency decision while departing from the historical interbranch experience).

<sup>19</sup> See *infra* Part II.B (sketching the background of the Judicial, Legislative, and Executive Branches and their relation to the War Powers Resolution and War Powers).

<sup>20</sup> See *infra* Part II.C (discussing the policy implications of the current legal status and recounting the process of amending the U.S. Constitution).

<sup>21</sup> See *infra* Part II.A.1 (outlining the historical basis of the constitutional War Powers and the acts of Congress to declare war).

<sup>22</sup> See *infra* Part II.A.2 (outlining the Gulf of Tonkin Resolution for the Vietnam War and its aftermath of the War Powers Resolution).

<sup>23</sup> See *infra* Part II.A.3 (outlining the AUMF and the War on Terror).

## 1. Declaring War

Prior to WWII, the United States made formal declarations of war.<sup>24</sup> The Constitution created an interbranch system for its war powers.<sup>25</sup> The Constitution vested the Executive Branch with the powers of Commander-in-Chief; however, it also vested the Legislative Branch with the authority to declare war and to appropriate funds for war.<sup>26</sup> While some have argued that the phrase “to declare war” does not mean starting a war, historically, the use of military force remained a Congressional prerogative.<sup>27</sup> Military regulations have served as an example of power-sharing between the two Branches.<sup>28</sup>

Past Congressional war declarations authorized the President to conduct war.<sup>29</sup> Most declarations of war contained boilerplate language

<sup>24</sup> See U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to declare war). See also GRIFFIN, LONG WARS, *supra* note 18, at 5–6 (opining that the Cold War produced a change from formal declarations of war).

<sup>25</sup> See U.S. CONST. art. I, § 8, cl. 11 (granting to Congress the plenary power to declare war); *id.* § 8, cl. 12 (granting Congress the power of the purse, i.e. that Congress votes to fund military operations); *id.* § 2, cl. 1 (naming the President Commander-in-Chief of the armed forces). See also GRIFFIN, LONG WARS, *supra* note 18, at 5–6 (noting the division of war powers in the Constitution).

<sup>26</sup> See U.S. CONST. art. I, § 8, cl. 11 (granting Congress the sole power to declare war); *id.* § 8, cl. 12 (granting Congress the power to appropriate funding for war); *id.* § 2, cl. 1 (making the President Commander-in-Chief of the armed forces); THE FEDERALIST NO. 69 (Alexander Hamilton) (describing the President’s powers as Commander-in-Chief as a supreme commander but unable to declare war compared with the King of Britain). See also GRIFFIN, LONG WARS, *supra* note 18, at 5–6 (noting the interbranch division of the war powers in the Constitution). Thus both branches, per the Constitution, are heavily involved in the use of military force. *Id.*

<sup>27</sup> See JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, 144–52 (2005) [hereinafter YOO, AFFAIRS AFTER 9/11] (arguing that the original textual meaning of “declare” which allows Congress to declare war should not be taken to mean that Congress initiates war). *But see* The Amy Warwick, 67 U.S. 635, 668–75 (1862) (noting in the dissent that “[b]y the Constitution, Congress alone has the power to declare a national or foreign war” while also noting the powers of the President for defensive action); Jennifer K. Elsea & Matthew C. Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, CONG. RES. SERV. (Apr. 18, 2014), <https://fas.org/sgp/crs/natsec/RL31133.pdf> [<http://perma.cc/8YMZ-STW9>] [hereinafter Elsea & Weed, *Declarations of War*] (providing the historical declarations of war by the United States, all of which are constitutional declarations detailing duration, distinct powers, and funding and direction to the President, and containing the Declaration of War on Mexico of 1846 which has nine separate sections detailing grants of power to the President for specific purposes).

<sup>28</sup> See generally *Swaim v. United States*, 165 U.S. 553, 556–58 (1897) (holding that the President as Executive controls the military while Congress controls military regulations and legislates military regulations); *Rostker v. Goldberg*, 453 U.S. 57, 64–66 (1981) (holding that Congress has the constitutional power to rule and regulate the military).

<sup>29</sup> See U.S. CONST. art. II, § 2, cl. 1 (granting the President the authority of Commander-in-Chief of the armed forces); Elsea & Weed, *Declarations of War*, *supra* note 27 (listing the

such as: “[the] President is hereby authorized and directed to employ [all U.S.] naval and military forces . . . and the [country’s] resources . . . to carry on war . . . to bring the conflict to a successful termination, [and that Congress pledges] all of the [nation’s] resources.”<sup>30</sup> This system worked well until WWI, when Congress issued its last declaration of war.<sup>31</sup> The system then changed, moving from an interbranch decision-making process to an interagency process subordinating military force within a foreign policy system under the Executive Branch.<sup>32</sup> Subsequent legal changes happened, such as the National Security Act of 1947; this Act set the stage for the use of military force throughout the Cold War.<sup>33</sup>

## 2. The Gulf of Tonkin Resolution and the War Powers Resolution

The new interagency decision-making framework existed throughout the Vietnam War under President Johnson.<sup>34</sup> During the Vietnam War,

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historical declarations of war by the United States as voted as joint resolutions by Congress empowering the President to pursue military and strategic action). The historical declarations of war by the United States are all constitutional declarations detailing duration and authority to the President to carry out a war to its termination, such as the Declaration of War against Germany in 1917 or the Declaration of War against Spain in 1898, both of which outline the forces to be used by the President and that the President should seek termination of the war. *Id.* When the United States declared war on Mexico, Congress’ declaration micromanaged the war effort while other declarations simply denoted the enemy and empowered the President to reach victory. *Id.*

<sup>30</sup> See Elsea & Weed, *Declarations of War*, *supra* note 27 (providing the boilerplate language of multiple declarations of war ranging from the Spanish-American War, WWI, and WWII).

<sup>31</sup> See *id.* (providing the historical declarations of war by the United States which are all constitutional declarations by Congress detailing duration, distinct powers, and funding and direction to the President); GRIFFIN, LONG WARS, *supra* note 18, at 53 (noting the change from interbranch decision-making on the use of military force between Congress and the President to an interagency decision after 1945, leading to problematic conclusions and a dearth of outright victories compared to prior to 1945).

<sup>32</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–22 (1936) (holding that the President is the constitutional representative of the United States for foreign affairs, and that his decisions, pursuant to legislative directive, are at the highest trough when scrutinized); GRIFFIN, LONG WARS, *supra* note 18, at 53 (noting the change from interbranch decision-making on the use of military force between Congress and the President to an interagency decision under the Executive Branch after 1945); *id.* at 63–64 (describing the incorporation after President Truman of the precedence of *Curtiss-Wright* as a mainstay of subsuming the war powers within the Executive’s powers of foreign policy).

<sup>33</sup> See GRIFFIN, LONG WARS, *supra* note 18, at 100–02 (outlining the National Security Act of 1947, which established the structure of the Department of Defense and the Central Intelligence Agency (CIA) under the Executive Branch). The National Security Act of 1947 reorganized the War Department into the Department of Defense, founded the CIA, and created the National Security Council under the Executive Branch, setting the stage for the use of military force under an interagency deliberation system. *Id.*

<sup>34</sup> See *id.* at 121 (noting that the post-WWII National Security Act of 1947 apparently endowed the President, as Executive, with control of nuclear and covert action and implied

Congress passed the Gulf of Tonkin Resolution.<sup>35</sup> President Johnson viewed this resolution as Congress' concession to his prosecution of the Vietnam War.<sup>36</sup> With the resolution, Congress essentially dealt President Johnson a blank check to use the military.<sup>37</sup> When Congress repealed the resolution, President Nixon relied on military appropriations, vice Congressional authorization.<sup>38</sup> In the end, the Vietnam War proved a failure, and Congress repealed the Gulf of Tonkin Resolution, bypassing President Nixon's veto power with the War Powers Resolution.<sup>39</sup>

The War Powers Resolution intended a return to an interbranch deliberation on deploying the military.<sup>40</sup> The resolution requires the

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that the President controlled the use of the military, which was then used by President Johnson).

<sup>35</sup> See Gulf Of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384, Aug. 10, 1964 (enacted but later repealed, authorizing the President to conduct war in Indochina and pursue the Vietnam War). See also H.R. MCMASTERS, DERELICTION OF DUTY 126-36 (1997) (noting President Johnson's process, via U.S. naval patrols in Vietnam, to convince Congress to pass the resolution, providing Johnson authority to conduct the Vietnam War).

<sup>36</sup> See GRIFFIN, LONG WARS, *supra* note 18, at 122-26 (outlining President Johnson's views that his actions and decisions in the Vietnam War were part of his plenary powers and did not require Congressional permission to pursue the Vietnam War).

<sup>37</sup> See Orlando v. Laird, 443 F.2d 1039, 1041-44 (2d Cir. 1971) (holding that the Gulf of Tonkin Resolution and subsequent financial appropriations for the Vietnam War equated to Congressional approval). A concurring judge in *Laird* noted the following: "[i]n light of the adoption by Congress of the Tonkin Gulf Resolution, and the clear evidence of continuing and distinctly expressed participation by the legislative branch in the prosecution of the war, I agree that the judgments below must be affirmed." *Id.* at 1044. See also REBECCA U. THORPE, THE AMERICAN WARFARE STATE 133-38 (2014) [hereinafter THORPE, AMERICAN WARFARE STATE] (noting that Congress continued to fund the Vietnam War and that budget gimmicks and Congressional abdication allowed President Nixon to continue his secret bombing campaign in Cambodia).

<sup>38</sup> See THORPE, AMERICAN WARFARE STATE, *supra* note 37, at 133-38 (explaining how President Nixon, moving beyond the precedents left to him by President Johnson, continued a secret bombing campaign in Cambodia, even in the face of Congressional disapproval when he relied upon Congressional appropriations to the Department of Defense to fund his use of the military in Cambodia).

<sup>39</sup> See *Laird*, 443 F.2d at 1042 (noting the repeal of the Gulf of Tonkin Resolution). See also THORPE, AMERICAN WARFARE STATE, *supra* note 37, at 133-38 (outlining not only the blank check to President Johnson and then the passage of the War Powers Resolution to retract such allowances and constrain free-wielding action by the Executive to conduct military action but also that Congress overrode President Nixon's veto).

<sup>40</sup> See War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (2012) (containing the War Powers Resolution of 1973, setting limits which the President must follow for ordering military force). See also War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973) ("[i]t is the purpose of this joint resolution to fulfill the intent of the Farmers [sic] of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations").



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President to submit a report to Congress within forty-eight hours after inserting U.S. Armed Forces into hostile terrain or into areas with impending hostilities without a declaration of war; furthermore, absent Congressional authorization, U.S. military forces must withdraw within sixty days, with a possible extension of thirty days in times of impending danger during withdraw.<sup>41</sup> Thus, the 148th Congress envisioned the War Powers Resolution as a return to the original constitutional intent of the Founding Forefathers.<sup>42</sup>

Commentators have questioned the War Powers Resolution.<sup>43</sup> The Department of Justice (DOJ), through its Office of Legal Counsel (OLC), has provided various opinions on the resolution.<sup>44</sup> Presidents also resisted compliance with the resolution.<sup>45</sup> And even members of Congress have questioned the resolution, with multiple unsuccessful attempts to repeal it.<sup>46</sup> Meanwhile, some Congressional members have suggested

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<sup>41</sup> See War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2012) (stating that Congress could approve extensions to the use of military force if done under sudden response of the President and presenting limitations on the Presidential use of military force absent a declaration of war).

<sup>42</sup> See *supra* note 40 (outlining the legislative intent of the War Powers Resolution).

<sup>43</sup> See, e.g., JOHN YOO, CRISIS AND COMMAND 353 (2009) [hereinafter YOO, CRISIS AND COMMAND] (questioning the constitutionality of the War Powers Resolution because it encroaches on the Executive's authority). See also generally Eugene V. Rostow, *Once More unto the Breach: The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 1 (1986) (decrying the War Powers Resolution as a mistaken reaction to the Vietnam War and unable to codify an essential political question).

<sup>44</sup> See *infra* note 111 (collecting various O.L.C. opinions that enable the President to use military force based on argued exceptions to the War Powers Resolution). Compare GRIFFIN, LONG WARS, *supra* note 18, at 204 (questioning Yoo's claim that the Executive Branch has resisted adherence to the War Powers Resolution), with YOO, CRISIS AND COMMAND, *supra* note 43, at 353 (arguing that the War Powers Resolution is an unconstitutional encroachment on the Executive's authority and plenary powers by an act of Congress).

<sup>45</sup> See Nolan Walters, *War Powers Resolution a Failure, Senators Say in Suggesting Changes*, PHILADELPHIA INQUIRER (May 20, 1998), [http://articles.philly.com/1988-05-20/news/26263790\\_1\\_war-powers-resolution-senators-congress](http://articles.philly.com/1988-05-20/news/26263790_1_war-powers-resolution-senators-congress) [hereinafter Walters, *War Powers Resolution*] (reporting on discontent regarding the War Powers Resolution and the failure of a lawsuit against President Reagan to enforce the resolution); Tim Ahern, *Reagan's Persian Gulf Policy: A Tragedy Waiting to Happen*, EVENING NEWS (June 8, 1988), <https://news.google.com/newspapers?nid=1982&dat=19880608&id=MzpRAAAAIBA&sjid=lzMNAAAAIBA&pg=1071,686989&hl=en> [<https://perma.cc/H5FN-9UEH>] [hereinafter Ahern, *Reagan's Persian Gulf Policy*] (recounting Reagan's policy of putting American naval forces in the Persian Gulf to deter Iran without seeking Congressional consent).

<sup>46</sup> See Pete Kasperowicz, *GOP Bill Would Kill War Powers Measure*, HILL (Sept. 10, 2013, at 01:16 PM), <http://thehill.com/blogs/floor-action/house/321261-gop-bill-would-terminate-the-war-powers-resolution> [<https://perma.cc/NV9W-TE8W>] [hereinafter Kasperowicz, *GOP Bill*] (recounting attempts of Congressional Republicans to repeal the War Powers Resolution); Brigid Schulte, *House Rejects GOP Effort to Repeal War Powers Law Forty-Four Republicans Joined Democrats to Defeat the Repeal. Gingrich Said Bosnia Loomed Large*,

modification, requiring the President return to a more consultative system.<sup>47</sup> To date, Congress has not made any modifications.<sup>48</sup> Instead, the legacy of the Gulf of Tonkin Resolution is the War Powers Resolution, providing the legal cornerstone for current uses of military force including the AUMF.<sup>49</sup>

### 3. 9/11 and the AUMFs

Since the War Powers Resolution, the United States has used military force during the first Iraq War and in Somalia.<sup>50</sup> The newest changes in using military force are the AUMF, which President George W. Bush

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INQUIRER (June 8, 1995), [http://articles.philly.com/1995-06-08/news/25690131\\_1\\_repeal-war-powers-resolution-bosnia-crisis](http://articles.philly.com/1995-06-08/news/25690131_1_repeal-war-powers-resolution-bosnia-crisis) [hereinafter Schulte, *Defeat the Repeal*] (recounting a prior attempt to repeal the War Powers Resolution).

<sup>47</sup> See Walters, *War Powers Resolution*, *supra* note 45 (reporting on Congressional misgivings regarding the War Powers Resolution); Center for Strategic and International Studies, *Reforming the War Powers Resolution*, YOUTUBE (May 14, 2014), <https://www.youtube.com/watch?v=iFx98M6PI24> [https://perma.cc/ZL5X-3F36] [hereinafter Kaine, *Reforming the War Powers Resolution*] (presenting Senator Kaine's experiences working in Congress to amend the War Powers Resolution); GRIFFIN, LONG WARS, *supra* note 18, at 273 (noting, among other things, that the lack of cooperation between Congress and the Presidency is and should be a key part of the decision to use military force). See generally Andre Miksha, Note, *Declaring War on the War Powers Resolution*, 37 VAL. U. L. REV. 651 (2002) [hereinafter Miksha, *War Powers Resolution*] (arguing to repeal the War Powers Resolution and proposing a constitutional amendment making a war council while not providing for any cause of action to enforce such an amendment).

<sup>48</sup> See Kaine, *Reforming the War Powers Resolution*, *supra* note 47 (offering Senator Kaine's proposed amendments the War Powers Resolution); GRIFFIN, LONG WARS, *supra* note 18, at 273 (observing that Congress and the President need not cooperate which is a key part of the deliberations for using military force). See also generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012) [hereinafter MANN & ORNSTEIN, *WORSE THAN IT LOOKS*] (arguing that the current political system and Congress does not work, resulting in a paralyzed form of governance which other commentators label a dysfunctional Congress).

<sup>49</sup> See *supra* Part II.A.2 (presenting the Gulf of Tonkin Resolution and the resulting War Powers Resolution which stem from the fallout of the Vietnam War and is the current basis of the legal status for the use of military force).

<sup>50</sup> See, e.g., *Auth. to Use United States Mil. Forces in Somalia*, 16 Op. O.L.C. 6 (1992), [https://www.justice.gov/sites/default/files/olc/opinions/1992/12/31/op-olc-v016-p0006\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/1992/12/31/op-olc-v016-p0006_0.pdf) [https://perma.cc/E3QN-CGNW] [hereinafter O.L.C., *Somalia*] (opining to President Bill Clinton about presidential discretion to use the military in Somalia). See also MICHAEL R. GORDON & BERNARD E. TRAINOR, *THE GENERALS' WAR: THE INSIDE STORY OF THE CONFLICT IN THE GULF* 205 (1995) (describing Congress's authorization of military force against Saddam Hussein with a joint resolution passing by a comfortable margin in the House and a more narrow margin in the Senate).

sought in the wake of 9/11.<sup>51</sup> Whereas the Gulf of Tonkin Resolution was not understood as a blank check for the Executive Branch, Presidents have used the AUMFs—in particular, the first one—to justify military force at their discretion.<sup>52</sup> Presidents now seek AUMFs as a Congressional blessing for military force; for instance, former President Obama contemplated a new AUMF against ISIL.<sup>53</sup> Yet, the first AUMF remains the mainstay for the justification of the use of military force.<sup>54</sup> Thus, the AUMFs are the new progeny of the War Powers Resolution.<sup>55</sup>

### B. *Problems of Government and Governance*

The War Powers and the War Powers Resolution touches all three branches of government.<sup>56</sup> Part II.B.1 explains the litigation associated

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<sup>51</sup> See GRIFFIN, *LONG WARS*, *supra* note 18, at 216–22 (noting the problems with the AUMF and claims by President George W. Bush to wage war based on his Article II powers and not needing the limits or approval of Congress).

<sup>52</sup> See GRIFFIN, *LONG WARS*, *supra* note 18, at 126–27 (noting that Senate did not intend the Gulf of Tonkin Resolution as a blank check to President Johnson). See also Jack Goldsmith, *Quick Reactions to Extraordinary Senate Armed Services Committee Hearing on the AUMF*, *LAWFARE* (May 16, 2013, at 1:53 PM), [https://www.lawfareblog.com/quick-reactions-extraordinary-senate-armed-services-committee-hearing-aumf?utm\\_source=twitterfeed&utm\\_medium=twitter](https://www.lawfareblog.com/quick-reactions-extraordinary-senate-armed-services-committee-hearing-aumf?utm_source=twitterfeed&utm_medium=twitter) [<https://perma.cc/L92Z-JH26>] [hereinafter Goldsmith, *Quick Reactions on Hearing on AUMF*] (reporting on a Senate committee hearing and showing that the military continued to interpret the AUMF as wide-ranging); Obama, *Regarding Iraq*, *supra* note 9 (declaring the two previous AUMFs provided President Obama sufficient legal authority for military operations against ISIL).

<sup>53</sup> See *Exploring the Draft AUMF*, *AMERICAN U.*, *supra* note 9 (discussing a draft AUMF for force against ISIL which Congress has not passed); Jennifer Daskal, & Stephen I. Vladeck, *After the AUMF*, 5 *HARV. NAT'L SEC. J.* 115, 125 (2014) [hereinafter Daskal & Vladeck, *After the AUMF*] (speculating that the Executive Branch would interpret the first AUMF increasingly wider regarding which groups fall under the first AUMF).

<sup>54</sup> See Goldsmith, *Quick Reactions on Hearing on AUMF*, *supra* note 52 (reporting his reaction to an open-ended meaning to the AUMF covering future foes not contemporary of the first AUMF); Obama, *Regarding Iraq*, *supra* note 9 (declaring the President's legal position that the two previous AUMFs legally justified military operations against ISIL); Daskal & Vladeck, *After the AUMF*, *supra* note 53, at 125 (arguing that the Executive Branch would more widely interpret which groups are covered by the first AUMF meaning the first AUMF has an almost unlimited shelf life).

<sup>55</sup> See *supra* Part II.A (showing the history from the founding to the present era for using military force).

<sup>56</sup> See *infra* Part II.B.1 (presenting the courts and failures to litigate the War Powers Resolution); *infra* Part II.B.2 (showing the Legislative Branch and Executive Branch and the War Powers Resolution and general War Powers).

with the War Powers Resolution and the Judicial Branch.<sup>57</sup> Part II.B.2 surveys the other two Branches.<sup>58</sup>

### 1. Going to Court on the War Powers Resolution

Multiple parties have sought to litigate the War Powers Resolution.<sup>59</sup> The War Powers Resolution has proven resistant to litigation.<sup>60</sup> The first problem is standing discussed in Part II.B.1.a.<sup>61</sup> Beyond standing are other judicial doctrines barring litigation in Part II.B.1.b.<sup>62</sup>

#### a. *Standing for Plaintiff to a Lawsuit, whether member of Congress or not*

Standing is a fundamental constitutional concept.<sup>63</sup> If plaintiffs lack standing, courts dismiss the lawsuit.<sup>64</sup> Standing means that plaintiffs can show particularized injury in their complaint, and does not include taxpayers.<sup>65</sup> Two types of plaintiffs have brought lawsuits over the War

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<sup>57</sup> See *supra* Part II.B.1 (presenting the judicial doctrines barring litigation of the War Powers Resolution).

<sup>58</sup> See *infra* Part II.B.2 (describing the Legislative Branch and its role in the War Powers Resolution and general War Powers and detailing the Executive Branch and its encroachment on the War Powers).

<sup>59</sup> See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216–28 (1974) (granting judgment to defendants because of lack of standing and inability to show actual injury); *Doe v. Bush*, 323 F.3d 133, 134 (1st Cir. 2003) (holding that a suit to prevent the 2003 invasion of Iraq was a non-justiciable item, even when the plaintiffs included parents of soldiers, active duty troops, reservists, and congressional members); *Lowry v. Reagan*, 676 F. Supp. 333, 334 (D.D.C. 1987) (dismissing an action by Congress members seeking President Reagan’s report per the War Powers Resolution).

<sup>60</sup> See *Smith v. Obama*, CV 16-843 (CKK), 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (dismissing Captain Smith’s lawsuit). See also GRIFFIN, *LONG WARS*, *supra* note 18, at 271 (noting that significant commenters such as Posner and the Younger declare the War Powers Resolution to be “dead letter law”); *infra* Part II.B.1.0 (describing the standing doctrine and lack thereof dismisses further suits); *infra* Part II.B.1.0 (describing doctrines including political question doctrine, military deference, and other doctrines *inter alia* leading the courts to dismiss suits involving the War Powers Resolution).

<sup>61</sup> See *infra* Part II.B.1.a (outlining the doctrine of standing in the context of the War Powers Resolution and differences in the standing analysis whether the plaintiff is or is not a member of Congress).

<sup>62</sup> See *infra* Part II.B.1.b (noting other judicial doctrines dismissing litigation involving the War Powers Resolution).

<sup>63</sup> See *Nat’l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1427–28 (D.C. Cir. 1996) (holding that a plaintiff must have standing, and standing must be established by showing actual injury).

<sup>64</sup> See *id.* (holding that a plaintiff requires standing, and standing means actual legal injury). See also *Smith v. Obama*, CV 16-843 (CKK), 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (holding that Captain Smith’s lawsuit was dismissed based on lack of standing).

<sup>65</sup> See *Nat’l Treas. Emps.’ Union*, 101 F.3d at 1427–28 (explaining the importance of standing which is determined by actual legal injury to plaintiff). See also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (holding that an injury must be particular to the plaintiff for there to

Powers Resolution and military force: (1) members of Congress and (2) everyone else.<sup>66</sup>

Members of the military, part of the everyone-elses, can also bring suit like Captain Smith, whose complaint recited his injuries to show standing.<sup>67</sup> His presumed legal injuries, however, did not grant standing, and the courts have found other reasons to dismiss on standing for military members.<sup>68</sup> Therefore, standing is the initial constitutional hurdle that plaintiffs must overcome.<sup>69</sup>

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be standing); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216–21 (1974) (holding that a case litigating the War Powers is dismissed due to standing which must show actual injury which plaintiffs could not show); *Page v. Shelby*, 995 F. Supp. 23, 27 (D.D.C. 1998) (outlining the requirements for standing for a lawsuit in which a citizen sued the U.S. Senate to change its rules); *Pietsch v. Bush*, 755 F. Supp. 62, 66 (E.D.N.Y. 1991), *aff'd*, 935 F.2d 1278 (2d Cir. 1991) (holding that merely being a taxpayer could not provide the requisite legal injury to grant standing to plaintiff in his suit). *Pietsch* also denotes that standing challenges government action, and “[p]romotes separation of powers . . . preventing lawsuits [who have] only an academic interest in the outcome of the case [while] ensuring that a specific controversy is [brought] before the court and that interested advocates litigate the controversy.” *Id.*

<sup>66</sup> See, e.g., *Pietsch*, 755 F. Supp. at 66 (finding that the plaintiff could not claim standing merely by being a taxpayer); *Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.D.C. 1987) (holding the court would dismiss an action brought by Congress members to force President Reagan to report, per the War Powers resolution, on his military actions in the Persian Gulf in combating Iran and Iranian forces). The distinction between members of Congress and non-members is a clear divide for all the case law regarding standing.

<sup>67</sup> See Compl., *Smith v. Obama*, No. 1:16-cv-00843 (D.D.C. 2016), 2016 WL 2347065, at \*2–\*3 (alleging President Obama’s violation of the War Powers Resolution constitute a legal injury to Captain Smith because President Obama’s orders violate a soldier’s oath).

<sup>68</sup> See *id.* (alleging President Obama’s violation of the War Powers Resolution constitute a legal injury to Captain Smith given that the effects of President Obama’s military orders violate a soldier’s oath to Constitution and country); *Smith v. Obama*, CV 16-843 (CKK), 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (“[b]ecause the specific legal injury about which he complains is not sufficiently concrete or particularized,” *i.e.* Captain Smith lacked standing). See also *Ange v. Bush*, 752 F. Supp. 509, 511 (D.D.C. 1990) (applying the *Ash* test from *Cort v. Ash*, 422 U.S. 66 (1975), which provides for the private cause of action within a statute, and the court ruling that Ange did have standing even as the court dismissed the lawsuit on other grounds). *But see Reservists Comm. to Stop the War*, 418 U.S. at 216–21 (holding that a case is dismissed due to standing which must show actual injury despite the plaintiffs being reservist and active-duty soldiers).

<sup>69</sup> See *Reservists Comm. to Stop the War*, 418 U.S. at 215–221 (holding that a case is dismissed due to standing which must show actual injury even when the plaintiffs are soldiers); *Doe v. Bush*, 323 F.3d 133, 134 (1st Cir. 2003) (holding that a suit to prevent the invasion of Iraq under President George W. Bush was a non-justiciable item, even when parents of soldiers, active duty troops, reservists, and congressional members are the plaintiffs); *Pietsch*, 755 F. Supp. at 66 (holding that plaintiff’s claims of being a taxpayer did not grant standing); *Ange*, 752 F. Supp. at 511 (applying the *Ash* test from *Cort v. Ash* to interpret a private cause of action within a statute, and the court ruling that Ange did have standing to challenge the first Gulf War even as the court dismissed the lawsuit on political question); Lederman, *Captain Smith’s Suit*, *supra* note 11 (describing how Captain Smith’s suit will fail based on

Member of Congress have also tried to litigate the War Powers Resolution.<sup>70</sup> Similarly, members of Congress must also have standing.<sup>71</sup> Likewise, the courts have dismissed Congressional members' suits for lacking standing, even claims of standing based on stewardship of taxpayer dollars.<sup>72</sup> Although often lacking standing and thereby access to the courts, members of Congress also have access to Congressional fora to disagree with military action which they should utilize rather than the courts.<sup>73</sup> Moreover, the courts will typically find that Congress cannot litigate the War Powers Resolution.<sup>74</sup>

*b. Dismissal Unattached to Standing*

Beyond standing, courts have other doctrinal reasons to dismiss any litigation involving the War Powers Resolution beyond simply standing.<sup>75</sup> One doctrine is mootness, and another is political question.<sup>76</sup> The courts

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standing); Goldsmith, *Analysis of Lawsuit*, *supra* note 11 (predicting that Captain Smith's lawsuit will fail due to the political question doctrine and standing problem).

<sup>70</sup> See *Doe*, 323 F.3d at 134 (holding that a suit to prevent the invasion of Iraq under President George W. Bush was a non-justiciable item, even when plaintiffs included congressional members); *Lowry*, 676 F. Supp. at 337 (holding that President Reagan's actions in the Persian Gulf were non-justiciable and that Congress members lacked standing).

<sup>71</sup> See *Doe*, 323 F.3d at 134 (holding that a lawsuit including members of Congress to prevent the invasion of Iraq under President George W. Bush was a non-justiciable item); *Lowry*, 676 F. Supp. at 337 (holding that members of Congress lacked standing to challenge President Reagan's actions in the Persian Gulf).

<sup>72</sup> See *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (holding that Congress cannot use the courts under the War Powers Resolution to review Executive actions). See also *Doe*, 323 F.3d at 134 (dismissing a suit to prevent the invasion of Iraq under President George W. Bush was a non-justiciable item, even when including plaintiffs included congressional members); *Lowry*, 676 F. Supp. at 337 (holding that a lawsuit by members of Congress seeking a report per the War Powers Resolution on President Reagan's actions in the Persian Gulf was non-justiciable because Congress members lacked standing).

<sup>73</sup> See *Raines v. Byrd*, 521 U.S. 811, 820-30 (1997) (holding that Congress has the congressional forum to express its displeasure with policy, and that such suits are barred by standing and political question doctrines); *Doe*, 323 F.3d at 134 (dismissing as a non-justiciable item a suit to prevent the invasion of Iraq under President George W. Bush despite parents of soldiers, active duty troops, reservists, and congressional members being the plaintiffs); *Lowry*, 676 F. Supp. at 337 (holding that judicial review of President Reagan's actions in the Persian Gulf based on a lawsuit by Congress members was non-justiciable). See generally *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (holding that a Congressman lacked standing to challenge President Obama's policy because the Congressman had a congressional forum to challenge presidential power).

<sup>74</sup> See *Crockett*, 720 F.2d at 1356-57 (dismissing a suit by Congress to review Executive actions under the War Powers Resolution).

<sup>75</sup> See *supra* Part II.B.1.a (outlining the contours of standing problems leading to dismissal of lawsuits); *infra* Part II.B.1.b (presenting other doctrines leading to dismissal of lawsuits litigating the War Powers Resolution).

<sup>76</sup> See, e.g., *Conyers v. Reagan*, 765 F.2d 1124, 1125 (D.C. Cir. 1985) (holding that the invasion of Grenada had already occurred, making the issue moot and thereby non-

also have a favored disposition toward the military and national security.<sup>77</sup> Finally, the *Feres* Doctrine bars civil suits against the military.<sup>78</sup> All of these doctrines lead to dismissal.<sup>79</sup>

Mootness means that a controversy is no longer ripe, and a recurring injury does not counter mootness.<sup>80</sup> Even if plaintiffs had standing to bring a case, military action may move too swiftly for the courts to react.<sup>81</sup> In short, sometimes the military action has already achieved its purpose, removing the impetus for the lawsuit, hence the problem of mootness.<sup>82</sup>

Certain controversies are, by their nature, outside of what the courts will entertain; as Justice Douglass noted “[u]sed to bar from the courts questions which . . . the Constitution . . . left to the other two coordinate Branches to resolve, viz., the so-called political question.”<sup>83</sup> The political question doctrine is a narrow doctrine and relates to the enumerated powers of the various branches.<sup>84</sup> The War Powers are enumerated

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justiciable); *infra* Part II.B.1.b (describing, *inter alia* the political question doctrine meaning that certain controversies are issues solved by the political branches, *i.e.*, Legislative and Executive branches, and are therefore non-justiciable controversies which are beyond court rulings).

<sup>77</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 229 (1974) (discussing the doctrines of state secrets and general deference to the military and military acts). See also *United States v. Reynolds*, 345 U.S. 1, 10–12 (1953) (presenting the state secrets privilege).

<sup>78</sup> See generally *Feres v. United States*, 340 U.S. 135 (1950) (introducing the *Feres* Doctrine and its bar to civil suits).

<sup>79</sup> See *supra* Part II.B.1.a (outlining the standing doctrine and problems associated therewith, leading to dismissal of lawsuits). See also *infra* Part II.B.1.b (outlining other doctrines which bar lawsuits tied to the War Powers and War Powers Resolution).

<sup>80</sup> See generally *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (holding that Congressmen lacked standing in a suit by Congressmen suing President Clinton over the use of military force in Yugoslavia, but also noting in dicta and concurrence that mootness was an alternative doctrine which would have dismissed the case); *Whitney v. Obama*, 845 F.Supp.2d 136 (D.D.C. 2012) (holding that the controversy was moot even if there was an alleged recurring violation and that mootness of the suit did assume that the plaintiff had standing). See also *Conyers*, 765 F.2d at 1125 (holding that mootness made the lawsuit to prevent the invasion of Grenada non-justiciable because it had already occurred and continued occupation did not offend the War Powers Resolution).

<sup>81</sup> See *Conyers*, 765 F.2d at 1125 (holding that mootness rendered the lawsuit to prevent the invasion of Grenada non-justiciable and thus dismissed the case because the invasion had already occurred and continued occupation did not offend the War Powers Resolution). See also *Whitney*, 845 F.Supp.2d at 137–40 (holding that the controversy was moot despite an alleged recurring violation and whilst mootness of the suit did assume that the plaintiff had standing).

<sup>82</sup> See *Conyers*, 765 F.2d at 1125 (dismissing the lawsuit on grounds of mootness because the invasion of Grenada had already occurred).

<sup>83</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 229 (1974).

<sup>84</sup> See generally § 3534.1 Political Questions—Political Issues and Separation of Powers, 13C FED. PRAC. & PROC. JURIS. § 3534.1 (3d ed.) (outlining the contours and limits of the political question doctrine). But see generally Rachel E. Barkow, *More Supreme Than Court?*

powers, and the courts have dismissed various lawsuits based on the political question doctrine.<sup>85</sup> For instance, the court noted the political question doctrine was an alternative reason to dismiss Captain Smith's suit.<sup>86</sup> Thus, the political question doctrine is also a bar to litigating the War Powers and War Powers Resolution.<sup>87</sup>

One other ground for dismissal is general deference to the military and national security.<sup>88</sup> The state secrets doctrine is an evidentiary privilege which keeps information related to state secrets or national security out of the courts for fear of disclosure.<sup>89</sup> The states secrets doctrine also has an example of false invocation, such as *United States v. Reynolds*.<sup>90</sup> Moreover, in recent years the state's secrets doctrine has

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*The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (questioning the political question doctrine).

<sup>85</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186, 218–29 (1962) (dismissing a challenge via litigation, asserting the requirements of standing and doctrine of political question). See also *Raines v. Byrd*, 521 U.S. 811, 820–30 (1997) (holding that Congress has the congressional forum to express its displeasure with policy, and that such suits are barred by standing and political question doctrines when seeking to assert standing as a legislature for challenging presidential action); *Doe v. Bush*, 323 F.3d 133, 134 (1st Cir. 2003) (holding that a suit to prevent George W. Bush's invasion of Iraq was a non-justiciable item, even when plaintiffs ranged from parents of soldiers, active duty troops, reservists, and to congressional members); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (dismissing a challenge to the President's Vietnam War policy).

<sup>86</sup> See *Smith v. Obama*, CV 16-843 (CKK), 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (“the Court finds that Plaintiff's claims raise non-justiciable political questions”).

<sup>87</sup> See *supra* Part II.B.1.b (explaining the political question doctrine and its problems for litigation of the War Powers Resolution).

<sup>88</sup> See *infra* Part II.B.1.b (outlining, *inter alia*, the state secrets doctrine and its various flavors as well as the general deference to the military, both of which are doctrinal hurdles for using the courts to pursue legal action based on the War Powers Resolution).

<sup>89</sup> Compare Robert E. Barnsby, *So Long, and Thanks for All the Secrets: A Response to Professor Telman*, 63 ALA. L. REV. 667, 668–70 (2011) (replying to an article stating that the states secrets doctrine, which forbids lawsuits based on secrecy includes the *Totten* doctrine, which Professor Telman maintains (and teaches) is a purely contract doctrine dealing with the non-justiciability of a secret agreement to spy between President Lincoln and his agent with secrecy as an inferred term), with D.A. Jeremy Telman, *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2191656](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191656) [<https://perma.cc/PNH5-D42N>] (explaining that the state secrets privilege cannot be conflated with the *Totten* Doctrine of contracts which deals solely with inferred terms of secrecy, forbidding justiciability of the contract apart from any state secrets), and D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2011) (explaining problems with the expanded state secrets doctrine and its morphing from a doctrine centered around evidentiary to a doctrine of dismissal as well as analyzing the misuse of the *Totten* Doctrine).

<sup>90</sup> See *United States v. Reynolds*, 345 U.S. 1, 10–12 (1953) (holding, in a wrongful death case of an Air Force accident resulting in death of a crewman, that it was reasonably possible that military secrets were involved and that there existed sufficient showing of privilege to cut off further demand for production making state secrets an evidentiary privilege). *But see* ANDREW BACEVICH, *THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM*, 86 (2008)



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transformed from an evidentiary privilege to a dispositive privilege to dismiss suits.<sup>91</sup> Additionally, the courts have shown a degree of deference toward the military and military policy underscoring the President's authority as Commander-in-Chief.<sup>92</sup> One example is the *Koramatsu* decision, where the Court found that military necessity was an adequate reason for the internment of Japanese-Americans.<sup>93</sup> Taken together, state secrets and deference to the military are additional bars to litigation.<sup>94</sup>

Finally, specific to military members, is the *Feres* Doctrine, which grants civil suit immunity to the military in a wide variety of causes of action.<sup>95</sup> The end result is that the courts dismiss these suits under the

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[hereinafter BACEVICH, LIMITS OF POWER] (recounting, from another source, the subsequent history of *Reynolds*, where later declassified documents showed that the claim of disclosure of national secrets and threat to national security proved to be an outright lie to hide embarrassment rather than the possibility of secrets being disclosed, in turn showing how the national security excuse can be used to hide questionable conduct).

<sup>91</sup> See *Reynolds*, 345 U.S. at 10-12 (holding that it was reasonably possible that military secrets were involved in an Air Force accident which sufficed to cut off further demand for production in discovery). But see BACEVICH, LIMITS OF POWER, *supra* note 90, at 86-87 (recapitulating the subsequent declassified history of *United States v. Reynolds* and showing that the claim of disclosure of national secrets and threat to national security proved to hide embarrassment rather than disclosure of secrets); Glenn Greenwald, *Court Accepts DOJ's 'State Secrets' Claim to Protect Shadowy Neocons: a New Low*, INTERCEPT (Mar. 26, 2015, 9:34 AM) <https://theintercept.com/2015/03/26/new-low-obama-doj-federal-courts-abusing-state-secrets-privilege/> [<https://perma.cc/62PS-ZF6X>] [hereinafter Greenwald, *Court Accepts DOJ's 'State Secrets' Claim*] (commenting on the dismissal of *Restis v. Am. Coalition Against Nuclear Iran, Inc.*, 13 CIV. 5032 ER, 2015 WL 1344479 (S.D.N.Y. 2015) and questioning why, in a private civil litigation tort suit between someone claiming defamation and a lobbyist group, did the DOJ intervene and had the suit dismissed based on the state secret doctrine and commenting on the state secrets doctrine's transformation under the George W. Bush and Obama Presidencies to a dispositive doctrine).

<sup>92</sup> See generally *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7 (2008) (holding the U.S. Navy, in order to train, could conduct sonar training per an exception granted by the President); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (remarking on the deference to government agencies against injunctive relief such as the CIA); *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that deference to national security and military met the standard of strict scrutiny necessitated by a racial classification); *Swaim v. United States*, 165 U.S. 553 (1897) (holding that the President as executive controls the military while Congress controls military regulations).

<sup>93</sup> See 323 U.S. at 215-24 (holding that national security and military necessity met constitutional strict scrutiny of a racial classification underpinning internment of Japanese-Americans during WWII).

<sup>94</sup> See *supra* Part II.B.1.b (outlining the complementary doctrines of state secrets and general deference to the military functioning as bars to litigation of the War Powers or War Powers Resolution).

<sup>95</sup> See generally *Feres v. United States*, 340 U.S. 135 (1950) (introducing the *Feres* Doctrine, which holds that the military has civil suit immunity from members of the military or their widows when the injury arises from conditions endemic to military service). See also *Smith v. United States*, 196 F.3d 774, 775 (7th Cir. 1999) (applying the *Feres* Doctrine and barring a civil suit for sexual assault); *The Feres Doctrine and Sexual Assault*, 50 TR. 54, 54 (March 2014)

*Feres* Doctrine.<sup>96</sup> Because Captain Smith's suit is against the Commander-in-Chief, such a suit could also be barred under the *Feres* Doctrine, although the *Feres* Doctrine has primarily been a torts doctrine.<sup>97</sup> Thus, the *Feres* Doctrine could act as a bar to litigants.<sup>98</sup> In short, multiple judicial doctrines exist, such as standing, or mootness, or political questions, which bar litigation of the War Powers doctrine.<sup>99</sup>

## 2. Congress and Legislative Turmoil and the Executive Branch and its Prerogatives

If the War Powers are truly a political question, then part of the blame is with Congress.<sup>100</sup> Congress, as a legislature, is a barometer of the public's concern and mores.<sup>101</sup> Congress has the power to declare war and also to amend the War Powers Resolution.<sup>102</sup> Congress also has the power

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(detailing the *Feres* Doctrine and its bar to civil suits, especially in the context of sexual assault).

<sup>96</sup> See *United States v. Shearer*, 473 U.S. 52, 57-59 (1985) (holding that the *Feres* Doctrine bars a civil suit of wrongful death when one soldier kills another soldier who is off-duty); *Smith*, 196 F.3d at 775 (holding that the *Feres* Doctrine bars civil suits in the context of one member of the military suing another for sexual assault tort damages); *The Feres Doctrine and Sexual Assault*, 50 Tr. 54, 54 (March 2014) (detailing the *Feres* Doctrine as a bar to civil suits involving tort damages for sexual assault).

<sup>97</sup> See, e.g., *Swaim v. United States*, 165 U.S. 553, 556-57 (1897) (holding that the President as executive controls the military as Commander-in-Chief while Congress controls military regulations via legislation); *Ex parte Vallandigham*, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (holding that the Commander-in-Chief is a part of the chain-of-command). See also *Feres*, 340 U.S. at 146 (introducing the *Feres* Doctrine and U.S. government and military civil suit immunity).

<sup>98</sup> See *Feres*, 340 U.S. at 146 (holding that the government has civil suit immunity from members of the military or their widows when the injury arises from conditions endemic to military service extending to the military branches).

<sup>99</sup> See *supra* Part II.B.1 (outlining doctrinal bars to litigation of the War Powers Resolution which can lead to dismissal of the lawsuit).

<sup>100</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 229 (1974) (Douglas J., dissenting) (speaking on the political question doctrine, which is "[a]lso used to bar from the courts questions which . . . the Constitution . . . left to the other two coordinate Branches to resolve, viz., the so-called political question"). See also GRIFFIN, *LONG WARS*, *supra* note 18, at 273 (viewing as key that the lack of cooperation between Congress and the Presidency in the decision to use military force).

<sup>101</sup> See *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (citing *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989) in holding that acts of the [legislatures] serve as objective evidence for the attitudes of society). But see generally MIKE LOFGREN, *THE PARTY IS OVER: HOW REPUBLICANS WENT CRAZY, DEMOCRATS BECAME USELESS, AND THE MIDDLE CLASS GOT SHAFTE*D (2012) (arguing that the Republican Party has transitioned into a parliamentary party within the U.S. system which is a reason for the paralysis of government based on partisan politics).

<sup>102</sup> See Kasperowicz, *GOP Bill*, *supra* note 46 (reporting on attempts of Congressional Republicans to repeal the War Powers Resolution); Schulte, *Defeat the Repeal*, *supra* note 46 (recounting an attempt to repeal the War Powers Resolution); Walters, *War Powers Resolution*, *supra* note 45 (presenting a report of Congressional misgivings in the War Powers

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of the purse, meaning that they could cease funding the military despite the bitter pill politically.<sup>103</sup> Congress has also not repealed either of the AUMFs, and Congress' continued funding for the military is tacit agreement on the use of military force amidst Congress' calls for a new AUMF.<sup>104</sup> One possible solution proposed is for Congress to have an office for litigation, using the courts alongside legislative fora.<sup>105</sup> Congress also suffers from problems of partisanship, which aids Executive Branch encroachment.<sup>106</sup> Moreover, multiple lawsuits have had their impetus with partisan sentiments.<sup>107</sup>

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Resolution); Kaine, *Reforming the War Powers Resolution*, *supra* note 47 (presenting Senator Kaine's failure to amend the War Powers Resolution); GRIFFIN, *LONG WARS*, *supra* note 18, at 273 (mentioning that the lack of cooperation between Congress and the Presidency is a key component of the decision to use military force). *See also* Miksha, *War Powers Resolution*, *supra* note 47, at 690-93 (proposing a constitutional amendment while repealing the War Powers Resolution and making a war council while lacking express enforcement).

<sup>103</sup> *See* U.S. CONST. art. I, § 8, cl. 12 (granting Congress the power of the purse, i.e. that Congress votes for funding military operations). *Compare* YOO, *AFFAIRS AFTER 9/11*, *supra* note 27, at 352-53 (arguing that Congress retains the power of the purse, and can fund or not fund military power, regardless of political cost), *with* GRIFFIN, *LONG WARS*, *supra* note 18, at 203-04 (noting Yoo's argument that the War Powers is not a restraint on the presidency, and this argument ignores the complex history surrounding the War Powers Resolution); and KENNETH SCHULTZ, *Domestic Politics and International Relations* 489-90, in *HANDBOOK OF INT'L REL.* (Walter Carlsnaes et al eds., 2d ed. 2013) [hereinafter SCHULTZ, *Domestic Politics*] (citing Mueller as an example to describe the "rally around the flag effect" in which a country's leader, e.g., the President, receives increased political support when the country becomes involved in military conflict).

<sup>104</sup> *See Reservoirs Comm. to Stop the War*, 418 U.S. at 231 (remarking that continued Congressional funding legitimized prosecution of the Vietnam War); Cody Poplin, *35 Lawmakers Pen Bipartisan Letter Calling for ISIS AUMF*, *LAWFARE* (Nov. 9, 2015, 5:08 PM), <https://www.lawfareblog.com/35-lawmakers-pen-bipartisan-letter-calling-isis-aumf> [<https://perma.cc/C7PB-7PTW>] [hereinafter Poplin, *35 Lawmakers Pen Bipartisan AUMF*] (noting that lawmakers requested a new AUMF for ISIL); Goldsmith, *Analysis of Lawsuit*, *supra* note 11 (remarking that Congress' continued funding of military operations is a tacit acknowledgement of Presidential-led military action).

<sup>105</sup> *See generally* Amanda Frost, *Congress in Court*, 59 *UCLA L. REV.* 914, 968 (2012) [hereinafter Frost, *Congress in Court*] (arguing that Congress should more vigorously challenge, via lawsuit, Executive encroachment).

<sup>106</sup> *See generally* Frost, *Congress in Court*, *supra* note 105, at 968 (arguing that Congress should more vigorously challenge Executive encroachment by using the courts); MANN & ORNSTEIN, *WORSE THAN IT LOOKS*, *supra* note 48 (maintaining that the current constitutional political system and Congress are paralyzed due to a hyper partisan Republican party).

<sup>107</sup> *See* *Conyers v. Reagan*, 765 F.2d 1124, 1125 (D.C. Cir. 1985) (holding that mootness dismissed the lawsuit to prevent the invasion of Grenada); *Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.D.C. 1987) (holding that members of Congress could not judicially contest President Reagan's actions in the Persian Gulf). *See generally* *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (holding that the courts are barred for Congress to review Executive actions under the War Powers Resolution); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002) (ruling that Congress lacked standing and was also barred by the political question doctrine of challenging a President's foreign policy decisions because the President

On the other hand, if the War Powers are truly a political question, then the other part of the blame lies with the Executive Branch.<sup>108</sup> Post-WWII, the Executive Branch monopolized deciding to use military force, moving from an interbranch decision to an interagency decision within the Executive Branch.<sup>109</sup> From this confluence comes the argument that Congress does not declare war, but rather that the Executive Branch does so while Congress supports it and pays for it.<sup>110</sup> Regardless of political party, the DOJ's OLC has authored multiple opinions arguing that the President can use military force absent Congress' approval, even when the situation looks analogous to war.<sup>111</sup> This opinion remains bipartisan

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determines the national interest); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (holding that a Congressman lacked standing to challenge President Obama's policy because the Congressman should have challenged presidential power in Congress).

<sup>108</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 229 (1974) (Douglas J., dissenting) (speaking on the issue of political question, which is "[a]lso used to bar from the courts questions which . . . the Constitution . . . left to the other two coordinate Branches to resolve, viz., the so-called political question" meaning that the lawsuit would also have failed based on the political question doctrine). See also GRIFFIN, *LONG WARS*, *supra* note 18, at 273 (noting that a key part of the decision to use military force rests on the lack of cooperation between Congress and the Presidency).

<sup>109</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–22 (1936) (holding that the President is the constitutional representative of the United States for foreign affairs, and that his decisions, pursuant to legislative directive are at their highest to withstand judicial scrutiny); GRIFFIN, *LONG WARS*, *supra* note 18, at 53 (noting the change from interbranch decision-making on the use of military force between Congress and the President to an interagency decision after 1945). See also *id.* at 63–64 (describing the interagency approach after the decision of *Curtiss-Wright* set a legal mainstay of subsuming the war powers within the Executive's powers of foreign policy).

<sup>110</sup> See YOO, *AFFAIRS AFTER 9/11*, *supra* note 27, at 144–52 (arguing that the original textual meaning of "declare" which allows Congress to declare war should not be taken to mean that Congress initiates war).

<sup>111</sup> See generally *Authority to use Military Force in Libya*, 35 Op. O.L.C. (2011), [https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf) [<https://perma.cc/43EA-8NVL>] [hereinafter O.L.C., *Libya*] (opining to President Barack Obama that using military force in Libya was within the President's constitutional authority minus a declaration of war or prior approval from Congress because of the low scale of the use of military power and the prior uses of military force for limited objectives such as Bosnia or Kosovo); *Effect of a Recent U.N.S.C. Res. on the Auth. of the President Under Int'l L. To Use Mil. Force Against Iraq*, 26 Op. O.L.C. 199 (2002), [https://www.justice.gov/sites/default/files/olc/opinions/2002/11/31/op-olc-v026-p0199\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2002/11/31/op-olc-v026-p0199_0.pdf) [<https://perma.cc/QJ94-PWKA>] [hereinafter O.L.C., *Iraq II*] (opining to President George W. Bush about the second AUMF and the UN Security Council's resolutions); *Auth. of the President Under Dom. & Int'l. L. to Use Mil. Force Against Iraq*, 26 Op. O.L.C. 143 (2002), [https://www.justice.gov/sites/default/files/olc/opinions/2002/10/31/op-olc-v026-p0143\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2002/10/31/op-olc-v026-p0143_0.pdf) [<https://perma.cc/T6WM-HR85>] [hereinafter O.L.C., *Iraq I*] (opining to President George W. Bush about presidential discretion and use of military force against Iraq); *The President's Con. Auth. to Conduct Mil. Operations Against Terrorists and Nations Supporting Them*, 25 Op. O.L.C. 188 (2001), [https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188_0.pdf) [<https://perma.cc/6S85->

policy for multiple Presidencies.<sup>112</sup> Presidents have treated Congressional resolutions as an acknowledgement of Presidential decisions rather than the greenlight for military action.<sup>113</sup> But this legal status has not been viewed as aberrant.<sup>114</sup> Moreover, the President, guarding the national interest, remains the paramount office involved in foreign policy, upholding the President's oath, including defense of the country.<sup>115</sup> Such actions have also not led to impeachment of the President.<sup>116</sup> Moreover, the Presidency remains the major office with the greatest degree of power

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B6H5] [hereinafter O.L.C., *Terrorists*] (opining to President George W. Bush about his presidential discretion and powers to conduct operations against terrorism); O.L.C., *Somalia*, *supra* note 50 (opining about the presidential discretion to use the military in Somalia in 1992).

<sup>112</sup> See also generally Chris Edelson, *Breaking the Cycle of Unrestrained Presidential National Security Power*, 32-33, (Aug. 2, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2817544](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817544) [<https://perma.cc/285Y-VR9Q>] [hereinafter Edelson, *Breaking the Cycle*] (arguing that there is more that the courts and Congress can do within the framework of the War Powers Resolution to improve the decision-making process for employing military force). See generally O.L.C., *Iraq II*, *supra* note 111 (opining about the second AUMF and Presidential Authority); O.L.C., *Iraq I*, *supra* note 111 (opining about George W. Bush's presidential discretion and use of military force against Iraq); O.L.C., *Terrorists*, *supra* note 111 (opining about George W. Bush's presidential discretion and powers to conduct operations against terrorism per the first AUMF); O.L.C., *Somalia*, *supra* note 50 (opining on the use of military force as within President Bill Clinton's discretion); Glenn Greenwald, *Key Democrats, Led by Hillary Clinton, Leave No doubt that Endless War is Official U.S. Doctrine*, INTERCEPT (Oct. 7, 2014, at 7:56 AM), <https://theintercept.com/2014/10/07/key-democrats-led-hillary-clinton-leave-doubt-endless-war-u-s-doctrine/> [<https://perma.cc/8C5K-UWRQ>] [hereinafter Greenwald, *Key Democrats*] (arguing that a change in presidents will not change the U.S. policy of perpetual war).

<sup>113</sup> See GRIFFIN, *LONG WARS*, *supra* note 18, at 240-42 (noting that Presidents have treated authorizations from Congress as sufficient blessings rather than necessary grants of permission).

<sup>114</sup> See generally Edelson, *Breaking the Cycle*, *supra* note 112 (arguing that Congress and the courts can do more within the framework of the War Powers Resolution by applying tangential case law limiting Executive power).

<sup>115</sup> See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936) (articulating the primacy of the President in the realm of foreign policy and defining the national interest). See also *Alsabri v. Obama*, 764 F. Supp. 2d 60, 62 (D.D.C. 2011), *aff'd*, 684 F.3d 1298 (D.C. Cir. 2012) (affirming the AUMF's grant of broad war powers to the President and their use for detention); U.S. CONST. art. I, § 2, cl. 8 (noting the President's oath to preserve, protect, and defend); *The Amy Warwick*, 67 U.S. 635, 659-66 (1862) (holding that Congress' declaration of war does not preclude the President's military orders during an existing state of belligerency); Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASHINGTON Q., Spring 2003, at 89, 90-91 (explaining the Caroline Doctrine and its limited parameters allowing for preemptive self-defense as long as: (1) the threat is imminent; (2) all alternatives to use of force are exhausted; and (3) the response is proportional); Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1 (2004) (arguing that the President's oath endows the President with certain national security powers to uphold that oath).

<sup>116</sup> See GRIFFIN, *LONG WARS*, *supra* note 18, at 240 (decrying the possibility of impeachment as a remedy for consequences of the President's use of military force).

regarding the use of military force.<sup>117</sup> In short, the Executive Branch has nearly monopolized the decision to use the military.<sup>118</sup>

### C. Policy Implications and Constitutional Amendments

Perpetual war has had multiple effects on American foreign and domestic policy.<sup>119</sup> Part II.C.1 presents the policy implications of perpetual war.<sup>120</sup> Part II.C.2 presents the ways of amending the U.S. Constitution.<sup>121</sup>

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<sup>117</sup> See Alex Emmons, *Major New Court Ruling Says “Even The President” Can’t Declare Torture Lawful*, INTERCEPT (Oct. 21, 2016, at 1:45 AM), <https://theintercept.com/2016/10/21/major-new-court-ruling-says-even-the-president-cant-declare-torture-lawful/> [<https://perma.cc/MW8R-UUPJ>] (reporting a court ruling that the President cannot intervene to protect a company accused of complicity in torture based solely on the President’s authority); Glenn Greenwald, *Democrats, Trump, and the Ongoing, Dangerous Refusal to Learn the Lesson of Brexit*, INTERCEPT (Nov. 9, 2016, at 9:43 AM), <https://theintercept.com/2016/11/09/democrats-trump-and-the-ongoing-dangerous-refusal-to-learn-the-lesson-of-brexit/> [<https://perma.cc/TJ9W-66QD>] [hereinafter Greenwald, *Brexit*] (detailing the war powers of the President which President Trump will take upon his ascension to the Presidency, including the high concentration of powers under the Executive Branch); Alex Emmons, *Commander-In-Chief Donald Trump Will Have Terrifying Powers. Thanks, Obama.*, INTERCEPT (Nov. 11, 2016, at 2:39 PM), <https://theintercept.com/2016/11/11/commander-in-chief-donald-trump-will-have-terrifying-powers-thanks-obama/> [<https://perma.cc/HRQ7-DLX5>] [hereinafter Emmons, *Thanks Obama*] (detailing the War Powers of President Trump including the drone program and other military powers which are currently within the expanded powers of the Executive Branch). See also generally *Ex parte Vallandigham*, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (holding that the President, as Commander-in-Chief, is the apex of the military chain-of-command).

<sup>118</sup> See GRIFFIN, *LONG WARS*, *supra* note 18, at 240–42 (noting that Presidents have treated authorizations not as grants of permission but as blessing to a pre-determined course of action). See generally O.L.C., *Libya*, *supra* note 111 (opining that the use of military force in Libya was within the President’s constitutional authority without a declaration of war or prior approval from Congress because the low scale of the use of military power was not “war”); O.L.C., *Iraq II*, *supra* note 111 (opining to President George W. Bush about the second AUMF and Presidential Authority, the national interest, and presidential discretion); O.L.C., *Iraq I*, *supra* note 111 (opining on presidential discretion and use of military force against Iraq); O.L.C., *Terrorists*, *supra* note 111 (opining about George W. Bush’s war powers to conduct operations against terrorism under the first AUMF); O.L.C., *Somalia*, *supra* note 50 (opining about Bill Clinton’s presidential discretion to use military force); Frost, *Congress in Court*, *supra* note 105, at 949, 968 (arguing that Congress should more vigorously challenge encroachment by the Executive Branch via the judiciary).

<sup>119</sup> See *infra* Part II.C.1 (noting the domestic and foreign policy implications of perpetual war).

<sup>120</sup> See *infra* Part II.C.1 (describing the domestic and foreign policy implications of perpetual war such as economic pressures upon the political system as well as a more militarized foreign policy).

<sup>121</sup> See *infra* Part II.C.2 (outlining the ways and pitfalls of amending the U.S. Constitution).

1. Policy Implications of Perpetual War

Profound policy implications and results of the current legal status for the use of military force exist, which some have described as enabling perpetual war.<sup>122</sup> Perpetual war has multiple effects, which warp the policies of the United States.<sup>123</sup> One warping effect is the extreme amounts of money spent on national security, which can exacerbate political incentives, further incentivizing Presidential use of military force and Congressional abdication.<sup>124</sup> This national security spending is also deficit-driven, meaning further expenditures actually reduce security.<sup>125</sup> Another warping effect suggested is the overly heavy reliance on military force as a tool of foreign policy.<sup>126</sup>

One further point is that the perpetual war policy tempts further interventionist military adventurism, a popular policy with foreign policy elites.<sup>127</sup> This policy, which often backfires, perpetuates various

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<sup>122</sup> See Emmons, *Neverending War*, *supra* note 1 (arguing that U.S. military engagement in the Middle East appears the cornerstone of American foreign policy).

<sup>123</sup> See Glenn Greenwald, *The Decade's Biggest Scam*, SALON (Aug. 29, 2011, at 09:30 AM), [http://www.salon.com/2011/08/29/terrorism\\_39/](http://www.salon.com/2011/08/29/terrorism_39/) [https://perma.cc/W2GW-SN6Q] [hereinafter Greenwald, *Decade's Biggest Scam*] (critiquing the large amount of money spent on security resulting from the "War on Terror"); Greenwald, *Key Democrats*, *supra* note 112 (arguing persuasively that a change in holder of the Presidency will not overturn the U.S. policy of perpetual war).

<sup>124</sup> See Greenwald, *Decade's Biggest Scam*, *supra* note 123 (critiquing the amount of spending based on the "War on Terror" in vain pursuit of security). See generally THORPE, AMERICAN WARFARE STATE, *supra* note 37 (arguing that the explosion of military funding has disproportionately increased pro-war pressures upon congressional districts and states with less-diversified economies, leading to support and congressional abdication).

<sup>125</sup> See BACEVICH, LIMITS OF POWER, *supra* note 90, at 10-11 (pointing out the deficit spending funding the national security state ends up reducing the capabilities of the United States).

<sup>126</sup> See U.S. Army War College, *2013 Strategic Conference*, *supra* note 12 (presenting a debate between Dr. Drezner and Mr. Nathan Frier where both parties agree on the excessive militarization of U.S. foreign policy relies heavily on the military to accomplish U.S. foreign policy goals). See also William & Mary U., *Stephen Walt William and Mary's IR Institute*, YOUTUBE (Oct. 25, 2013), <https://www.youtube.com/watch?v=Wu0WxTic1RA> [hereinafter William & Mary U., *Stephen Walt*] (containing a comment by Professor Walt indicating how the United States, and the United States alone, has a global military footprint and geographic combatant commands covering the entire world and leading to the problem of any crisis anywhere in the world impinges U.S. credibility and its military strength per other commentators).

<sup>127</sup> See Stephen Walt, *Why Is America So Bad at Promoting Democracy in Other Countries?*, FOREIGN POL'Y (April 25, 2016), <http://foreignpolicy.com/2016/04/25/why-is-america-so-bad-at-promoting-democracy-in-other-countries/> [https://perma.cc/LR95-SM9J] (arguing that interventionism is a popular policy despite America's abject failure in pursuit of this policy); Stephen Walt, *Why Is America's Foreign Policy Still Punching Above Its Weight?*, FOREIGN POL'Y (June 6, 2016), <http://foreignpolicy.com/2016/06/09/why-is-america-foreign-policy-still-punching-above-its-weight/> [https://perma.cc/B3UA-DQVP] (raising

pathologies within the U.S. foreign policy community.<sup>128</sup> Such a policy remains propped up by threat-mongering, even threat-mongering about terrorism.<sup>129</sup> Even a prospective change in the Presidency does not auger an end of such a policy of perpetual war and its negative effects.<sup>130</sup> Additionally, the policy of interventionism precludes other strategies, such as off-shore balancing and removing military forces to maintain a

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the question of whether the United States' foreign policy, due to its providential geopolitical situation, attempts to do too much with the detriment borne mostly by nations in which the United States practices its interventions); Stephen Walt, *Don't Knock Offshore Balancing Until You've Tried It*, FOREIGN POL'Y (Dec. 8, 2016), <https://foreignpolicy.com/2016/12/08/dont-knock-offshore-balancing-youve-tried-it-obama-middle-east-realism-liberal-hegemony/> [<https://perma.cc/PP6H-R6RC>] [hereinafter Walt, *Offshore Balancing*] (arguing that a more realist foreign policy means re-examining offshore balancing and its differences from the more liberal interventionist or neo-conservative foreign policy which treats a interventionist foreign policy as a mark of leadership).

<sup>128</sup> See William & Mary U., *Stephen Walt*, *supra* note 126 (presenting Professor Stephen Walt, a realist, who argues that America's geopolitical position surrounded by weak countries and two oceans and America's great wealth provide enough isolation to insulate America from the persistent problems stemming from an often incorrect foreign policy elite which lacks accountability for its numerous failures, proving a dictum misattributed to Otto von Bismark "there is a special kind of Providence which watches out for fools, drunkards, and the United States of America").

<sup>129</sup> See Stephen Walt, *Monsters of Our Own Imaginings*, FOREIGN POL'Y (Mar. 24, 2016), <http://foreignpolicy.com/2016/03/24/monsters-of-our-own-imaginings-brussels-bombings-islamic-state/> [<https://perma.cc/LBP4-NQAK>] (arguing that terrorism is an example of threat inflation and does not pose an existential threat); Stephen Walt, *Chill Out, America*, FOREIGN POL'Y (May 29, 2015), <http://foreignpolicy.com/2015/05/29/chill-out-america-fear-terror-threats/> [<https://perma.cc/8D2R-L2D7>] (noting the problems of threat inflation); WILLIAM & MARY U., *Stephen Walt*, *supra* note 126 (presenting Professor Stephen Walt, a realist, who argues that America's geopolitical position and great wealth provide enough isolation to insulate America from the persistent problems stemming from an often incorrect foreign policy elite which engages in threat inflation and fear mongering to make insignificant threats, such as Iran, into giants which are inflated beyond their actual degree of threat); Glenn Greenwald, *For Terrorist Fearmongers, It's Always the Scariest Time Ever*, INTERCEPT (June 2, 2015, at 1:25 PM), <https://theintercept.com/2015/06/02/fear-mongers-always-scariest-time-ever/> [<https://perma.cc/RX9Y-SQX5>] (noting the fearmongering associated with counterterrorism, with multiple instances of political and counterterrorism figures insisting, over the years, that a terrorist attack was nigh, but which failed to materialize).

<sup>130</sup> See Greenwald, *Key Democrats*, *supra* note 112 (arguing that a change in who is president will not change U.S. policy of perpetual war). *But see* Stephen Walt, *Why Are We So Sure Hillary Will Be a Hawk?*, FOREIGN POL'Y (Sept. 25, 2016), <https://foreignpolicy.com/2016/09/25/why-are-we-so-sure-hillary-will-be-a-hawk-election-trump-syria-iraq-obama/> [<https://perma.cc/7PMQ-38WU>] (expressing doubt that then-presidential-candidate Hillary Clinton would be an interventionist President given the major structural problems facing the United States which would be exacerbated in the event of an international interventionist agenda attributed (with ample historical reason) to Hillary Clinton).



balance of power.<sup>131</sup> In short, the current legal status of perpetual war relates to self-augmenting policy and strategic problems.<sup>132</sup>

## 2. Amending the Constitution

Finally, the Constitution could be amended rather than simply amending the War Powers Resolution; an amendment has been proposed before, focusing on expanding the people entrusted with the decision to use military force into a war council.<sup>133</sup> The Constitution has proven, over time, to be extremely difficult to amend, requiring super-majorities within both houses of Congress and the States.<sup>134</sup> Moreover, the various amendments to the Constitution have focused primarily on extending freedoms rather than representing a tinkering in the original workings of the Constitution.<sup>135</sup> One commentator has also questioned whether the U.S. Constitution and its conceptions of governance actually function well in the 21st Century, or whether its conceptions are antiquated notions

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<sup>131</sup> See Walt, *Offshore Balancing*, *supra* note 127 (arguing that a more realist foreign policy means re-examining the policy of off-shore balancing, which places forces outside of a perceived hotspot, and its differences from the more liberal interventionist or neo-conservative foreign policy which treats an interventionist foreign policy as a mark of leadership); JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 140–43 (2001) (arguing, as a realist, the United States is a regional hegemon and as a realist foreign policy should focus on strategies of off-shore balancing in order to forestall the emergence of other regional hegemons which could contest the United States' status).

<sup>132</sup> See *supra* Part II.C.1 (relating the policy implications of the current legal status of the use of military force).

<sup>133</sup> See Miksha, *War Powers Resolution*, *supra* note 47, at 690–93 (repealing the War Powers Resolution and substituting a constitutional amendment making a war council responsible for deciding to use military force).

<sup>134</sup> See U.S. CONST. art. V (describing the processes for amending the Constitution). See also LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS— AND A PLAN TO STOP IT*, 290–304 (reprint ed. 2011) [hereinafter LESSIG, *REPUBLIC, LOST*] (discussing, in the context of political campaign contribution reform, the process under the Constitution for amending the Constitution and how the approval of an amendment is unlikely due to the necessity of super-majorities in both houses of Congress and in the States to secure an amendment and the unlikelihood of the alternative of proposing an amendment via another Constitutional Convention per Article V of the Constitution).

<sup>135</sup> See, e.g., Vikram Amar, *The 20th Century – the Amendments and Populist Century*, 47 FED. LAW. 32 (May 2000) [hereinafter Amar, *Amendments and Populist Century*] (explaining the historical developments of constitutional amendments and how the amendments may be categorized). See also 50 U.S.C. § 1541(a) (2012) (beginning with “it is the purpose of this joint resolution to fulfill the intent of the Framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations” meaning that Congress intended to remedy a perceived constitutional pitfall via legislation rather than via a constitutional amendment).

from the Enlightenment.<sup>136</sup> Thus, while proposed before in a different fashion, actual effort on a constitutional amendment restructuring the War Powers has not occurred.<sup>137</sup>

Another feature of certain constitutional amendments is the phrase “The Congress shall have power to enforce this article by appropriate legislation.”<sup>138</sup> The language can mean that Congress has the power, via appropriate legislation, to enforce an amendment.<sup>139</sup> The specific language varies, but the fact remains that Congress, via legislation, can enforce amendments.<sup>140</sup>

### III. ANALYSIS

The current legal status, with reliance on AUMFs rather than as previously on declarations of war, bears close analysis, because that status is the current one for employing military power and is Part III.A.<sup>141</sup> Following that section, Part III.B.1 presents the analysis of a hypothetical case litigating the War Powers Resolution, showing the pitfalls and why

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<sup>136</sup> See U.S. Army War College, *2013 Strategic Conference*, *supra* note 12 (presenting a debate between Dr. Daniel Drezner and Mr. Nathan Frier in which Professor Drezner posits that the U.S. Constitution is antiquated, contributing to his main argument that the U.S. foreign policy is excessively militarized).

<sup>137</sup> See *supra* Part II.C.2 (outlining the process and pitfalls of amending the Constitution).

<sup>138</sup> See U.S. CONST. amend. XV, § 2 (allowing Congress the power to pass appropriate legislation to enforce universal male suffrage); *id.* amend. XXVI, § 2 (allowing Congress the power to pass appropriate legislation to enforce the right of citizens eighteen or older to vote); *id.* amend. XIV, § 5 (allowing Congress the power to pass appropriate legislation to enforce the provisions of the Fourteenth Amendment); *id.* amend. XIX (allowing Congress the power to pass appropriate legislation to enforce the right of women to vote); *id.* amend. XXIII, § 2 (allowing Congress the power to pass appropriate legislation to allow the District of Columbia to have electors within the Electoral College); *id.* amend. XXIV, § 2 (allowing Congress the power to pass appropriate legislation to allow the allowance of persons to stand to be electors regardless of poll taxes). All these Amendments contain the language allowing Congress to pass legislation enforcing the provisions of the Amendments, albeit that most, if not all, of these Amendments deal with the rights of voting, and have not been applied to other areas of the law.

<sup>139</sup> See *supra* note 138 (noting the language of multiple amendments which allow Congress to pass statutes to enforce the amendments). *But see generally* *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (striking down portions of the Voting Rights Act which had been upheld by *South Carolina v. Katzenbach*, 383 U.S. 301). See *generally* *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), abrogated by *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (holding that Congress has the power, via appropriate legislation, to enforce amendments with the language within limits prescribed in the Constitution).

<sup>140</sup> See *supra* note 138 (noting the multiple constitutional amendments which contain language allowing for Congress to enforce the amendments via appropriate legislation).

<sup>141</sup> See *infra* Part III.A (explaining that authorizations on the use of military force are the new legitimate form of Congressional Authorization for the use of military force by the President).

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such a case is mere hypothetical.<sup>142</sup> Part III.B.2 follows analyzing the Judicial Branch, shifting focus to the other two Branches and their shortcomings with the War Powers.<sup>143</sup> The final section of analysis will consider the resulting policy implications of the current status in Part III.C.1 and how an amendment process will serve as a solution in Part III.C.2.<sup>144</sup>

A. *History and Current Status*

Simply put, Congress alone has the power to declare war and fund military operations.<sup>145</sup> While the President remains Commander-in-Chief, Congress formerly showed a degree of sophistication with its declarations of war coupled with its power of the purse.<sup>146</sup> Congress has the power to declare and fund war so that the Executive would not be tempted to make war, which subsequent generations confirmed.<sup>147</sup>

Currently, however, Congress does not declare war; instead it created the AUMFs under the War Powers Resolution to delegate that power to the President.<sup>148</sup> Taken together, Congress seemingly abdicates from declaring war, instead ceding the use of military force to the President's

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<sup>142</sup> See *infra* Part III.B.1 (explaining the unworkability of litigating the War Powers).

<sup>143</sup> See *infra* Part III.B.2 (describing the problems with the War Powers in the Legislative Branch); *infra* Part III.B.3 (expounding on the problems of the Executive Branch).

<sup>144</sup> See *infra* Part III.C (opining that the current legal status enables disastrous policies that are costly to the American people and outlining a constitutional amendment).

<sup>145</sup> See U.S. CONST. art. I, § 8, cl. 11 (granting Congress the plenary power to declare war via Congressional resolution); *id.* § 8, cl. 12 (granting Congress the power to appropriate funds for military operations). See also *The Amy Warwick*, 67 U.S. 635, 668–89 (1862) (noting in the dissent that Congress alone can declare a national or foreign war while the President retains powers for defensive action).

<sup>146</sup> See U.S. CONST. art. II, § 2, cl. 1 (installing the President as Commander-in-Chief of the armed forces); Elsea & Weed, *Declarations of War*, *supra* note 27 (collecting the historical declarations of war by the United States, all of which are constitutional declarations); THE FEDERALIST NO. 24 (Alexander Hamilton) (remarking that the Legislature had the power to raise armies); THE FEDERALIST NO. 69 (Alexander Hamilton) (insisting that the President cannot declare war because Congress retains that power, but the President retains the power of Commander-in-Chief).

<sup>147</sup> See *The Amy Warwick*, 67 U.S. at 668–89 (noting in the dissent the constitutional separation of powers whereby Congress alone can declare war). See also THE FEDERALIST NO. 24 (Alexander Hamilton) (noting that the raising of armies is entrusted to the legislature); THE FEDERALIST NO. 69 (Alexander Hamilton) (noting that the President, as Executive, cannot declare war which is a power reserved to Congress, but retains the power of Commander-in-Chief). See generally David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083 (1992) (noting the war powers, the constitutional separation thereof, and their effect on public and private liberty).

<sup>148</sup> See War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2012) (setting limits which the President must follow for ordering military force and providing Congress with legislative methods to delegate to the President).

discretion.<sup>149</sup> This discretionary power results in the current AUMFs, the byproducts of the War Powers Resolution.<sup>150</sup> The AUMFs – especially the first AUMF – continue to show extreme elasticity, allowing the President to claim its use against ISIL in Iraq and Syria, despite the fact that the attacks on September 11th predate the formation of ISIL.<sup>151</sup> Current U.S. operations against ISIL in Iraq are grounded in this legal mechanism that legitimates those operations, under the original AUMF; with contemplations of a new AUMF, Congress essentially vests the President with the power to effectively declare war.<sup>152</sup> Therefore, the decision to use military force remains predicated on future AUMFs, grants of Congressional delegation to the President, stemming from the War Powers Resolution.<sup>153</sup>

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<sup>149</sup> See GRIFFIN, *LONG WARS*, *supra* note 18, at 216–22 (noting the problems with the AUMF not needing the limits or approval of Congress).

<sup>150</sup> See Authorization For Use Of Military Force, Pub. L. 107–40, Sept. 18, 2001, 115 Stat. 224 (enacted) (authorizing by Congress that the President avenge 9/11); Authorization For Use Of Military Force Against Iraq Resolution Of 2002, Pub. L. 107–243, Oct. 16, 2002, 116 Stat. 1498 (enacted) (authorizing the President to invade Iraq). See also Elsea & Weed, *Declarations of War*, *supra* note 27 (providing the text of both AUMFs which note their compliance with the War Powers Resolution).

<sup>151</sup> See Obama, *Regarding Iraq*, *supra* note 9 (declaring that the two previous AUMFs provided President Obama sufficient legal authority for military operations against ISIL); Bruce Ackerman, *The War Against ISIS is Unconstitutional*, *LAWFARE* (May 5, 2016, 2:10 PM), <https://lawfareblog.com/war-against-isis-unconstitutional> [<https://perma.cc/UY8T-V2UK>] (arguing that President Obama’s actions in Iraq against ISIL are unconstitutional); Daskal & Vladeck, *After the AUMF*, *supra* note 53, at 125 (speculating quite foresightedly that the Executive Branch would interpret the first AUMF expansively to include threats post-dating the AUMF); Goldsmith, *Quick Reactions on Hearing on AUMF*, *supra* note 52 (remarking on the open-ended interpretation of the AUMF for military actions beyond terrorist forces associated with 9/11).

<sup>152</sup> See *Exploring the Draft AUMF*, AMER. U., *supra* note 9 (discussing a heretofore non-enacted draft AUMF dealing with ISIL proposed by President Obama); Poplin, *35 Lawmakers Pen Bipartisan AUMF*, *supra* note 104 (noting that lawmakers contemplated a new AUMF for combating ISIL).

<sup>153</sup> See, e.g., *Alsabri v. Obama*, 764 F. Supp. 2d 60, 62 (D.D.C. 2011), *aff’d*, 684 F.3d 1298 (D.C. Cir. 2012) (affirming the AUMF’s grant of broad war powers extending to further combatants beyond September 11, 2001 and their use for detention by the President). See also Goldsmith, *Quick Reactions on Hearing on AUMF*, *supra* note 52 (reporting on a Senate committee hearing with military members who continued to interpret an open-ended meaning to the AUMF for military actions and inadvertently highlighting that the Congressional discussion focuses on an AUMF rather than any declaration of war); Daskal & Vladeck, *After the AUMF*, *supra* note 53, at 125 (speculating on an open-ended interpretation of the first AUMF).

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B. *Three Branches or Three Stooges: The Courts, Congress, and the President*

The U.S. Constitution created three branches of government, and all three have a role to play in the War Powers.<sup>154</sup> Part III.B.1 analyzes the courts, supposing a hypothetical lawsuit like Captain Smith's, and outlines the inevitable failure of such a lawsuit.<sup>155</sup> Parts III.B.2 and III.B.3 look at the Legislative and Executive Branches respectively.<sup>156</sup> In short, Part III.B will show that a change or fundamental re-alignment will not emerge from any of the three political branches.<sup>157</sup>

1. The Courts

While the War Powers Resolution gives Congress the power to ponder further AUMFs as a matter of legislative course, bringing suit based on the Resolution itself is nigh impossible.<sup>158</sup> Supposing a hypothetical lawsuit, such as Captain Smith's complaint, there are multiple, insurmountable hurdles, but the results are all the same: dismissal.<sup>159</sup>

The first problem is simply of standing which is why Captain Smith's Complaint joins other prior lawsuits in dismissal.<sup>160</sup> Even claims that

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<sup>154</sup> See *infra* Part III.B (outlining the three branches of government and their interactions with the War Powers and War Powers Resolution). See also U.S. CONST. art. I, § 1 (establishing Congress); *id.* art. II, § 1 (establishing the President as the head of the Executive Branch); *id.* art. III, § 1 (establishing the U.S. Supreme Court).

<sup>155</sup> See *infra* Part III.B.1 (analyzing the courts and the inevitable dismissal of lawsuits litigating the War Powers Resolution).

<sup>156</sup> See *infra* Part III.B.2 (scrutinizing the Legislative Branch and their maladies regarding the War Powers Resolution and War Powers); *infra* Part III.B.3 (analyzing the Executive Branch and its maladies with the War Powers and War Powers Resolution).

<sup>157</sup> See *infra* Part III.B (outlining that the three political branches and their maladies with the War Powers and War Powers Resolution to show that a change in the War Powers will not emerge from the Branches).

<sup>158</sup> See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215–28 (1974) (holding that a case involving military officers was lacked standing). See also *Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.D.C. 1987) (holding that President Reagan's actions in the Persian Gulf in 1986 was non-justiciable); *Doe v. Bush*, 323 F.3d 133, 134 (1st Cir. 2003) (holding that a suit to prevent the invasion of Iraq in 2003 was a non-justiciable item, despite including plaintiffs ranging from parents of soldiers, active duty troops, reservists, and congressional members).

<sup>159</sup> See *Compl., Smith v. Obama*, No. 1:16-cv-00843, 2016 WL 2347065 (D.D.C. 2016) (alleging President Obama's violation of the War Powers Resolution due to military actions against ISIL).

<sup>160</sup> See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–62 (1992) (holding that an injury must be particular to the plaintiff for there to be standing); *Nat'l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1427–28 (D.C. Cir. 1996) (holding that a plaintiff must have standing, and standing must be established by showing actual injury). See also *Smith v. Obama*, CV 16-843 (CKK), 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (dismissing CPT Smith's Complaint based on lack of standing because his specific legal injury in his complaint was not sufficiently concrete or particularized); *Lederman, Captain Smith's Suit*, *supra* note 11

being a taxpayer and citizen do not provide standing.<sup>161</sup> Even suits by members of Congress flounder on standing.<sup>162</sup> Even Captain Smith's recital of his legal injuries based on a soldier's oath of service does not grant him sufficient standing, and more modern lawsuits find other reasons to dismiss on standing for military members.<sup>163</sup> Without standing, the lawsuit over the Resolution and use of military force ends only in dismissal, and doctrines limiting the Executive Branch are never applied to the merits of cases arising from the War Powers; they simply do not even get out of the gate.<sup>164</sup>

Likewise, standing also proves the bane of most litigation attempts by members of Congress.<sup>165</sup> Members of Congress can claim to be elected stewards of taxpayer money, but this contention fails to grant standing.<sup>166</sup> Moreover, by virtue of their position as members of Congress, courts find that those members have the Congressional fora, House and Senate, to

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(describing how CPT Smith's suit will fail); Goldsmith, *Analysis of Lawsuit*, *supra* note 11 (arguing that CPT Smith's lawsuit will fail based on the political question doctrine and standing problem).

<sup>161</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216–28 (1974) (holding that a case is dismissed due to standing which reservists could not demonstrate as either citizens or taxpayers); *Pietsch v. Bush*, 755 F. Supp. 62, 66 (E.D.N.Y. 1991), *aff'd*, 935 F.2d 1278 (2d Cir. 1991) (holding that plaintiff lacked standing despite being a taxpayer).

<sup>162</sup> See *Doe v. Bush*, 323 F.3d 133, 134 (1st Cir. 2003) (holding that a suit to prevent the 2003 invasion of Iraq was a non-justiciable item despite who the plaintiffs were); *Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.D.C. 1987) (holding that Congress members could not bring suit over President Reagan's actions in the Persian Gulf). *But see Reservists Comm. to Stop the War*, 418 U.S. at 216–28 (holding actual military reservists members lacked standing).

<sup>163</sup> See *Compl., Smith v. Obama*, No. 1:16-cv-00843, 2016 WL 2347065, at \*2–\*3 (D.D.C. 2016), (alleging President Obama's violation of the War Powers Resolution constitute a legal injury to Captain Smith given that the effects of President Obama's orders violate a soldier's oath). See also *Ange v. Bush*, 752 F. Supp. 509, 511 (D.D.C. 1990) (applying the *Ash* test from *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L.Ed.2d 26 (1975), which provides for the private cause of action within a statute, and the court ruling that Ange did have standing even as the court dismissed the lawsuit on other grounds); *Smith v. Obama*, CV 16-843 (CKK), 2016 WL 6839357, at \*1 (D.D.C. Nov. 21, 2016) (ruling that CPT Smith's suit is dismissed because CPT Smith lacked standing because his specific legal injury in his complaint was not sufficiently concrete or particularized). *But see Reservists Comm. to Stop the War*, 418 U.S. at 216–28 (holding that a case is dismissed due to standing which must show actual injury despite the plaintiffs being reservist and active-duty soldiers in their suit).

<sup>164</sup> *But see Edelson, Breaking the Cycle*, *supra* note 112, at 32–33 (arguing that there are four cases reducing presidential plenary power, but not acknowledging how the standing problem prevents these doctrines being used in the realm of litigating the War Powers Resolution).

<sup>165</sup> See *Doe*, 323 F.3d at 134 (holding that members of congress could not litigate the 2003 invasion of Iraq).

<sup>166</sup> See *id.* (holding that members of Congress lacked standing to contest the 2003 invasion of Iraq in the courts).

contest executive decisions; therefore, the courts are closed.<sup>167</sup> Even one commentator's assertion that Congress can and should more energetically confront the Executive Branch by judicial contest fails to overcome the courts' presumption that members of Congress should confine their efforts solely to their special fora.<sup>168</sup> Even when multiple members of Congress commit or join a lawsuit as plaintiffs, mere numbers fail to convert quantity into standing.<sup>169</sup> Thus, to simply litigate the War Powers, even members of Congress lack standing.<sup>170</sup>

Yet suppose the standing requirement were somehow (mythically) solved; were that to happen, the courts still have other doctrinal ways to dismiss the suit regardless of the plaintiffs, *inter alia* doctrines like political question.<sup>171</sup> Consequently, courts will not review certain Executive

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<sup>167</sup> See *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (holding that Congress has the congressional forum to express its displeasure with policy, and that such suits are barred by standing and political question doctrines); *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (DC Cir. 1983) (holding that Congress cannot use the courts under the War Powers Resolution to review Executive actions); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (holding that a Congressman lacked standing to challenge President Obama's policy over Libya because the Congressman had a congressional forum to challenge presidential power); *Lowry*, 676 F. Supp. at 337 (holding that President Reagan's actions in the Persian Gulf were non-justiciable even for Congress members when 100 members joined the suit as plaintiffs).

<sup>168</sup> Compare *Raines*, 521 U.S. at 829–30 (holding that Congress lacked standing and that they could pass bills to remedy the dismissal of their suit); and *Crockett*, 720 F.2d at 1356–57 (holding that Congress cannot use the courts to review Executive actions on the use of military force); and *Kucinich*, 821 F. Supp. 2d at 125 (holding that a Congressman lacked standing to challenge President Obama's use of military force in Libya because the Congressman had a congressional forum for political questions); and *Lowry*, 676 F. Supp. at 337 (holding that even 100 members of Congress joined to the suit as plaintiffs did not grant justiciability), with *Frost, Congress in Court*, *supra* note 105, at 968 (arguing that Congress should more vigorously challenge encroachment by the executive Branch via lawsuits).

<sup>169</sup> See *Lowry*, 676 F. Supp. at 337 (noting that even having 100 members of Congress joined to the suit as plaintiffs did not grant justiciability). See also *Walters, War Powers Resolution*, *supra* note 45 (reporting on the failure of a lawsuit, which was *Lowry v. Reagan*, against then-President Reagan to enforce the War Powers Resolution).

<sup>170</sup> See *Crockett*, 720 F.2d at 1356–57 (holding that the War Powers Resolution could not be used by Congress in litigation to review Executive actions); *Kucinich*, 821 F. Supp. 2d at 125 (holding that a Congressman lacked standing to challenge President Obama's use of military force in Libya); *Lowry*, 676 F. Supp. at 337 (holding that even when 100 members of Congress joined the suit as plaintiffs that they lacked standing for purposes of justiciability).

<sup>171</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 229 (1974) (Douglas J., dissenting) (speaking on the issue of political question, which is “[a]lso used to bar from the courts questions which . . . the Constitution . . . left to the other two coordinate Branches to resolve, viz., the so-called political question”). See generally *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (holding that Congress has the congressional forum to express its displeasure with policy, and that such suits are barred by standing and political question doctrines); *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (ruling that Congress lacked standing and was also barred by the political question doctrine of challenging a President's foreign policy decisions because the President determines the national interest, thus dismissing the suit); § 3534.1 Political Questions—Political Issues and Separation of Powers, 13C FED. PRAC. &

policies, meaning that lawsuits cannot change those polices, which includes any use of military force.<sup>172</sup> Should the political question doctrine fail, the courts can also fall back on either the suit lacking ripeness or being moot, either of which makes justiciability impossible.<sup>173</sup> Mootness can especially be a problem when the courts work more slowly compared to the swift use of military force.<sup>174</sup> In short, other doctrinal hurdles exist to bar any potential lawsuit involving the War Powers Resolution, essentially rendering the resolution dead-letter law.<sup>175</sup>

The doctrines above are also not the only bars to a lawsuit, but rather a foretaste of doctrinal hurdles which dismiss a mythical lawsuit.<sup>176</sup> Moreover, the court could rely upon other doctrines, such as state secrets or basic deference to the military, and the President's actions under the

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PROC. JURIS. § 3534.1 (3d ed.) (outlining the contours and limits of the political question doctrine, which makes some controversies, typically between the executive and legislative Branches, non-judicial controversies because they involve a question of public policy, and are thus political questions determined by the Branches).

<sup>172</sup> See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–201 (2012) (noting problems associated with the political question doctrine and that political question doctrine dismisses lawsuits). See, e.g., *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (holding that Congress lacked standing and was also barred by the political question doctrine of challenging a President's foreign policy decisions); *Crockett*, 720 F.2d at 1356–57 (holding that Congress cannot review Executive use of military force under the War Powers Resolution using the courts). See also *Reservists Comm. to Stop the War*, 418 U.S. at 229 (Douglas J., dissenting) (speaking on the issue of political question, which is "[a]lso used to bar from the courts questions which . . . the Constitution . . . left to the other two coordinate Branches to resolve, viz., the so-called political question" meaning that the lawsuit would also have failed based on the political question doctrine); *Baker v. Carr*, 369 U.S. 186, 210–17 (1962) (explaining the contours of the political question doctrine); *Orlando v. Laird*, 443 F.2d 1039, 1043–44 (2d Cir. 1971) (disposing of a challenge to the President's Vietnam War policy based on the Gulf of Tonkin Resolution legitimating Executive policy).

<sup>173</sup> See *Powell v. McCormack*, 395 U.S. 486, 496–501 (1969) (explaining the mootness doctrine); *Conyers v. Reagan*, 765 F.2d 1124, 1127–29 (D.C. Cir. 1985) (holding that mootness made the lawsuit to prevent the invasion of Grenada non-justiciable because it had already occurred and continued occupation did not present a recurring offense which is an exception to the mootness doctrine); *Ange v. Bush*, 752 F. Supp. 509, 510 (D.D.C. 1990) (holding that the controversy was not ripe despite plaintiff having standing).

<sup>174</sup> See *Powell*, 395 U.S. at 496–500 (holding that due to mootness, certain political questions are outside federal subject matter jurisdiction of the U.S. Supreme Court and by extension its subordinate courts); *Conyers*, 765 F.2d at 1127–29 (holding that mootness rendered the lawsuit to prevent the invasion of Grenada non-justiciable because it had already occurred making the controversy non-justiciable); *Ange*, 752 F. Supp. 509 at 510–11 (holding that the controversy was not ripe).

<sup>175</sup> See *supra* Part III.B.1 (analyzing the bars to litigation, including the *Feres* Doctrine, State Secrets Doctrine, in addition to the problems related to standing); GRIFFIN, LONG WARS, *supra* note 18, at 271 (remarking that Posner the Younger declared the War Powers Resolution to be "dead letter law").

<sup>176</sup> See *supra* note 175 (referencing the multitude of doctrinal bars which all lead to dismissal of lawsuits litigating the War Power Resolution and the use of military force).



War Powers, both of which mean that the courts would recoil from judging a suit on the merits and instead merely dismiss it.<sup>177</sup> For a soldier, such as Captain Smith, to bring suit and to find standing, the courts could always turn to the *Feres* Doctrine, cloaking the War Powers in civil immunity from military members' suits by making the President, as Commander-in-Chief, immune from suits from military petitioners.<sup>178</sup>

All these doctrines, ranging from standing to political question to mootness to deference to military action to the other doctrines illustrate the high impossibility of pursuing a case against the use of military force under the War Powers Resolution, inevitably leading to dismissal.<sup>179</sup> With these hurdles in place, lawsuits cannot reference other case law limiting the Executive Branch, and attempts to litigate the War Powers will fail to

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<sup>177</sup> See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-62 (1992) (holding that an injury must be particularized to the plaintiff for there to be standing and remarking on the deference to military necessity); *Korematsu v. United States*, 323 U.S. 214, 215-24 (1944) (explaining deference to national security and military necessity meets strict scrutiny of racial classifications); *United States v. Reynolds*, 345 U.S. 1, 10-12 (1953) (holding that military secrets, if involved, should not be discoverable in a civil suit). Compare Robert E. Barnsby, *So Long, and Thanks for All the Secrets: A Response to Professor Telman*, 63 ALA. L. REV. 667, 668-70 (2011) (replying to an article stating that the state secrets doctrine, which forbids lawsuits based on secrecy includes the *Totten* doctrine, which Professor Telman maintains (and teaches) is a purely contract doctrine dealing with the non-justiciability of a secret agreement to spy between President Lincoln and his agent with secrecy as an inferred term), with D.A. Jeremy Telman, *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2191656](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191656) [https://perma.cc/PNH5-D42N] (explaining that the state secrets privilege cannot be conflated with the *Totten* Doctrine of contracts which deals solely with inferred terms of secrecy, forbidding justiciability of the contract apart from any state secrets); and D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 433-39 (2011) (explaining problems with the expanded state secrets doctrine and its morphing from a doctrine centered around evidentiary to a doctrine of dismissal as well as analyzing the misuse of the *Totten* Doctrine). But see BACEVICH, *LIMITS OF POWER*, *supra* note 90, at 86 (observing the problems related to *United States v. Reynolds*, in which subsequent declassification showed that the claim of disclosure of national secrets and threat to national security proved unfounded and merely hid embarrassment of a military mishap).

<sup>178</sup> See *Feres v. United States*, 340 U.S. 135, 146 (1950) (introducing the *Feres* Doctrine barring civil suits from members of the military or their widows when the injury arises from conditions endemic to military service); *Ex parte Vallandigham*, 28 F. Cas. 874, 881-83 (C.C.S.D. Ohio 1863) (holding that the Commander-in-Chief is a part of the chain-of-command and thus has a position within the military). See also *United States v. Shearer*, 473 U.S. 52 (1985) (holding that the *Feres* Doctrine bars a civil suit of wrongful death); *Smith v. United States*, 196 F.3d 774, 775 (7th Cir. 1999) (holding that the *Feres* Doctrine bars a tort sexual assault civil suit between members of the military); *The Feres Doctrine and Sexual Assault*, 50 TR. 54 (March 2014) (detailing the *Feres* Doctrine and its bar to civil suits, especially in the context of sexual assault).

<sup>179</sup> See *supra* Part III.B (outlining the problems with pursuing legal action via the courts, with multiple bars including standing and other judicial doctrines which lead to dismissal of the lawsuit without any consideration of the merits of the lawsuit).

reach a consideration of the merits or limiting doctrines on the use of military force.<sup>180</sup> In short, because of the standing question and multiple bars to litigation, the courts cannot and will not litigate the use of military force under the War Powers Resolution, rendering the War Powers Resolution dead-letter law.<sup>181</sup> Thus, the case of a mythical lawsuit is just that, such as pursued by Captain Smith, the courts will simply dismiss, meaning that the courts are no venue to litigate the War Powers or War Powers Resolution or provide any correction.<sup>182</sup>

## 2. Congressional Abdication

If the War Powers are truly a political question, as the courts maintain, then part of the blame lies with Congress.<sup>183</sup> Part of the problem is that Congress has only toyed with fixing the War Powers Resolution using its normal legislative capabilities, or considered outright repeal.<sup>184</sup> Other members of Congress have settled for incremental modification, requiring the President to consult Congress more frequently and return to a more consultative system for using military force, but without results.<sup>185</sup> Nor

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<sup>180</sup> Compare *supra* Part III.B (indicating the problems of litigating the war powers with various dispositive bars to litigation), with generally Edelson, *Breaking the Cycle*, *supra* note 112 (arguing that there are four cases reducing presidential plenary power, but not acknowledging how the standing problem prevents these doctrines from being used in the realm of litigating the War Powers Resolution, meaning that the doctrines cannot be used to argue about the central issue of military force, making Edelson's paper into an insistence for the status quo system).

<sup>181</sup> See *supra* Part III.B (analyzing the three branches). See also *Orlando v. Laird*, 443 F.2d 1039, 1043–44 (2d Cir. 1971) (dismissing a challenge to the President's Vietnam War policy); GRIFFIN, *LONG WARS*, *supra* note 18, at 271 (noting that the War Powers Resolution is effectively "dead letter law").

<sup>182</sup> See *supra* Part III.B.1 (showing the path of a mythical lawsuit and the array of bars to litigation over the War Powers and War Powers Resolution, leading to the conclusion that pursuing such a course in the courts is a fool's errand and leads to dismissal of all suits involving the War Powers or War Powers Resolution).

<sup>183</sup> See *Reservists Comm. to Stop the War*, 418 U.S. at 229 (noting in the dissent that the political question is a question "[w]hich . . . the Constitution . . . left to the other two coordinate Branches to resolve"). See also GRIFFIN, *LONG WARS*, *supra* note 18, at 273 (observing that the two political branches, Congress and the Presidency, may disagree which is a key part of the deliberations for using military force).

<sup>184</sup> See generally Kasperowicz, *GOP Bill*, *supra* note 46 (recounting attempts to repeal the War Powers Resolution by various members of the GOP); Schulte, *Defeat the Repeal*, *supra* note 46 (recounting an attempt to repeal the War Powers Resolution); Walters, *War Powers Resolution*, *supra* note 45 (reporting on concerns regarding the War Powers Resolution and a failure of a lawsuit against then-President Reagan).

<sup>185</sup> See Walters, *War Powers Resolution*, *supra* note 45 (reporting on discontent regarding the War Powers Resolution and a failure of a lawsuit to enforce the War Powers act). See also Kaine, *Reforming the War Powers Resolution*, *supra* note 47 (explaining his experiences while working in Congress to amend the War Powers Resolution and his proposed changes to form a military council and the subsequent failure to do so); GRIFFIN, *LONG WARS*, *supra* note 18,

have Congressional-led lawsuits led to anything; moreover, many of these lawsuits have partisan roots.<sup>186</sup>

Congress also deserves a degree of blame for the current AUMF status via continued funding of the use of military force.<sup>187</sup> Funding war is a Congressional power, one which Congress could potentially withhold and end some use of military force, even while troops are engaged.<sup>188</sup> Yet, to contend plausibly that Congress would cease funding with deployed troops in the field, for instance, utterly ignores the political problems of that choice and ignores the political costs associated with funding, making sole control of funding an ineffective check on the Executive Branch.<sup>189</sup> Moreover, Congress continues to vote for funding for military operations, tacitly approving the President's actions.<sup>190</sup> Between continuing to fund

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at 273 (observing that the disagreement between the two political branches is a key part of the deliberations for using military force); Miksha, *War Powers Resolution*, *supra* note 47, at 690-93 (proposing a constitutional amendment which forms a war council composed of members of the Executive and Legislative Branches while repealing the War Powers Resolution); MANN & ORNSTEIN, *WORSE THAN IT LOOKS*, *supra* note 48, at Introduction XIX-XXIV (arguing that the current constitutional political system and Congress, in particular, cannot work due to paralysis caused by the Republican party and a weakened Democratic party which has shifted rightward due to Republican pressure).

<sup>186</sup> See *supra* Part III.B.1 (describing problems associated with standing with Congress-initiated lawsuits among other problems such as the political question doctrine which serve to bar Congress-initiated lawsuits over the War Powers and War Powers Resolution). See also *supra* note 106 (noting the partisan nature of the lawsuits with the exception of *Kucinich v. Obama*).

<sup>187</sup> See Goldsmith, *Quick Reactions on Hearing on AUMF*, *supra* note 52 (noting that Congress' continued funding of military operations acts as a tacit acknowledgement and agreement with the President's use of military force). See also *Orlando v. Laird*, 443 F.2d 1039, 1042-44 (2d Cir. 1971) (holding that funding from Congress as part of the Gulf of Tonkin Resolution includes Congressional recognition of Executive acts).

<sup>188</sup> See U.S. CONST. art. I, § 8, cl. 12 (granting Congress the power of the purse, *i.e.*, Congress votes for funding military operations and appropriations for defense); YOO, *CRISIS AND COMMAND*, *supra* note 43, at 144-59 (arguing that Congress retains the power of the purse, and can fund or not fund military power, regardless of the political choice).

<sup>189</sup> Compare YOO, *AFFAIRS AFTER 9/11*, *supra* note 27, at 159 (arguing that Congress retains the power of the purse and that a poor political choice does not equal a violation of the Constitution), with GRIFFIN, *LONG WARS*, *supra* note 18, at 203-04 (questioning Yoo's argument that the War Powers are not a restraint on the presidency, and this argument ignores the complex history surrounding the War Powers Resolution and its adoption). See also SCHULTZ, *Domestic Politics*, *supra* note 103, at 489-90 (remarking on the "rally around the flag effect" in which a country's leader receives increased political support when the country becomes involved in military conflict, making domestic political opposition a fringe stance as opposed to one tempering the pursuit of military action).

<sup>190</sup> See Goldsmith, *Quick Reactions on Hearing on AUMF*, *supra* note 52 (remarking that when Congress continues to fund military operations, this funding acts as a tacit acknowledgement). See also *Orlando*, 443 F.2d at 1042-44 (holding that funding via the Gulf of Tonkin Resolution meant that Congress recognized and supported Executive acts in Vietnam).

wars and lack of legislative initiative on the war powers, Congress has effectively abdicated its position, and has not adopted a way that would make the use of military force a more consultative act between Executive and Legislation, which this Note proposes.<sup>191</sup> Therefore, Congress' supine stance, partisanship, and other maladies do not auger that Congressional action will change the policy of perpetual war.<sup>192</sup>

### 3. Executive Overreach in War Powers and Perpetual Undeclared War

The Executive Branch has, in the past, taken advantage of Congressional abdication.<sup>193</sup> While arguments exist that the President, not Congress, declares war, the Executive Branch has, with essential Congressional abdication, further increased its control of the War Powers to a nigh monopoly.<sup>194</sup> Moreover, the President's counsel in the OLC has argued for even more ways that the President can deploy military force without explicit Congressional approval, relying on the tacit approval via funding bills or redefining the use of military force under a certain threshold as less than war.<sup>195</sup> Furthermore, the President enjoys the benefits of all the dismissed lawsuits challenging the War Powers and War

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<sup>191</sup> See Goldsmith, *Quick Reactions on Hearing on AUMF*, *supra* note 52 (noting that Congress' continued funding of military operations equals tacit acknowledgement and support of the President's military policy). See also GRIFFIN, *LONG WARS*, *supra* note 18, at 241–42 (arguing that previously, use of military force was a consultative process conducted by both the Legislative and Executive Branches); Miksha, *War Powers Resolution*, *supra* note 47, at 690–93 (proposing a constitutional amendment to create a war council as a more consultative model for employing military force).

<sup>192</sup> See *supra* Part III.B.2 (demonstrating that a moribund Congress will neither repeal nor amend the War Powers Resolution while continuing to fund the military meaning that Congress is not an engine to change the current military policy).

<sup>193</sup> See Frost, *Congress in Court*, *supra* note 105, at 968 (arguing that Congress, via lawsuits, should more vigorously challenge Executive Branch encroachment and thereby more vigorously assert itself in government policy).

<sup>194</sup> See YOO, *AFFAIRS AFTER 9/11*, *supra* note 27, at 144–52 (arguing that the original textual meaning of “declare” from the Founding period which allows Congress to declare war should not be construed to mean that Congress has the sole power to initiate war). See also GRIFFIN, *LONG WARS*, *supra* note 18, at 240–42 (noting that Presidents have treated authorizations from Congress as votes of confidence in pre-decided polices rather than necessary grants of permission).

<sup>195</sup> See generally O.L.C., *Libya*, *supra* note 111 (opining to President Barack Obama that the use of military force did not require a declaration of war or prior approval from Congress due to the low scale of the use of military power); O.L.C., *Iraq II*, *supra* note 111 (opining about the second AUMF and Presidential Authority, the national interest, and presidential discretion for the 2003 Invasion of Iraq); O.L.C., *Iraq I*, *supra* note 111 (opining on presidential discretion and use of military force for the 2003 invasion of Iraq); O.L.C., *Terrorists*, *supra* note 111 (opining on President George W. Bush's presidential discretion and powers against terrorism with the first AUMF); O.L.C., *Somalia*, *supra* note 50 (opining to use the military in Somalia in 1992 to President Bill Clinton).

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Powers Resolution; because courts dismiss, the President does not have to alter policy.<sup>196</sup>

This continuing trend, remaining a mostly bipartisan view of the Executive Branch and its discretionary powers, also runs counter to a conjecture that the decision-making process for use of military force is still a system thought to be working with only a few bad apples.<sup>197</sup> Such a conjecture also ignores how judicial opinions enshrine the power of the President to set the national interest and foreign policy powers.<sup>198</sup> Contrary to pre-WWII policy, the President's use of the first AUMF expands beyond the inherent defensive powers of the President to make offensive actions a key foreign policy principle.<sup>199</sup> Moreover, the

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<sup>196</sup> See *supra* Part III.B.1 (analyzing the process of litigation of the War Powers and War Powers Resolution and demonstrating that all suits end in dismissal meaning that none of the suits, in turn, will affect policy).

<sup>197</sup> See Edelson, *Breaking the Cycle*, *supra* note 129, at 32–33 (arguing that there is more that the courts and Congress can do within the framework of the War Powers Resolution which will improve the decision-making process for employing military force); *supra* note 117 (outlining the expansive powers of the Executive and the President's broad powers for the use of military force, including undeclared wars). See generally O.L.C., *Iraq II*, *supra* note 111 (opining to President George W. Bush about the second AUMF and Presidential Authority, the national interest, and presidential discretion for the 2003 invasion); O.L.C., *Iraq I*, *supra* note 111 (opining about presidential discretion and use of military force against Iraq for George W. Bush); O.L.C., *Terrorists*, *supra* note 111 (opining on presidential discretion and powers to conduct operations against terrorism per the first AUMF); O.L.C., *Somalia*, *supra* note 50 (opining to President Bill Clinton about the use of the military in Somalia within presidential discretion); Greenwald, *Key Democrats*, *supra* note 112 (opining that changing the person of the President will not change the U.S. policy of perpetual war).

<sup>198</sup> See KISSINGER, *DIPLOMACY*, *supra* note 3, at 39–40 (writing prior to 1994 that Americans were “[a] people brought up in the belief that peace is the normal condition,” and seeing that the U.S. Senate exercised a large sway in deciding the national interest, via appropriations for the military, leading to a concentration of policies focused on acquiring territory in continental North American and foregoing territorial battling in Europe). See generally *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (articulating the primacy of the President in the realm of foreign policy and the President's role in defining the national interest as the constitutional representative of the United States in foreign affairs); *Alsabri v. Obama*, 764 F. Supp. 2d 60, 62 (D.D.C. 2011), *aff'd*, 684 F.3d 1298 (D.C. Cir. 2012) (affirming the AUMF's grant of broad war powers and particularly their use for detention by the President).

<sup>199</sup> See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–22 (1936) (noting that the President is primary in the realm of foreign policy and the President defines the national interest). See also U.S. CONST. art. I, § 2, cl. 8 (noting the President's oath to preserve, protect, and defend); *The Amy Warwick*, 67 U.S. 635, 659–66 (1862) (holding that the President can still order military force absent Congress' declaration of war when a state of belligerency exists and that this belligerency does not require Congressional say-so to exist to be recognized as requiring the use of military force); Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Prudence*, 73 UMKC L. REV. 1 (2004) (arguing that the President's oath endows the President with certain national security powers in order to fulfill that oath); Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASHINGTON Q., Spring 2003, at 89, 90–91 (detailing the

possibility of impeachment does not exist to check the Executive Branch's continued overreach.<sup>200</sup> But while the President sits atop the hierarchy of the three branches of the United States government to determine the national interest within its foreign policy powers, reducing the use of American military force from an interbranch deliberation to an interagency deliberation within the Executive Branch has not led to better policy, systematic recalibration, or unmitigated success in war; that policy, instead, is the result of the current state of affairs with the War Powers Resolution.<sup>201</sup> Even a change in the Presidency seems unlikely to change the current policy situation.<sup>202</sup> In short, given the benefits of Congressional abdication, bars of litigation, and discretion to use military force, the President is extremely unlikely to change a system which benefits the Executive.<sup>203</sup> Thus, change to the perpetual war policy is unlikely to emerge from the Judiciary, the Legislature, or the Executive.<sup>204</sup>

### C. *Effects of the Problem and Changing the Situation*

As with any legal status, inquiries about the results of the AUMFs and their effect on the United States are important questions, to which the

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Caroline Doctrine and its limited parameters allowing for preemptive self-defense); WILLIAM & MARY U., *Stephen Walt*, *supra* note 126 (presenting Professor Stephen Walt, a realist, who describes the use of military force as a magic button which the President can use to make problems in non-strategic areas go away for a paltry millions of dollars).

<sup>200</sup> See GRIFFIN, *LONG WARS*, *supra* note 18, at 240 (noting that impeachment is a poor possibility to call a President to heel on overreach).

<sup>201</sup> See *id.* at 242-44 (noting that the post-WWII decisions to employ military force, changing from a deliberation between Presidents and Congress to a deliberation within the Executive Branch's national security framework, have led to questionable military results). See also *infra* Part III (analyzing the problematic policy results of the current status of AUMF and the War Powers Resolution).

<sup>202</sup> See Greenwald, *Key Democrats*, *supra* note 112 (arguing that a change in presidents will not change that the United States continues perpetual war); Greenwald, *Brexit*, *supra* note 117 (arguing that the change in Presidents from Obama to Trump has placed President Trump in charge of a perpetual war machine which was discounted by some commentators because of President Obama's charisma and apparent even-handedness); Emmons, *Thanks Obama*, *supra* note 117 (noting the policy of perpetual war and the arsenal of nuclear weapons, drone program, *et al* which President Trump now controls under the Executive Branch).

<sup>203</sup> See *supra* Part III.B.1 (analyzing the litigation of the War Powers and War Powers Resolution, leading to the conclusion that courts dismiss all suits involving those subjects); *supra* Part III.B.2 (analyzing Congress' inaction to either repeal or amend the War Powers Resolution while continuing to fund the military, leading to a conclusion that Congress is paralyzed); *supra* Part III.B.3 (analyzing the Executive Branch and demonstrating that the Executive Branch, with its discretion over military force via the AUMF, is the clear driver of this policy unfettered by the other two Branches).

<sup>204</sup> See *supra* Part III.B (arguing that neither the courts, based on bars to litigation, nor Congress, based on its paralysis, nor the Executive, based on received benefits, will end or modify the policy of perpetual war).

answers are not positive.<sup>205</sup> The current state of affairs encourages further Executive Branch encroachment, with the abdication if not encouragement of Congressional members whose districts are so dependent on spending associated with the AUMF and perpetual war.<sup>206</sup> Such spending incentivizes and reinforces the current system, from which America's geopolitical position insulates it from more of the baneful effects.<sup>207</sup> Instead of a time when peace and war were entirely distinct phases, a self-reinforcing, permanent state of war predicated on a pernicious focus on interventionism is in place.<sup>208</sup>

Given the resultant problems of the current status, many have thought to change it.<sup>209</sup> But neither the courts nor Congress are viable avenues to change the current status of the War Powers Resolution and AUMFs'

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<sup>205</sup> See WGBH Forum, *Washington Rules: The Path to Permanent War*, YOUTUBE (March 31, 2014), <https://www.youtube.com/watch?v=Kc21J76dcYs> [hereinafter Bacevich, *Washington Rules*] (presenting Professor Andrew Bacevich who argues that military engagement has become the de facto response of American foreign policy, and that the Department of Defense is an instrument of overseas power projection, vice homeland defense).

<sup>206</sup> See Greenwald, *Decade's Biggest Scam*, *supra* note 123 (critiquing the large amount of money appropriated to the "War on Terror" in the pursuit of security with dubious results). See generally THORPE, *AMERICAN WARFARE STATE*, *supra* note 37 (arguing that the explosion of military funding has disproportionately increased pro-war pressures upon congressional districts and states with less diversified economies, leading to support and congressional abdication).

<sup>207</sup> See Greenwald, *Decade's Biggest Scam*, *supra* note 123 (questioning the large amount of money spent in pursuit of security in the "War on Terror" resulting in questionable results and questionable domestic effects); Greenwald, *Key Democrats*, *supra* note 112 (arguing persuasively that a change in presidents will not change that the United States continues perpetual war). See also William & Mary U., *Stephen Walt*, *supra* note 126 (presenting Professor Stephen Walt, a realist, who argues that America's geopolitical position, surrounded by weak countries and two oceans, and America's great wealth provide enough isolation to insulate America from the persistent foreign policy problems stemming from an often incorrect foreign policy elite lacking accountability for its numerous failures, as evidenced by a dictum misattributed to Otto von Bismark "there is a special kind of Providence which watches out for fools, drunkards, and the United States of America").

<sup>208</sup> Compare Greenwald, *Key Democrats*, *supra* note 112 (arguing persuasively that a change in presidents will not change that the United States continues perpetual war), and Bacevich, *Washington Rules*, *supra* note 205 (presenting Professor Andrew Bacevich who argues that military engagement has become America's *de facto* foreign policy), and Emmons, *Neverending War*, *supra* note 1 (arguing that U.S. military engagement in the Middle East is essentially a permanent foundation of American foreign policy), with KISSINGER, *DIPLOMACY*, *supra* note 3, at 39–40 (writing at the end of the Cold War that Americans were "[a] people brought up in the belief that peace is the normal condition" and denoting that war and peace were previously viewed as distinct and separate conditions).

<sup>209</sup> See *supra* Part II.C (presenting the results of the current legal status for the use of military power); *supra* Part III.B.2 (noting Congress' failures to change the War Powers Resolution amid flirtations with repealing it wholesale).

current status.<sup>210</sup> Nor is the Executive Branch likely to self-regulate.<sup>211</sup> Given these problems, the solution appears: an amendment to the Constitution, an admittedly tough proposition.<sup>212</sup> An amendment is an extremely difficult proposal, requiring a super-majority in Congress and the States, or alternatively, a new Constitutional Convention which has never happened.<sup>213</sup> Such an amendment would work above and alongside the War Powers Resolution, and focus on four major items: (1) allowing the courts to be used to litigate the use of military force in a manner which is foreseeable and scalable, limiting the power to bring a lawsuit solely to the President and Congress; (2) requiring Congress and the President to deliberate in an interbranch manner regarding the use of military force; (3) requiring Congress to avoid tacit approval by having periodic, public votes reaffirming the use of military force and paying for it; and (4) providing ways for Congress or the President, via the courts, to enforce the amendment.<sup>214</sup> In short, rather than an amendment

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<sup>210</sup> See *supra* Part III.B (analyzing the failures of using the courts to litigate the War Powers Resolution, the failures of Congress to change the War Powers Resolution or to attempt any other actions beyond abdication, and the Executive Branch's exploitation of the situation).

<sup>211</sup> See GRIFFIN, *LONG WARS*, *supra* note 18, at 242-44 (noting that the post-WWII decisions to employ military force, changing from a deliberation between Presidents and Congress to a deliberation within the Executive Branch's national security framework, have led to questionable military results and noting that the Executive Branch is unlikely to self-correct as opposed to being balanced by the other Branches). See also *supra* Part III (reviewing the Executive Branch and its high monopolization of interagency decision-making for using military force and arguing that the President is unlikely to change the current status quo).

<sup>212</sup> See Miksha, *War Powers Resolution*, *supra* note 47, at 691 (indicating that a most serious approach is the proposal of a constitutional amendment to solve a problem). See also LESSIG, *REPUBLIC, LOST*, *supra* note 134, at 290-304 (providing an overview of the process under the Constitution for amending the Constitution and the difficulties of having super-majorities in both houses of Congress and in the States to secure an amendment, meaning that a proposed amendment will be extremely unlikely despite the other alternative of another Constitutional Convention provided in Article V of the Constitution); Amar, *Amendments and Populist Century*, *supra* note 135 (explaining the historical developments of constitutional amendments and how the amendments may be categorized as well as noting the few numbers of amendments).

<sup>213</sup> See U.S. CONST. art. V (describing the processes for amending the Constitution in which amendments can emerge from either two-thirds of the States or from Congress); Miksha, *War Powers Resolution*, *supra* note 47, at 691 (noting that proposing a constitutional amendment is the most serious approach to solving the question of the War Powers). See also LESSIG, *REPUBLIC, LOST*, *supra* note 134, at 290-304 (providing an overview of the process to amend the Constitution and the difficulties of having super majorities in both houses of Congress and in the States to secure an amendment, meaning that a proposed amendment will be extremely unlikely despite the other alternative of another Constitutional Convention provided in Article V of the Constitution which requires a super majority of the states).

<sup>214</sup> See *supra* Part III.B.1 (analyzing the failures of using the courts to litigate the War Powers Resolution). See also *Orlando v. Laird*, 443 F.2d 1039, 1042-44 (2d Cir. 1971) (holding that funding for the Vietnam War attached to the Gulf of Tonkin Resolution meant Congressional recognition and support for President Johnson's Vietnam War); *supra* Part III.B.2 (noting



reaffirming rights or expanding the popular nature of society, this amendment must re-entangle the Legislative and Executive Branches when approaching the important task of using military force.<sup>215</sup>

When appraising the War Powers and checks on their modern use compared to former declarations of war, one comes to the conclusion that the courts do not work, Congress functions even less, and only the Executive Branch decides on the use of military force while Congress pays.<sup>216</sup> The existing legal status supports the current interventionist policy at the Executive Branch's behest, despite the resultant problems.<sup>217</sup> Given the problems and the non-functional solutions, the answer is clear: in the light of failure of checks and balances, a new constitutional amendment is required to remedy the dysfunction and produce better policy outcomes for the United States.<sup>218</sup>

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Congress' failures to change the War Powers Resolution amid flirtations with repealing it wholesale); Goldsmith, *Quick Reactions on Hearing on AUMF*, *supra* note 52 (asserting that continued funding of military operations is a tacit acknowledgement); *supra* Part III.B.3 (noting continued executive encroachment on issues of war powers and the use of military force); *supra* Part II.C.2 (noting the path of amendments and that certain amendments have sections and clauses allowing for Congressional enforcement via appropriate legislation).

<sup>215</sup> See *supra* Part III.B.1 (analyzing past court cases and arguing that the courts cannot be used to litigate the War Powers Resolution). See also *supra* Part III.B.2 (noting Congressional failures to change the War Powers Resolution and act as a check on Executive overreach); Goldsmith, *Quick Reactions on Hearing on AUMF*, *supra* note 52 (remarking that continued funding of military operations equals tacit acknowledgement); *supra* Part III.B.3 (noting continued executive encroachment on issues of war powers and the use of military force); *supra* Part III.C (outlining the resultant policy effects based on the current legal status); GRIFFIN, *LONG WARS*, *supra* note 18, at 242–44 (noting that the post-WWII decisions to employ military force, changing from a deliberation between Presidents and Congress to a deliberation within the Executive Branch's national security framework, have led to questionable military results in the interagency use of military force under the Executive Branch).

<sup>216</sup> See *supra* Part III.A (outlining the problems of the War Powers Resolution). See also *supra* Part III.B.1 (analyzing the failures of using the courts to litigate the War Powers Resolution, noting Congress's failures to change the War Powers Resolution amid flirtations with repealing it wholesale, and noting continued executive encroachment on issues of War Powers and the use of military force).

<sup>217</sup> See *supra* Part III.C (discussing the resultant policy effects based on the current legal status, which enables further interventionism based on the use of military force as well as the process of analyzing the path to amending the Constitution).

<sup>218</sup> See *supra* Part III.A (outlining the current problems associated the War Powers Resolution including the current AUMFs). See also *supra* Part III.B.1 (analyzing the failures of using the courts to litigate the War Powers Resolution); *supra* Part III.B.2 (noting Congress's failures to change the War Powers Resolution amid flirtations with repealing it wholesale); *supra* Part III.B.3 (noting continued Executive encroachment on issues of War Powers and the use of military force); *supra* Part III.C (discussing the resultant policy effects based on the current legal status, which enables further interventionism based on the use of military force and arguing in the absence of workable solutions, the ultimate solution, a constitutional amendment, is the only working answer to the problem of the War Powers).

## IV. CONTRIBUTION

The first section presents the proposed constitutional amendment.<sup>219</sup> The second section, concluding this Note's contribution, is a commentary of the proposed amendment.<sup>220</sup>

A. *Proposed Constitutional Amendment*

Thus the amendment should read as follows:

§ 1 *The sustained use of military force must be a decision of the Congress and the President. Both branches, in total, must meet and discuss the use of military force beyond thirty days. The President, while Commander-in-Chief, cannot employ offensive military force or declare war on the President's own recognizance.*

§ 2 *Congressional representatives, either representative or senator, shall have standing to litigate this measure if duly authorized as a delegation from Congress based on joint resolution. This measure will be decided on the merits of the case presented by Congress before dismissal.*

§ 3 *Congress must periodically reaffirm the use of military force and vote the levies to pay for the use of military force. These periodic reaffirmations must be public, open, joint, and recorded. The President may have recourse to the courts to enforce this provision.*

§ 4 *Presidential failure to abide under this article is grounds for impeachment, and follows the normal procedure in the Constitution.*

§ 5 *The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*<sup>221</sup>

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<sup>219</sup> See *infra* Part IV.A (putting forth a constitutional amendment making Congress responsible for declarations of war and for periodic renewals to continue the use of military force while requiring the President to plan the use of military force and linking both Branches in an arrangement allowing either Branch to turn to the Courts to enforce the duties of each Branch in order to provide an enforcement mechanism within the amendment).

<sup>220</sup> See *infra* Part IV.B (addressing concerns with the constitutional amendment with the intent of trying to restore an interbranch deliberation model for the use of military force based on a judicial pathway to force the Executive and Legislative Branches to act in concert when deliberating the use of military force).

<sup>221</sup> This amendment is the author's contribution, embodying the intent of recreating an interbranch system and creating a judicial pathway for either Congress or the President to enforce the terms of this amendment and pre-supposing the repeal of the first AUMF. See *supra* Part III.B.2 (analyzing the problem of Congressional abdication); *supra* Part III (analyzing the effects and resulting policy of the current status of the use of military force

B. *Commentary*

A proposed constitutional amendment improving the constitutional War Powers must contain several parts, which solve the problems associated with the War Powers Resolution.<sup>222</sup> A constitutional amendment is a major step, because proposing a constitutional amendment is also an admission that a simple legislative fix for the War Powers does not exist, and the current situation will not change from efforts emerging from the three Branches.<sup>223</sup> Attempts to amend the War Powers Resolution, attempts at outright repeal, and actions of the Executive Branch, regardless of political party, to circumvent the War Powers Resolution all support a conclusion that a simple legislative fix does not exist.<sup>224</sup> Moreover, constitutional amendments are rare and extremely difficult requiring super-majorities, but because a legislative fix is not possible, an amendment appears an even more unlikely option, but is the solution when all three branches are the problem.<sup>225</sup>

The first portion of the proposed amendment is that it must restate with vigor that the decision to use military force is not a decision solely

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and process of amending the Constitution); *supra* Part III.B.3 (analyzing the problems related to the use of military force related to the President and the problems of Executive overreach by the President in order to use military force, in effect obviating the power of declaring war vested with Congress); *supra* Part III.B.1 (analyzing the bars to litigation and the probable dismissal of any lawsuit litigating the War Powers Resolution or the use of military force). *See also supra* note 138 (noting the language and existence of provisions within constitutional amendments allowing Congress to pass appropriate legislation to enforce an amendment, meaning that the language could also allow for the use of the War Powers Resolution or amendments thereto as enforcing legislation).

<sup>222</sup> *See supra* note 218 (analyzing the legal status and problems related to the War Powers Resolution and the constitutional War Powers).

<sup>223</sup> *See supra* Part III (describing that the use of military force, previously an interbranch decision, has become something that cannot be fixed solely by the Judicial Branch because of the various bars to litigation, cannot be fixed by the legislature due to partisan rancor and Congressional abdication, and cannot be fixed by sole action of the Executive Branch which has monopolized the use of military force as an interagency decision).

<sup>224</sup> *See supra* note 124 (noting the funding from the government related to the “War on Terror” and its effects both on private markets and security-related companies as well as a detrimental effect on politics and enabling of certain policies via incentivizing Congressional inaction or abdication).

<sup>225</sup> *See* U.S. CONST. art. V (detailing how to amend the Constitution by either an amendment emerging from Congress or via a new Constitutional Convention called by two-thirds of the States); Miksha, *War Powers Resolution*, *supra* note 47, at 691 (noting that proposing a constitutional amendment is the most serious approach to solving a problem). *See also* LESSIG, *REPUBLIC, LOST*, *supra* note 134, at 290–304 (presenting an overview of amending the Constitution requiring super-majorities in both houses of Congress and in the States to secure an amendment, or the other alternative of another Constitutional Convention provided in Article V of the Constitution which requires a super majority of the states, both of which are extremely difficult hurdles to overcome in order to amend the Constitution).

endowed to the President.<sup>226</sup> Traditionally, the decision to use military force has been a bilateral decision involving both the Executive and Legislative Branches.<sup>227</sup> This recognition means that a section of the amendment must cement that the normal process for deciding the use of military force must be a consultative decision involving Congress and not left solely to the decisions or whims of the President, in effect following the purpose of the War Powers Resolution.<sup>228</sup>

In reincorporating Congress into the decision to use military force, the amendment should have clear language describing how Congress periodically assesses the decision and passes a budget for using military force.<sup>229</sup> Congress is a barometer of the public feeling, and an amendment would reassert that Congress has to act as a proxy on behalf of the public.<sup>230</sup> Therefore, an amendment would reinforce that Congress must periodically reaffirm, for the duration of the use of military force, that Congress supports this use of military force.<sup>231</sup> Thus, Congress would actually act upon its power of the purse to affirm and spend for the use of

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<sup>226</sup> See U.S. CONST. art. I, § 8, cl. 11 (making Congress the branch with the power to declare war); *id.* § 8, cl. 12 (granting Congress control of funding for military operations); U.S. CONST. art. II, § 2, cl. 1 (making the President Commander-in-Chief of the armed forces). See also *supra* Part III.A (denoting that the history of the use of military force has focused on the use of war decided by both the Executive and Legislative Branches); *supra* Part II.A (outlining the history of the United States from the founding to the present day and outlining the previous practice of interbranch deliberations for the use of military force).

<sup>227</sup> See *supra* Part III.A (analyzing the interbranch decision to use military force); *supra* Part II.A (outlining the history of the United States from the founding to the present day and highlighting the interbranch practice of deliberating the use of military force from the founding until WWII).

<sup>228</sup> See *supra* note 214 (analyzing the failures of all three branches of government on the War Powers Resolution and the constitutional War Powers). See also *supra* note 40 (noting the purpose of the War Powers Resolution to restore the use of the War Powers as envisioned by the constitutional Founders).

<sup>229</sup> See *supra* Part III (noting the problems of Congress and its abdication, including that Congress can tacitly approve military force by simply passing the budget for the Department of Defense); *supra* note 187 (noting that the Congress continues to pass the budgets funding the use of military force, denoting tacit support for the use of military force).

<sup>230</sup> See *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (citing *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989)) (relating that state legislatures, and Congress as the head of the Legislative Branch, act theoretically as barometers of social mores and opinion).

<sup>231</sup> Cf. note 187 (indicating the degree of passivity upon which Congress can rely, tacitly approving military force via voting for budgets without actually and explicitly defending the use of military force).

military force.<sup>232</sup> Moreover, Congress should also insist on how the money for military force has been spent.<sup>233</sup>

One apparent problem in crafting a combination of a choke-chain and the Sword of Damocles is that it promotes encroachment between both the Legislative Branch and the Executive Branch.<sup>234</sup> While some commentators, such as John Yoo, uphold a view of the Executive Branch as leading and deciding war, this amendment would give effect to the intent of the War Powers Resolution, which was to restore the decision of the use of the military force as an interbranch decision.<sup>235</sup> Moreover, making the delegation to represent Congress in a lawsuit would also damper pure partisanship, which has tainted other litigation involving the War Powers.<sup>236</sup>

Another problem which an amendment must solve is the lack of justiciability of the War Powers Resolution.<sup>237</sup> As noted, the War Powers Resolution has proven to be the equivalent of dead-letter law, with various doctrines deployed by the courts to avoid deciding on the question of War Powers.<sup>238</sup> In solving this question, the answer cannot be to allow just anyone to sue over war policy; instead, the standing should be restricted to a delegation from Congress, but within reason so as not to

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<sup>232</sup> See *supra* note 218 (outlining the sections of the Analysis section indicating that neither the courts nor the other branches of government are the potential drivers for changing the current legal status of the War Powers and the underlying policy implications of that legal status); *supra* Part III.B.2 (outlining the problems related to Congress).

<sup>233</sup> Cf. Elesa & Weed, *Declarations of War*, *supra* note 27 (demonstrating the previous declarations of war which were public declarations by the Congress and nation).

<sup>234</sup> See *supra* Part III.B.3 (presenting an argument of Executive Branch overreach and problems resulting from interagency decisions regarding the use of military force). See also *supra* note 40 (reporting the War Powers Resolution purpose to “[t]o fulfill the intent of the Farmers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities”).

<sup>235</sup> See *supra* Part III.B.3 (presenting an argument of Executive Branch overreach and problems associated with solely interagency decisions regarding the use of military force). See also *supra* note 40 (reporting the purpose of the War Powers Resolution to “[i]t is the purpose of this joint resolution to fulfill the intent of the Farmers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities”).

<sup>236</sup> See *supra* Part III.B.1 (noting the problems associated with the standing problem with suits by Congress).

<sup>237</sup> See *supra* Part III.B.1 (analyzing the various bars to litigation over the constitutional War Powers and the War Powers Resolution leading courts to dismiss all lawsuits which seek to litigate the War Powers and War Powers Resolution).

<sup>238</sup> See *supra* Part III.B.1 (referencing the analysis section and the problems of litigating the War Powers Resolution). See also *supra* note 60 (noting that the War Powers Resolution is dead-letter law).

invite partisan rancor to overwhelm sober thought.<sup>239</sup> Likewise, the President should also have standing to sue regarding the budgetary elements related to budgeting for military force.<sup>240</sup>

Moreover, solving the justiciability issue addresses another problem.<sup>241</sup> Constitutional amendments do not have elements that automatically enforce them; for instance, the Fourteenth Amendment states that Congress shall pass laws enabling the object of the amendment.<sup>242</sup> The inclusion of the judiciary into the issue of military force provides an enforcement mechanism for the provisions of the proposed constitutional amendment, and prevents the amendment from being dead-letter law, a flaw with another proposed amendment.<sup>243</sup>

One other possibility is to include failure of the President to follow the amendment's parameters as a cause for impeachment.<sup>244</sup> While a major decision fraught with the possibility of government paralysis, such a decision would also add another edge to the amendment, because Congress would have a cause for action independent of the courts and the

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<sup>239</sup> Cf. note 106 (noting that the Executive Branch takes advantage of dithering and abdication by Congress in the realm of war powers).

<sup>240</sup> Cf. note 239 (noting the problems of Congress, including that Congress can tacitly approve military force by simply passing the budget for the Department of Defense). See also *Orlando v. Laird*, 443 F.2d 1039, 1042–44 (2d Cir. 1971) (remarking on continued Congressional funding as legitimizing Executive action and prosecution of the Vietnam War); *supra* note 188 (noting that the Congress continues to pass the budgets funding the use of military force, denoting tacit support for the use of military force).

<sup>241</sup> See *supra* Part III.C (referencing the analysis section dealing with the problem of litigating the War Powers Resolution and the problem of pursuing action via the courts and that courts dismiss all lawsuits litigating the War Powers and War Powers Resolution). See also Elsea & Weed, *Declarations of War*, *supra* note 27 (containing the previous declarations of war which were public declarations by the Congress).

<sup>242</sup> See *supra* Part III.C (analyzing the problems related to amending the Constitution). See also *supra* Part II.C.2 (presenting the background of amending the Constitution and the difficulty of such a feat because it requires a super-majority in both Congress and the individual states).

<sup>243</sup> See *supra* Part III (analyzing the War Powers and War Powers Resolution, leading to a conclusion that neither the courts nor the other branches of government are the drivers for changing the current legal status of the War Powers and the underlying policy implications of that legal status, and remarking specifically on the problems related to Congress, including partisanship and Congressional abdication). See also Miksha, *War Powers Resolution*, *supra* note 47, at 690–93 (proposing a constitutional amendment to create a war council as a more consultative model for employing military force, but which lacked any enforcement language, relying on dicta from *Marbury v. Madison*, 1 Cranch 137, 174 (1803) reading, “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it”).

<sup>244</sup> See *supra* Part III.B.3 (indicating the overreach of the Executive Branch and how the first AUMF enables the use of offensive military force beyond self-defense to be part of U.S. foreign policy). But see *supra* note 200 (decrying the possibility of impeachment).

standing controversy associated with cases involving the War Powers.<sup>245</sup> Including a cause for impeachment would also serve as a way to modify presidential behavior, especially behavior associated with the various presidential dodges used to circumvent the reporting and consulting requirements of the War Powers Resolution.<sup>246</sup> On the downside, this provision is also open to partisan abuse.<sup>247</sup>

## V. CONCLUSION

The current military policy of the United States is one of perpetual war. Such a policy departs from U.S. traditions and the Constitution until the post-WWII world, where the decision to use military force transformed from an interbranch dialogue between the Executive and Legislative branches to an interagency decision in the Executive Branch. Such a policy is an aberration from previous understandings of Americans that war and peace were distinctive. Peace rather than war was the natural state, and this aberration has had disastrous effects, warping U.S. foreign policy as well as causing ill domestic effects.

In understanding the policy of perpetual war, the real question has been how the current legal status leads to the current U.S. policy. The courts cannot rectify the problem, with various bars to litigation proving that lawsuits are not the solution. Nor does it appear that the solution will emerge from a fractious or partisan Congress. Similarly, the Executive Branch will not look a gift horse in the mouth by an abdicating Congress, whereby the Executive Branch makes using military force an interagency decision rather than an interbranch decision.

Because the solution will not emerge from the three branches of government, the answer to the problem of perpetual war is instead a radical idea: a constitutional amendment. This Note proposes a reworking of the War Powers within the Constitution to force interbranch deliberation on the use of military force, providing pathways for either the Executive Branch or Legislative Branch to compel compliance via lawsuit.

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<sup>245</sup> See *supra* Part III.B.1 (analyzing the problems related to litigating the War Powers and War Powers Resolution, including multiple bars to litigation meaning that all cases are dismissed resulting in the War Powers Resolution as dead-letter law).

<sup>246</sup> See *supra* Part III.B.2 (analyzing the problems of governance from the Legislative Branch, denoting that Congress has neither served as an effective counterweight nor has Congress amended the War Powers Resolution); *supra* Part III.B.2 (analyzing the problems of governance from the Executive Branch, denoting that the Executive Branch has continued its overreach based on Congressional abdication).

<sup>247</sup> See *supra* note 239 (noting the problems of Congress, including that Congress can tacitly approve military force by simply passing the budget for the Department of Defense, which was noted as a legitimization of Executive actions noted in *Orlando v. Laird*, 443 F.2d 1039, 1042-44 (2d Cir. 1971)).

The proposed amendment also obviates lawsuits like Captain Smith's; while the courts dismissed Captain Smith's lawsuit for lack of standing or political question, this proposed amendment empowers only Congress or the President to sue over military force. The proposed amendment is not sublime perfection, but an attempt to restore the interbranch dialogue that the United States originally used for military action, providing a more sober military and foreign policy.

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