



# UVU JOURNAL *of* NATIONAL SECURITY

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The *UVU Journal of National Security* is Utah's first student-edited academic journal focused on national security issues. The *JNS* is published twice annually—in April and December—and is supported by the Center for National Security Studies (CNSS) at Utah Valley University (UVU). The *JNS* publishes timely, insightful articles on critical national security matters, including topics relating to foreign affairs, intelligence, homeland security, terrorism, and national defense. The *JNS* accepts articles from UVU students, alumni, faculty, staff, and administration. Submissions should be sent to the *JNS* Editor-in-Chief at [nationalsecurity@uvu.edu](mailto:nationalsecurity@uvu.edu).

#### THE CENTER FOR NATIONAL SECURITY STUDIES

The CNSS at UVU was established in January 2016. The Center is the first of its kind in the State of Utah. The CNSS is a nonpartisan academic institution for the instruction, analysis, and discussion of the issues related to the field of U.S. national security. The mission of the CNSS is twofold: to promote an interdisciplinary academic environment on campus that critically examines both the theoretical and practical aspects of national security policy and practice; and to assist students in preparing for public and private sector national security careers through acquisition of subject matter expertise, analytical skills, and practical experience. The CNSS aims to provide students with the knowledge, skills, and opportunities needed to succeed in the growing national security sector.

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UVU is a teaching institution that provides opportunity, promotes student success, and meets regional educational needs. UVU builds on a foundation of substantive scholarly and creative work to foster engaged learning. The university prepares professionally competent people of integrity who, as lifelong learners and leaders, serve as stewards of a globally interdependent community.

The opinions expressed in this journal are the views of the authors and do not necessarily reflect the views or opinions of Utah Valley University.



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## A NOTE FROM THE EDITOR-IN-CHIEF

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*Ryan J. Griffith*

Although this is my first time as editor-in-chief, I have had the opportunity to work on, and publish in, this journal since our first issue. Every semester is a learning experience, full of success and failure, but what sticks out to me the most every semester is the determination of so many professors, authors, English classes, and journal staff. They volunteer dozens of hours each semester to create a product we are all proud of. This is truly a team effort, and after a semester at the helm I realize now more than ever that no great ship has ever been sailed by one person alone.

Every highlight of my time at UVU has included remarkable people. This semester I am particularly grateful to Deb Thornton. She is a wizard when it comes to creating a professional product and working with and learning from her is truly a privilege. Additionally, I am grateful for my staff, many of whom are new to our national security program. Mark Driggs, and Sam Elzinga, in particular, have provided needed encouragement, advice, and humor during roadblocks along the way. I truly believe the students involved with the Center for National Security Studies are some of the brightest young national security minds in the world. Their willingness to put their work out there, combat and accept new theories and principles, and continually work to improve themselves is key to the success of our program.

I am also thrilled to have the contributions from Dr. Kori Schake, and Prof. Mike Smidt. Their careers and examples of public service inspire me. I hope you gain as much as I have from their contributions to our program and U.S. national security.

In an ever evolving world, an understanding of national security is increasingly important. No matter your profession, or interests, national security issues effect our lives. And though we live in a world

saturated with news and information, we sell ourselves short when we limit our education to talking points and buzz words. My hope, is that this journal serves as a source of valuable information that increases education and debate in both quality and quantity.

Editor-in-Chief

*Journal of National Security*



## FOREWORD

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Kori Schake  
Deputy Director-General  
International Institute for Strategic Studies

What a joy it is to be among the contributors to this issue of the UVU Journal of National Security! Thank you, Ryan Griffith, for giving me the opportunity to come talk about these issues with Utah Valley University students earlier this year, and for inviting me back to celebrate this good work students are doing in these pages.

I'm so impressed with the National Security Studies program UVU is building, open to undergraduate as well as graduate students. I'm thrilled to see Utah Valley University students landing internships in the intelligence community, at the State Department, Capitol Hill, the White House, and the Pentagon—and fulfilling jobs important to our country's security on the basis of those experiences. I'm so proud of them, and so grateful for them choosing work to keep our country safe and able to act effectively in the world.

Let me also applaud the initiative UVU students have taken to create and curate a journal of long-form articles. Much as I love the cut and thrust of social media exchanges, there is no substitute for deeply researching issues, unskinning complex arguments, and seeking to both inform and persuade in the ways that journal articles do. And especially for those just coming into the field.

Here's what I've learned writing a whole career on these issues: the way to be a good writer is to write. As the great historian David McCullough says, "writing is hard because it requires thinking clearly. And thinking clearly is hard." It took me a very long time to become a good writer, mostly because I was trying to sound like an intellectual instead of just being an intellectual. It took getting a lot more confi-

dent about what I knew and that I had a perspective worth hearing while sounding like myself before I could write well about it.

So I want to celebrate the contributors to this journal for committing to the craftsmanship of writing about difficult and important national security issues. But I also want to encourage the *Journal of National Security's* readers to sink your teeth into these articles and argue with the authors. Education is a contact sport. It requires thinking critically, offering countervailing data, and formulating alternative arguments.

I do my best work when I challenge myself to identify what would be the data that would prove my arguments wrong, and then try and find that data. If I can't, it makes me more confident in the analysis and policy prescriptions I'm offering. If I can find the discriminating data that shows me in error, I congratulate myself for being honest and getting smarter, and think afresh about the problem and its solutions.

I love that the topics of this edition range across European security, terrorist propaganda, dealing with a revanchist Russia, and grappling with how changes in the Arctic will affect the global economy and security. I started my career as a European analyst, and am never far from that tethering. My own work just now is focusing on whether the middle powers of the liberal international order—especially America's allies in Europe and Asia, can sustain the existing order against American destructiveness. I have a slim book on that coming out at the same time as this edition of the Journal, and I hope I've upheld the standard as well as the contributors to this issue of the Journal of National Security.



## STRATEGIC CERTAINTY: THE PROPOSED WAR POWERS CONSULTATION ACT

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*Michael L. Smidt*<sup>1</sup>

War cannot be divorced from political life, and whenever this occurs in our thinking about war, the many links that connect the two elements are destroyed and we are left with something pointless and devoid of sense.  
—Carl von Clausewitz<sup>2</sup>

With the recent passing of a genuine American hero, Senator John McCain (R-AZ), it seems appropriate to re-look and re-consider seriously a bill Senators Tim Kaine (D-VA) and McCain proposed in 2014.<sup>3</sup> Unfortunately, this very well thought out and beneficial piece of proposed legislation has never left the Senate.<sup>4</sup> Should this bill ever become law, when it comes to sending American troops into battle, the law would lead to greater compliance with the US Constitution, increased political and domestic certainty through greater participation of both political branches in any decision to commit US forces, and, the subject of this article, greater certainty and the likelihood of success on the actual battlefield.

Over the years, particularly since the Korean War, presidents have deployed the armed forces of the United States into combat or into situations where combat was likely without fully consulting Congress.

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1. Michael L. Smidt, J.D., LL.M., M.S.S., is an Assistant Professor of Criminal Justice at Utah Valley University. Prior to coming to UVU, Professor Smidt retired as a Colonel in the Judge Advocate General's Corps of the U.S. Army. He teaches, among other classes, National Security Law.

2. Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret, eds. (Princeton: Princeton University Press, 1984), 605.

3. CONG. RECORD, 113th Cong., S441 (Jan. 16, 2014).

4. S. 1939, War Powers Consultation Act of 2014.

For its part, Congress has failed to properly exercise its constitutional duty to participate in the decision whether to commit troops and has simply acquiesced to executive leadership. Passage of the act would require the participation of both political branches of the government in any decision to consign the armed forces to any significant hostile action, as many assert that the framers of the Constitution intended.

Not only would participation of both branches of the government lead to a more constitutionally grounded decision to employ military force and expend US treasure, a joint decision to use force would lead to greater strategic certainty for military commanders. In turn, the resulting clear and unambiguous statements of support for the use of American forces by both political branches of the government should, and, in many cases, would translate to a greater likelihood of battlefield success for the military commander.

In an effort to limit a president's ability to deploy US forces into hostile situations without congressional involvement, Congress passed the 1973 War Powers Resolution over the veto of President Richard M. Nixon.<sup>5</sup> However, presidents from both parties have since considered the War Powers Resolution unconstitutional.<sup>6</sup> Moreover, recognizing its defects,<sup>7</sup> not only have presidents tended to ignore application of the law, so has Congress.<sup>8</sup> The Supreme Court has all but re-fused to decide cases based on the law, applying the "political question" doctrine as method to avoid ruling on use of force questions.<sup>9</sup> The court

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5. John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, Princeton University Press, 1993), 48; Donald Westerfield, *War Powers: The President, the Congress, and the Question of War* (Westport: Praegar Publishers, 1996), 3; Robert F. Turner, *The War Powers Resolution: Its Implementation in Theory and Practice* (Philadelphia: Foreign Policy Research Institute, 1983).

6. Congressional Research Service (CRS), *The War Powers Resolution: After 34 Years* (Washington, DC: Congressional Research Service, March 10, 2008), 1; National War Powers Commission (NWPC), *National War Powers Commission Report*, 35.

7. Sam Nunn, *Democratic Leadership Council Speech* (Williamsburg: Feb. 29, 1988),

4. Senator Nunn stated that the War Powers Resolution is "riddled with defects."

8. Nunn, Democratic; CRS, *War Powers Resolution*, 1; NWPC, *National War Powers Commission*, 35.

9. NWPC, *National War Powers Commission Report*, The Miller Center of Public Affairs (Charlottesville: University of Virginia Press, 2009), 12. The Supreme Court has treated decisions to deploy the armed forces of the United States into hostilities as a political question within the exclusive purview of Congress and the Executive.

has never ruled on the constitutionality of the War Powers Resolution. Even so, the court has struck down other unrelated laws that appear to have the same or similar defects. This has led many to believe that the Supreme Court would find the 1973 War Powers Resolution unconstitutional if the right case ever came before it.<sup>10</sup>

In 2014, Senator Tim Kaine and the late Senator John McCain introduced Senate Bill 1939, the proposed War Powers Consultation Act of 2014.<sup>11</sup> This legislation was substantially, with some minor changes, the so-called 2009 War Powers Consultation Act, produced by a team of distinguished experts, consisting of very senior former government officials and renowned academics, at the University of Virginia's Miller Center.<sup>12</sup> The stated purpose of S 1939 was to repeal and replace the 1973 War Powers Resolution with something that the team of experts and the two senators believed would pass constitutional muster and require the participation of both political branches anytime a president deployed US forces into "significant armed conflict."<sup>13</sup>

Both the senators and the team of experts believed that the 1973 War Powers Resolution, which has existed for 45 years, is, at worst, unconstitutional, and, at best, ineffective.<sup>14</sup> That, and because under the Constitution, it is unclear as to which political branch has primacy in a decision to send US forces into combat,<sup>15</sup> and because the judiciary has largely avoided this issue by citing the "political question" doctrine and/or standing,<sup>16</sup> we are left with great political uncertainty when it

10. NWPC, *National War Powers*, 21, citing *INS v. Chadha*, 462 U.S. 919 (1983).

11. CONG. RECORD, Jan. 16, 2014.

12. NWPC, *National War Powers*, 6. The National War Powers Commission was organized at the Miller Center of Public Affairs at the University of Virginia and partnered with the James A Baker III Institute for Public Policy, Rice University; the Freeman Spough Institute for International Studies and Stanford Law School, Stanford University; the University of Virginia School of Law; and William and Mary School of Law. James A. Baker, III and Warren Christopher, both former Secretaries of State, served as Commission Co-Chairs. The Commission Co-Directors were John C. Jeffries, Jr. and W. Taylor Reveley III. Commission members included Slade Gordon, Lee H. Hamilton, Carla A. Hills, John O. Marsh Jr., Edwin Meese III, Abner J. Mikva, J. Paul Reason, Brent Scowcroft, Anne-Marie Slaughter, and Strobe Talbot. The Commission also heard from a number of current and former government officials and members of academia.

13. S. 1939, War Powers Consultation Act of 2014, §3.

14. S. 1939, §2(a)(1); NWPC, *National War Powers*, 21, 23.

15. NWPC, 6.

16. NWPC, 6; S. 1939, §2(a)(3).



comes to deciding whether to send in the troops. The senators and experts assert, and rightly so in my opinion, that the American public wants to see both political branches work in unison and either agree or disagree together to deploy our armed forces into “significant armed conflict.”<sup>17</sup> A decision with which both the Congress and the president agree would also, I believe, tend to bring any such decision in harmony with the requirements established by the framers in the US Constitution.<sup>18</sup>

But that is not all. Not only would application of the principles enunciated in the 2014 War Powers Consultation Act bring about greater political certainty and stability, it would have the tendency to create greater strategic, operational, and tactical certainty on the battlefield for US commanders and troops as well. If both the president and Congress participate in a decision to deploy US armed forces, this should, in turn, generate greater support among this US populace. It would mean that the adversary would see clear US resolve, which, in turn, may have a deterrent effect against the adversary’s continued use of military force to achieve his objectives. Moreover, if the American people see the two political branches working in tandem, perhaps support, including recruiting efforts, would be even more forthcoming and observable.

If commanders on the ground know that both the president, as commander-in-chief, and Congress, the branch responsible for declaring war, raising the force necessary, and funding operations, agree that American armed forces should be sent into combat, commanders and planners can effectively plan and conduct operations without having to wonder if suddenly the “rug might be pulled out from under them” by one or both of the political branches. Not only will commanders know they will receive the support they need as they plan and execute combat operations, but also the troops will be confident that the entire weight of the US government, and the people themselves, is behind them.

Or, alternatively, where one or both of the political branches as a whole are clearly on record as opposing the deployment early on, then commanders will know it is less likely they will deploy or remain deployed if they are already in place. This would likely weigh heavily in

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17. S. 1939, §2(a)(2); NWPC, 35.

18. See generally, US Constitution, arts. I and II.

any decision to engage his or her troops in significant combat until the dispute is resolved.

Another way the 2014 War Powers Consultation Act contributes greatly to strategic certainty is through its definition of and exceptions to “significant armed conflict,” the trigger for the Act,<sup>19</sup> as well as the list of limited exceptions to consultation and reporting requirements.<sup>20</sup>

The United States has had more than 40 years of experimentation with the 1973 War Powers Resolution. Because of the work of the War Powers Commission and Senators Kaine and McCain, the United States is in a position to bring greater constitutional, political, and strategic certainty to any decision to use American armed forces. Passage of the 2014 War Powers Consultation Act is in the United States’ best interests.

#### THE POWER TO MAKE WAR IS A SHARED CONGRESSIONAL AND PRESIDENTIAL POWER

As noted above, since the Korean War, presidents have deployed armed forces without consulting Congress, and the latter has acquiesced to executive leadership. The Act would require co-participation of both government branches to deploy or consign the armed forces to any significant hostile action.

The Constitution itself, perhaps purposefully, generates some of the uncertainty tied to the deployment of US armed forces because as long as there has been a United States, there has been intense debate as to which of the political branches is responsible for committing US forces into combat. Does that responsibility belong to the president, Congress, or both?

In terms of national security, the framers of the Constitution created a decision-making framework that balanced power between the president and Congress. Each branch has unique and separate powers regarding committing forces into hostilities. It is as if both branches hold certain keys that must be used together in order to be effective. For example, in Article I, the Constitution grants to Congress power to raise and support armies.<sup>21</sup> In Article II, the Constitution grants to

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19. S. 1939, §3.

20. S. 1939, §8(b)(2).

21. US Constitution, art. I, sec. 8, cl. 12.

the president the commander-in-chief power.<sup>22</sup> Congress generates the force that the president commands. Both are required to create and lead the force. It is arguably, then, more of a shared power than separate powers.

Both branches with their respective national security powers are indispensable. However, it is not clear in the Constitution as to how these respective powers are to be balanced. Some argue that the balance of power in making war should favor Congress, while others say the Executive should be the primary power broker.

More than 230 years have passed since the Constitution was ratified, and yet the appropriate balance of power between the political branches with regard to foreign affairs and the power to wage war has not been settled.<sup>23</sup> Some argue that the founding fathers never completely resolved the issue of which branch has primacy in foreign affairs, including the power to commit military force.<sup>24</sup> Others argue that the issue was resolved but that the Framers purposely created a system with some ambiguity built in. The result is a system that diffuses power and thereby reduces the possibility for abuse.<sup>25</sup>

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22. US Constitution, art. II, sec. 2, cl. 1.

23. Westerfield, *War Powers*, 13; NWPC, 6; John Lehman, *Making War: The 200 Year-Old Battle Between the President and Congress over How America Goes to War* (New York: Macmillan Publishing Company, 1992), 59; Louis Fisher, "Historical Survey of the War Powers and the Use of Force," in *The United States Constitution and the Power to Go to War*, ed. Gary M. Stern and Morton H. Halperin (Westport: Greenwood Press 1994); William Conrad Gibbons, "The Origins of the War Power Provision of the Constitution," in *Congress and United States Foreign Policy: Controlling the Use of Force in the Nuclear Age*, ed. Michael Barnhart (Albany: University of New York Press, 1987), 9; L. Gordon Crovitz & Jeremy A. Rabkin, eds., *The Fettered Presidency: Legal Constraints on the Executive Branch* (Washington DC: American Enterprise Institute, 1989).

24. Lehman, *Making War*, 60. Others however, have argued that the Founding Fathers did, in fact, resolve the foreign relations and war powers issues. They argue that certainly the Founders would not have left this crucial issue to chance, to be resolved in the future. For example, Professor Turner argues that is not reasonable to believe the Founders intended for there to be a "jump ball" approach to national security. Professor Turner believes that there was actually substantial consensus with respect to the distribution of foreign affairs or national security powers. Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (Riverside: Brassey's Inc. 1991), 51-52, 56.

25. W. Taylor Reveley III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* (Charlottesville: University of Virginia Press, 1981), 71.

The Constitution is, as Edward Corwin sees it, an “invitation to struggle for the privilege of directing American Foreign policy.”<sup>26</sup> While the preponderance of power may shift back and forth between the two branches depending on the type of and phase of a given crisis, in the final analysis, it is a shared and balanced power.

#### ARGUMENTS IN SUPPORT OF CONGRESSIONAL PRIMACY IN FOREIGN AFFAIRS AND NATIONAL SECURITY

Some constitutional scholars have become critical of the way in which presidents, from Harry S. Truman through George W. Bush, have committed US forces. They argue that presidents have relied on an unconstitutionally exaggerated scope of the commander-in-chief power. They believe that presidents have ignored the primary role the Constitution grants to Congress in war making.<sup>27</sup>

26. Edward S. Corwin, *The President: Office and Powers*, 5th ed. (New York: New York University Press, 1984), 201.

27. John C. Yoo, “The Continuation of Politics by Other Means: The Original Understanding of War Powers,” *Calif. L. Rev.* 84 (March 1996): 167, citing Ely; Michael J. Glennon, *Constitutional Diplomacy* (Princeton: Princeton University Press, 1990); Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004); Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990); Harold H. Koh, *The National Security Constitution: Sharing Power after the Iran–Contra Affair* (New Haven: Yale University Press, 1990); Francis D. Wormuth et al., “To Chain the Dog of War,” *Duke L. J.* 41 (1991): 27; Jane E. Stromseth, “Rethinking War Powers: Congress, the President, and the United Nations,” *Geo. L. J.* 81 (1993): 597; Thomas F. Eagleton, *War and Presidential Power: A Chronicle of Congressional Surrender* (New York: Liveright, 1974); Louis Henkin, ed., *Foreign Affairs and the U.S. Constitution* (Oxford: Oxford University Press, 1990); Edward Keynes, *Undeclared War: Twilight Zone of the Constitutional Power* (University Park: Pennsylvania State University Press, 1982); Reveley, *War Powers*; Arthur M. Schlesinger Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973); Ann Van Wynen Thomas and A. J. Thomas Jr., *The War-Making Power of the President: Constitutional and International Aspects* (Dallas: SMU Press, 1982); William Van Alstyne, “Congress, the President, and the Power to Declare War: A Requiem for Vietnam,” *U. Pa. L. Rev.* 121 (1972): 1; Arthur Bestor, “Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined,” *Seton Hall L. Rev.* 5 (1974): 527; Alexander M. Bickel, “Congress, the President and the Power to Wage War,” *Chi.-Kent L. Rev.* 48 (1971): 131; Gerhard Casper, “Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model,” *Chi. L. Rev.* 43 (1976): 463; Leonard G. Ratner, “The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles,” *S. Cal. L. Rev.* 44 (1971): 461; Stephen L. Carter, “The Constitutionality of the War Powers Resolution,” *Va. L. Rev.* 70

Congressional power proponents point out that Article I of the Constitution created Congress, suggesting that Congress was intended to be the preeminent branch of government. Those who assert that Congress has the primary role in national security often cite the sheer number of authorities granted to Congress, including such things as the power to

- Lay and collect taxes, duties, imports and excises, to pay the debts, and to provide for the common defense;
- Regulate commerce with foreign nations;
- Define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
- Declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
- Raise and support armies;
- Provide and maintain a navy;
- Make rules for the government and regulation of the land and naval forces;
- Provide for the calling forth of the militia and to execute the laws of the Union, suppress insurrections, and repel invasions; and
- Erect forts, magazines, arsenals, dockyards, and other needful buildings.<sup>28</sup>

Additionally, in some cases, the Constitution grants to Congress certain key-like powers that prevent other entities from acting in the area of national security without prior congressional approval, including

- No money shall be drawn from the treasury, but in consequence of appropriations made by law;
- No state shall enter into any treaty, alliance, or confederation; grant letters of marquee and reprisal;
- No state shall, without the consent of Congress [. . .] keep troops or ships of war in time of peace, enter into any agreement or compact with another state or foreign power or engage in war.<sup>29</sup>

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(1984): 101; John H. Ely, "Suppose Congress Wanted a War Powers Act That Worked," *Colum. L. Rev.* 88 (1988): 1379; Eugene V. Rostow, "Once More into the Breach: The War Powers Resolution Revisited," *Val. U. L. Rev.* 21 (1986): 1.

28. U.S. Constitution, art. I, sec. 8.

29. U.S. Constitution, art. 1, sec. 9, cl. 7, and sec. 10, cl. 1 and 3. While many

While all of these enumerated powers have a direct impact on national security, the constitutional authority most often cited in support of congressional preeminence in the decision to use the military is the congressional prerogative to declare war. Congressional power proponents point out that the framers were deathly afraid of an imperial president and did not want to give him or her unchecked authority to drag the United States into war. They argue that the phrase “declare war” means that only Congress has the power to authorize or initiate war. Professor Jon Hart Ely explains, “The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, ‘declared’ in so many words or not—most weren’t even then—had to be legislatively authorized.”<sup>30</sup>

Congressional power advocates assert that a president must have a declaration of war or its statutory equivalent before the commander-in-chief power is unlocked.<sup>31</sup> They argue that Congress must first

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believe Congress can simply stop funding military activities it is opposed to, some question whether, constitutionally speaking, Congress can simply “pull the plug” on a military action underway using the appropriations power. The Constitution does not give Congress a “War Veto Power” but the power to declare war. Peter Raven-Hansen, “Constitutional Constraints: The War Clause,” in *The United States Constitution and the Power to Go to War*, ed. Gary M. Stern and Morton H. Halperin (Westport: Greenwood Press, 1994), 46.

30. Ely, *War and Responsibility*, 3, citing U.S. Constitution, art. I, sec. 8, cl. 11; *Bas v. Tingy*, 4 U.S. 32, 35-36 (1800); *Talbor v. Seeman*, 5 U.S. 1, 18 (1804); *The Federalist* No. 25 at 211 (Hamilton) (B. Wright ed. 1961) and War Powers Resolution of 1973, Note 21 to the appendix. Ely further argues, “The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war to the Legislature.” Ely, 4, citing letter from James Madison to Thomas Jefferson, James Madison, “Letter to Thomas Jefferson,” April 2, 1798.

31. See generally, Yoo, 167, citing Ely; Michae J. Glennon, *Constitutional Diplomacy*; Fisher, *Presidential War Power*; Henkin, *Constitutionalism, Democracy*; Koh, *National Security*; Wormuth, “To Chain the Dog of War,” 27; Stromseth, “Rethinking,” 597; Eagleton, *War and Presidential Power*; Henkin, *Foreign Affairs*; Keynes, *Undeclared War*; Reveley, *War Powers*; Schlesinger, *The Imperial Presidency*; Van Alstyne, “Congress,” 1; Bestor, “Separation of Powers,” 527; Bickel, “Congress,” 131; Casper, “Constitutional Constraints,” 463; Ratner, “Coordinated Warmaking Power,” 461; Carter, “Constitutionality of the War Powers Resolution,” 101; Ely, “Suppose Congress Wanted,” 1379; Rostow, “Once More,” 1.

authorize war.<sup>32</sup> In support of this argument, congressional power adherents point to the linguistic shift from the original draft of the Constitution, which gave Congress the power to “make war,” to the final version, which gave Congress the power to “declare war,” as evidence that the framers did not want Congress to “conduct” war, an executive function, but wanted Congress to have a monopoly on the power to “authorize” war.<sup>33</sup> They further explain that use of the phrase “declare war” rather than “make war” would protect the Executive’s power to repel sudden attacks against the United States, but they reserve to Congress the power to take an otherwise peaceful nation to war.<sup>34</sup>

Unlike the president’s treaty power, which requires consent from the Senate,<sup>35</sup> a declaration of war is issued by Congress exercising its legislative or law-making power, which requires the participation of both the House and Senate.<sup>36</sup> The framers added an additional level of debate when it comes to declaring war. Requiring House participation in the decision to declare war is circumstantial evidence that the Framers intended to slow the road to war by creating an intentional pause or a “sober second thought.”<sup>37</sup>

#### ARGUMENTS IN SUPPORT OF PRESIDENTIAL PRIMACY IN FOREIGN AFFAIRS AND NATIONAL SECURITY

Most of the 55 delegates to the Constitutional Convention had

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32. NWPC, *Report*, appendix 4, page 3.

33. Reveley, *War Powers*, 81–85. Alexander Hamilton argues the president is nothing more than the “First General” or “Admiral” and that, unlike the King, he has no power to declare war, raise or regulate fleets and armies. Alexander Hamilton, “The Federalist No. 69, The Real Character of the Executive,” March 14, 1788, [http://avalon.law.yale.edu/18th\\_century/fed69.asp](http://avalon.law.yale.edu/18th_century/fed69.asp). However, just four days later, Hamilton wrote, “Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. . . . In the legislature, promptitude of decision is oftener an evil than a benefit.” Alexander Hamilton, “The Federalist No. 70, The Executive Department Further Considered,” March 18, 1788, [http://avalon.law.yale.edu/18th\\_century/fed70.asp](http://avalon.law.yale.edu/18th_century/fed70.asp).

34. Turner, *War Powers Resolution*, 17.

35. U.S. Constitution, art. II, sec. 2, cl. 2.

36. U.S. Constitution, art. I, sec. 8. This also suggests that the argument that the president can commit forces in order to execute a treaty, without consultation with Congress, is questionable.

37. Ely, *War and Responsibility*, 4.

served in the Continental Congress during the Revolutionary War.<sup>38</sup> Before the revolution, “the mood in the colonies was notoriously anti-executive.”<sup>39</sup> By the time of the Constitutional Convention, however, the drafters of the Constitution were no longer concerned solely with the dangers associated with an imperial president. They were also keenly aware of the problems the young republic had experienced because of a weak executive.<sup>40</sup>

The Articles of Confederation gave the Continental Congress the power to conduct foreign affairs, make treaties, and declare war; however, the Articles failed to provide for an executive body with powers that could enforce the laws passed by the Continental Congress.<sup>41</sup> Delegates came to the Constitutional Convention in Philadelphia intending, among other things, to replace the Articles of Confederation with a stronger national government for national security purposes.<sup>42</sup>

Many constitutional scholars agree that, unlike the enumerated congressional powers, there are “aggregate powers” in the president that are both explicit and implied. The “Vesting” and “Commander-in-Chief” clauses arguably give presidents a broad array of inherent powers not specifically listed in the Constitution.<sup>43</sup>

38. Stephen Dycus, Arthur L. Berney, William C. Banks, and Peter Raven-Hansen, *National Security Law*, 2nd ed. (Boston: Little, Brown, 1997), 20.

39. Dycus et al., 18.

40. Dycus, et al., 20; Williamson Murray, MacGregor Knox, and Alvin Bernstein, eds., *The Making of Strategy: Rulers, States and War* (New York: Cambridge University Press, 1994), 208–216; Peter Irons, *War Powers: How the Imperial President Hijacked the Constitution* (New York: Metropolitan Books, 2005), 12; Gary M. Stern and Morton H. Halperin, eds., *The United States Constitution and the Power to Go to War* (Westport: Greenwood Press, 1994), 1.

41. Irons, *War Powers*, 12. Professor Yoo explains, “Hence, the story of the Continental Congress is a tale of failed attempts to organize its executive, not legislative power effectively.” Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, (Chicago: University of Chicago Press, 2005), 76.

42. Yoo, *Powers of War*, 88; Dycus et al., 19; Robert B. Zoellick, “Congress and the Making of US Foreign Policy,” *Survival* 41, no. 4 (Winter 1999/2000): 31.

43. Westerfield, *War Powers*, 38. The Constitution explains the legislative power granted to Congress with great specificity and detail concerning the substantive areas in which Congress can legislate. However, Article II lacks any real specificity in terms of what authority is included with the Commander and Chief and executive powers, which has led courts and many scholars alike to conclude the framers must have intended for the president to have all the powers generally associated with being the chief Executive and Commander in Chief, even though these powers were not enumerated. The framers wanted to clearly enumerate congress-



Support for the notion that the president has inherent commander-in-chief and executive powers not specifically enumerated in the Constitution can be found in the US Supreme Court case of *United States v. Curtiss-Wright Export Corp.*<sup>44</sup> In *Curtiss-Wright Export Corp.*, Justice George Sutherland, a former senator and member of the Foreign Relations Committee, and no supporter of President Franklin D. Roosevelt or of executive power,<sup>45</sup> opined that the “president [is] the sole organ of the federal government in the field of international relations,” and his “power [ . . . ] does not require as a basis for its exercise an act of Congress.”<sup>46</sup> The court apparently believed that the nation needed to be able to speak with one voice in foreign affairs, and that one voice was to be the president’s.<sup>47</sup> The *Curtiss-Wright* Court opined that, unlike in domestic affairs, in foreign affairs, the president requires a “degree of discretion and freedom from statutory restriction.”<sup>48</sup>

Although the Supreme Court has, since *Curtiss-Wright*, rendered opinions that temper the language of *Curtiss-Wright* and suggest that the “sole organ” language is merely *dicta* and not the actual holding of the court,<sup>49</sup> even strong proponents of congressional power admit there are times where the president has an interest in an apparently inherent emergency response authority to “repel sudden attacks” on

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sional power, but wanted to give general guidance in terms of presidential power.

44. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936). In *Curtiss-Wright*, Congress had authorized the President to place an embargo on arms sales to certain countries in South America. President Franklin D. Roosevelt executed such an embargo. In the face of criminal charges that it had sold arms to Bolivia, the corporation argued that Congress did not have the power to grant to the President the power to make a fundamentally legislative determination. The Court disagreed, finding that with regard to external decisions, a specific enumerated power need not always be present in the Constitution.

45. Lehman, *Making War*, 64, citing, *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936). John Lehman writes, “In what amounted to a clear affirmation of presidential primacy, the court held that ‘the powers of external sovereignty do not depend upon the affirmative grants of the Constitution’ and endorsed the existence of the ‘very delicate plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.’”

46. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936).

47. NWPC, *Report*, appendix 5, page 5.

48. Lehman, *Making War*, 64.

49. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 636, note 2 (1952).

United States territory and possibly a functional equivalent when there is some unforeseen “clear danger” to national security, where there is no time to secure advanced congressional authorization.<sup>50</sup>

Similarly, executive power proponents argue that from a “structural” standpoint, the Constitution places the Executive in the best position to handle matters of foreign affairs and national security.<sup>51</sup> The president has control over the intelligence agencies and the intelligence produced by those agencies. The Executive is more likely to be able to protect secrets because fewer persons are involved. The president controls the departments of State and Defense.

Debate, compromise, shifting policy, and building consensus are important attributes when it comes to drafting legislation. However, these structural strengths are potential structural weaknesses in foreign relations because they lead to indecision, lack of unity of purpose, and perceived weakness by allies and enemies alike.<sup>52</sup> He can more effectively provide unity of effort and act swiftly and decisively when time is of the essence.<sup>53</sup> Justice Robert Bork explains, “Congress, consisting of 535 members assisted by huge staffs, is obviously incapable of swift, decisive, and flexible action in the employment of armed force, the conduct of foreign policy, and the control of intelligence operations.”<sup>54</sup>

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50. Ely, *War and Responsibility*, 6. However, not all emergencies justify unilateral executive action. In Youngstown, President Truman attempted to improperly nationalize the steel industry during the Korean War. Justice Douglas wrote, “There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised.” *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 629 (Douglas, J. concurring, 1952).

51. Thomas Jefferson wrote, “The transaction of business with foreign nations is executive altogether.” *The Papers of Thomas Jefferson*, ed. Boyd, vol. 6 (Princeton, NJ; Princeton University Press 1961), 378–379. Robert Bork explains, “The need for Presidents to have the power [to use force abroad without congressional approval], particularly in the modern age, should be obvious to almost everyone.” Ely, *War and Responsibility*, 5, citing Robert H. Bork, “Erosion of the President’s Power in Foreign Affairs,” *Wash. U. L. Q.* 68 (1990): 693, 698.

52. Caspar W. Weinberger, “Dangerous Constraints on the President’s War Powers,” in L. Gordon Crovitz & Jeremy A. Rabkin, eds., 97.

53. Turner, *Repealing the War Powers*, 47–80. See also note 33.

54. Robert H. Bork, “Forward” in ed. L. Gordon Crovitz and Jeremy A. Rabkin, eds.

There is no denying that it is Congress, not the Executive, that has the power to declare war. However, presidential power proponents argue that the power to declare war is often misunderstood and does not necessarily include the power to initiate war. As with congressional power proponents, those who favor executive power point out that the initial draft of the Constitution granted to the legislature the power to “make war” rather than “declare war.”<sup>55</sup> However, they also look to the notes of some present during the debates that indicate the drafters were concerned that giving Congress the power to “make war” rather than “declare war” was too broad and would impinge on the Executive’s role as commander-in-chief.<sup>56</sup> For example, Rufus King from Massachusetts was concerned that use of the word “make” might be understood to mean that Congress was to “conduct” war, which was the job of the Executive.<sup>57</sup>

Some argue that the power to declare war should be viewed more along the lines of the authority to announce that a state of war exists rather than the power to initiate war.<sup>58</sup> According to dictionaries in print at the time of the Constitution, “declare” meant to “recognize” or “proclaim.”<sup>59</sup> The framers could have instead selected words such as “enter,” “authorize,” “approve,” “initiate,” “begin,” “direct,” or “conduct” war if it had been their intent for Congress to have the power to take the nation to war. An example of use of the word “declare” contemporaneous with the Constitution is in the Declaration of Independence, which did not authorize combat by its own terms. Instead, the Declaration served as notice that the new republic had changed its status from a group of British colonies to several independent states.<sup>60</sup>

Certainly, treatises on international law, such as Hugo Grotius’s *De Jure Belli ac Pacis* and Vattel’s *The Law of Nations or Principles of Natural Law* were well known to the framers.<sup>61</sup> Supporters of a strong

55. Westerfield, *War Powers*, 18–19; John Norton Moore, Frederick S. Tipson, and Robert F. Turner, *National Security Law* (Durham: Carolina Academic Press 1990), 817.

56. Westerfield, 18–19; Turner, *Repealing*, 68–69.

57. Dycus et al., 22.

58. Yoo, *Powers of War*, 144.

59. John Yoo, “War and the Constitutional Text,” *U. Chi. L. Rev.* 69, (2002): 1639, 1670.

60. Yoo, “War,” 1671.

61. Yoo, *Powers of War*, 33, 42. A declaration of war served two purposes. First, it notified the enemy that a state of war existed. It made it clear that future

Executive point out that the constitutional framers would have realized that a declaration of war was not required in international law prior to the initiation of hostilities.<sup>62</sup> At the time of the Constitution, war was declared about 10 percent of the time, and these notices of intent were largely used when a state was going to conduct offensive rather than defensive war.<sup>63</sup> There would be no reason to declare war in the defense because it would be obvious to the attacking power and to US citizens that a state of war existed.<sup>64</sup>

And, finally, in a rarely cited section of the Constitution, the individual states are granted the power to “engage” in war with prior congressional approval.<sup>65</sup> However, in contrast to the provision regarding the states, there is no explicit requirement in the Constitution that the president first obtain congressional consent before engaging in an exercise of commander-in-chief powers or committing forces to war.<sup>66</sup> If the framers had thought to include this requirement for prior approval for the states, they could have easily done so with the Executive if that had been their intent. Moreover, the framers used the word “engage” when referring to states and chose “declare” when describing

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hostilities were sanctioned by the government, and were not a criminal or private affair and so that the citizens of the other state could be attacked. Secondly, a declaration served to inform citizens of the declaring state that their legal status had been altered. It was necessary for a nation to warn its own citizens of their new relationship with their own state and the other hostile party. A declaration merely perfected or made “completely effectual” the hostilities between two or more parties.

62. Yoo, *Powers of War*, 33, 42.

63. Turner, *War Powers Resolution*, 21; Mark R. Shulman, “The Legality and Constitutionality of the President’s Authority to Initiate an Invasion of Iraq,” in James R. Silkenat and Mark R. Shulman, eds., 44, 47. Dean Shulman argues that President Bush could not claim that he was repelling an attack or anything like it and so this was not a defensive war and President Bush therefore needed a declaration of war by Congress to send troops to Iraq.

64. J. Hamilton ed., *Works of Alexander Hamilton* (1851), 746–747, quoted in “Congress, the President, and the Power to Commit Forces to Combat” in 1779. Alexander Hamilton explained, “But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress in nugatory; it is at least unnecessary.” Some have argued that a post-UN Charter declaration of war may be illegal under international law because offensive war is aggression. See Turner, 85–92.

65. U.S. Constitution, art. I, sec. 10, cl. 3.

66. NWPC, appendix 4, page 5.

congressional power. Common usage of the word “declare,” as in “declare war,” suggests a lesser power than to “engage” in war.

While there is certainly merit to the arguments made by those who favor a strong Executive, scholars who believe Congress is the primary branch in matters of national security make an equally compelling case. From the above discussion, it appears that there is insufficient evidence in order to determine which, if either, branch is controlling the decision to commit armed forces. As will be discussed below, the Judiciary has played a very limited role in resolving the debate. As will be seen, national security power is a balanced and shared power between both of the political branches.

#### THE ROLE OF THE JUDICIARY IN NATIONAL SECURITY

Of the three branches of government, the Judiciary has the most limited role to play in foreign policy and in national security. The Constitution states, “The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>67</sup> And, “the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.”<sup>68</sup>

Not only is the Constitution relatively silent on the precise function the Judiciary is to play in national security, the Court itself has limited its own participation through the Court’s self-made “political question” doctrine and by often finding that plaintiffs lack “standing” to bring challenges to national security decisions made by the political branches.<sup>69</sup> Efforts to turn to the Supreme Court have failed for the most part because the courts view the decision to use military force more as a policy or political decision rather than as a legal one.

The Court has consistently maintained that the judicial branch plays a far less significant role than do the political branches in foreign policy.<sup>70</sup> Unlike other areas of constitutional law, such as criminal procedure, interstate commerce, equal protection, free speech, and privacy, the judicial branch has avoided acting as a referee between the

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67. U.S. Constitution, art. III, sec. 1.

68. U.S. Constitution, art. III, sec. 2.

69. Proposed War Powers Resolution Act of 2009, Preamble, printed in NWPC, *Report*, appendix 8, page 2.

70. See generally, *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

two branches of government wrestling over national security issues. Ironically, resolving matters of national security may represent the most important of all constitutional governmental functions.<sup>71</sup>

#### THE POWER TO MAKE WAR AS A SHARED POWER

Congress and the president both have significant roles to play when sending troops into combat. For example, even if, as commander-in-chief, the president has the power to deploy forces unilaterally without a declaration of war or the equivalent from Congress, he will not be able to maintain that situation for any length of time because Congress must raise the army that he sends.<sup>72</sup> Congress must also decide whether to finance the effort.<sup>73</sup> Conversely, should Congress declare war, the commander-in-chief would decide where, when, and how to prosecute the war. He would decide the strategy and tactics to be followed,<sup>74</sup> and he would determine whether and when and under what conditions to negotiate a peace treaty.<sup>75</sup>

In the area of national security, the concept of separated powers, in which each branch operates separately from one another in its own sphere, is somewhat of a misnomer. While the two branches are indeed separate, each with unique authorities, their powers are overlapping or shared.<sup>76</sup> History provides examples of how these overlapping powers have been exercised. Past exercises of the balance of power are important to consider because the Supreme Court looks to the “gloss of history” as an important tool in interpreting the balance of power outlined in the Constitution.<sup>77</sup>

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71. NWPC, *Report*, 12.

72. U.S. Constitution, art. I, sec. 8, cl. 12.

73. U.S. Constitution, art. I, sec. 9, cl. 7.

74. U.S. Constitution, art. II, sec. 2, cl. 1.

75. U.S. Constitution, art. II, sec. 2, cl. 2.

76. Dycus et al., 29.

77. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 596 (Frankfurter, J. concurring, 1952), quoting *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579. Justice Frankfurter wrote (610-611), “The pole-star for constitutional adjudications is John Marshall’s greatest judicial utterance that ‘it is a constitution we are expounding.’” Justice Frankfurter explained that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, [. . .] making as it were such an exercise of power part of the structure of government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”

In the American experience, declarations of war are rare in proportion to the total number of times forces have been involved in armed conflict. The United States has sent its military forces abroad in excess of 220 times; however, in only five instances has the United States committed its armed forces with a declaration of war. And in four of those five cases, the president had committed troops before a declaration had been issued.<sup>78</sup>

The mere lack of an exercise of a constitutional power certainly does not mean it has ceased to exist; however, if the Supreme Court looks to the “gloss of history,” then non-use over an extended period of time might suggest the authority has atrophied and now lacks the significance it once enjoyed. So rarely has Congress declared war that it is questionable whether the “declare war” clause is now any more relevant than the issuing of letters of Marque power included in the same clause of the Constitution.<sup>79</sup>

Unilateral decisions by presidents to commit forces without declarations of war have occurred from our earliest days. President Thomas Jefferson sent the American fleet into the Mediterranean Sea to deal with the Barbary pirates without authority from Congress.<sup>80</sup> Presidents have often committed military forces without congressional approval, and Congress has issued resolutions in support of the action or to continue to authorize funding for the effort.<sup>81</sup> However, in a few cases, the president has deployed forces where Congress never formally approved the use of force, Korea being the most notable.<sup>82</sup>

Presidents have sent military forces while “engaging in hot pursuit of aggressors, [. . .] conducting punitive reprisals, [. . .] preemptively attacking enemies, [. . .] enforcing treaties, [. . .] and acting pursuant

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78. Lehman, *Making War*, 58; Raven-Hansen, “Constitutional Constraints,” 29; Yoo, “Continuation of Politics,” 177. The five declarations of war include the War of 1812, the Mexican–American War of 1848, the Spanish–American War of 1898, World War I, and World War II.

79. U.S. Constitution, art. I, sec. 8, cl. 11.

80. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 643, n. 10 (Jackson, J. concurring, 1952).

81. Yoo, “Continuation of Politics,” 175, citing Act of May 28, 1798, ch. 48, 1 Stat. 561 (France); Southeast Asia (Tonkin Gulf) Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (Vietnam); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) (Persian Gulf).

82. Yoo, 177.

to international organizations.”<sup>83</sup> If the “gloss of history” does, in fact, provide us with an indication of the proper relationship between Congress and the president in the use of armed forces, it appears that the president has the constitutional authority to use troops to repel attacks against the United States, fight defensive wars initiated against us, rescue or evacuate US citizens abroad, protect American nationals or their property abroad, and pursue attackers in retreat without any declaration of war.<sup>84</sup>

In *Youngstown Sheet & Tube v. Sawyer*, the Supreme Court provides guidelines in analyzing balance of power questions under these sorts of circumstances.<sup>85</sup> In *Youngstown*, President Truman issued an Executive Order in 1952, directing the Secretary of Commerce to seize and operate key steel mills. Truman hoped that taking control of the mills would avert a labor strike during the Korean War. In a 6–3 decision, the Supreme Court found that the president lacked the independent constitutional power to seize the mills. Congress had not previously authorized the president to seize the steel mills or to seize private property in general in order to prevent or resolve labor disputes. In fact,

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83. NWPC, *Report*, appendix 4, page 5; Raven-Hansen, “Constitutional Constraints,” 45. The Korean War is often cited as an example of where the president committed US forces in a significant armed conflict without congressional authority. President Truman argued that, as the chief Executive, he was merely enforcing the UN Charter, a treaty entered into with the consent of Congress. He believed he had the congressional consent required. However, a treaty only requires the participation of the Senate, whereas a declaration of war would also require the consent of the House. See generally, Yoo, “Continuation of Politics,” 177; Jane E. Stromseth, “Treaty Constraints: The United Nations Charter and War Powers” in *The United States Constitution and the Power to Go to War*, ed. Gary M. Stern and Morton H. Halperin (Westport: Greenwood Press, 1994), 85; and Ely, *War and Responsibility*, 10, citing Hearings on Assignment of Ground Forces of the US to Duty in the European Area before the Senate Comms. On Foreign Relations and Armed Services, 82nd Cong., 1st Sess. 88–93 (1951) (testimony of Secretary Acheson).

84. Raven-Hansen, “Constitutional Constraints,” 45.

85. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). While *Youngstown* is a widely cited case in the area of shared powers, some have argued that in reality, it is not a foreign affairs case but instead a case involving the domestic seizure of private property under the due process clause of the Fifth Amendment. For example, see Moore, Tipson, and Turner, *National Security Law*, 773. However, there is no disputing the fact that the Court analyzed the President’s commander-in-chief and executive powers in relation to congressional legislative power in the context of the Korean War.



there were a few statutes in existence at the time that allowed the president to seize property, but the court found that the requirements of these statutes had not been met, suggesting that Congress was not silent but opposed the seizure of the mills.<sup>86</sup>

In his concurrence, Justice Robert H. Jackson provided a simple but commonsensical methodology for evaluating the president's use of his commander-in-chief and executive powers:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. [ . . . ]<sup>87</sup>

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, it not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law. [ . . . ]<sup>88</sup>

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his constitutional powers minus any powers of Congress over the matter.<sup>89</sup>

This test explains that when the Congress and the president share in a national security decision, such as the deployment of forces, all of their unique constitutional powers are combined and exercised in unity. The Supreme Court will rarely, if ever, review a shared national security decision, and it is highly unlikely that such a decision would be found to be unconstitutional. When the president goes it alone without Congress, only his powers are at play, and he runs a risk that his

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86. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585–589 (1952).

87. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S., 635 (Jackson, J. concurring, 1952).

88. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S., 637.

89. *Youngstown*, 637.

decision will not be constitutional. Where the two branches disagree on a proper response; it is quite possible that the president's decision may be declared unconstitutional because he would be acting without any congressional authority, including the power to draw funds from the treasury.

Supreme Court jurisprudence before and certainly since *Youngstown* has generally reflected the common sense wisdom of Justice Jackson's concurring opinion.<sup>90</sup> The court has been willing to give the "presidents wide berth in exercising their war powers when Congress has voiced its support."<sup>91</sup> The court has generally been unwilling to hear cases brought by individual members of Congress in opposition to the vote of the majority of Congress or to hear cases brought by members of Congress prior to Congress voting on a use of force, relying on its "political question" or "standing" doctrine.<sup>92</sup> However, the Supreme Court has been more "receptive to challenges" where Congress has not been consulted or where the president has acted against congressional will.<sup>93</sup>

However, no matter which of the two political branches has primacy in a decision to go to war, where there is no agreement between the branches, or when concurrence between the branches does not exist, there is uncertainty as to the constitutionality of the decision to deploy US forces. And this uncertainty not only leaves the general American populace confused, it leaves commanders on the battlefield in a precarious predicament. There is only one commander-in-chief, but, as has been discussed, long-term staying power in any conflict clearly depends on Congress. Where the political branches cannot come together on a war powers question, US military commanders have to play a kind of guessing game as to how to approach the conflict to which they have been sent.

#### SHARED DECISIONS GENERATE GREATER STRATEGIC CERTAINTY

Although the primary benefit from a joint congressional and presidential decision to commit the armed forces into armed conflict is an increased likelihood of constitutionality and public support, there are

90. NWPC, *Report*, 32.

91. NWPC, 32.

92. Proposed War Powers Resolution Act of 2009, Preamble, printed in NWPC, *Report*, appendix 8, page 2.

93. NWPC, *Report*, appendix 8, page 2.

also potentially significant strategic, operational, and tactical benefits in complying with the shared-power construct laid out in the Constitution. Certainly Carl von Clausewitz never formally supported the ideals of the United States Constitution; however, his writings regarding the importance of government in warfare, ironically, do suggest there are strategic advantages for a government to follow its political principles.

While certainly no two wars are alike, Clausewitz identifies three common components present in all armed conflicts. This “paradoxical trinity,” as he describes it, is “composed of primordial violence, hatred and enmity.”<sup>94</sup> The first of these three aspects is generally associated with the “people,” the second “with the commander and his army,” and the third with “the government.”<sup>95</sup> Clausewitz goes on to explain that a successful military policy or strategy will be one that considers each leg of the trinity and balances the relationship between them as though the policy was “an object suspended between three magnets.”<sup>96</sup>

Clausewitz explains that any successful wartime strategy must include participation by the political arm. In the final analysis, the use of military force is nothing more than the clear manifestation and forceful exercise of state policy by violent or potentially violent means.<sup>97</sup> Therefore, the state political arm must clearly articulate to the military the underlying political objective sought and the way that the government defines success.<sup>98</sup>

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94. Clausewitz, *On War*, 89.

95. Clausewitz, 89.

96. Clausewitz, 89.

97. Clausewitz, 607. Clausewitz is arguably the military strategist who most clearly understood and articulated the nexus between policy and war. Bernard Brodie, *War & Politics* (New York: MacMillan, 1973), 438, 441. Clausewitz wrote: “We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. [ . . . ] The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.” Clausewitz, *On War*, 87. See also, Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1995), 184. Hedley Bull argues that war is “organised violence carried on by political units against each other.”

98. Basil Henry Liddell Hart, *Strategy*, 2nd ed. (New York: Penguin, 1967), 338; Brodie, *War & Politics*, 38. Brodie explains that fighting for a political purpose does not always mean fighting to win in the military sense.

Strategy is neither a purely political creation nor a military one;<sup>99</sup> however, “strategy ultimately derives its significance from the realm of politics,”<sup>100</sup> and “the political dimension of strategy is the one that gives it meaning.”<sup>101</sup> The governing body, not just its military forces, must participate in the making of strategy. When a decision is made to apply military force to a problem, the body politic must determine the scope, magnitude, and duration of its commitment. The state must decide what it is willing to spend in terms of lives and treasure. The state must calculate what risks it is willing to assume regarding its own national security, and that of its allies and the international community.<sup>102</sup> Failure of the government to participate in the making of strategy can lead to potentially catastrophic results on the battlefield.<sup>103</sup>

Achieving the political object underlying the decision to use military power determines the degree of effort and commitment required of the military.<sup>104</sup> Success on the battlefield may be as much about the quality, clarity, and suitability of a state’s political objectives as it is about the relative military vitality, strength, and tactical superiority of the various opponents in the conflict. When the government fails to fulfill its responsibility to set and clearly articulate policy, it creates strategic uncertainty within its own population, its armed forces, and its allies. Moreover, absent clearly articulated state policy, the military element of power will not enjoy its full deterrent potential against the enemy.<sup>105</sup>

As as been discussed, the framers created a system that requires the participation of both branches of government in national security decisions. Unless both branches participate, the president is acting without congressional power, and he is therefore only exercising half of the available war-making power of the US government. Moreover,

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99. Colin S. Gray, *Modern Strategy* (New York: Oxford University Press, 1999), 17.

100. Gray, 55.

101. Gray, 29.

102. Clausewitz, *On War*, 92.

103. Gray, *Modern Strategy*, 1. Gray explains, “Poor strategy is expensive, bad strategy can be lethal, which when the stakes include survival, very bad strategy is almost always fatal.”

104. Clausewitz, *On War*, 81. Clausewitz writes, “The political object—the original motive for war—will thus determine both the military objective to be reached and the amount of effort it requires.”

105. Edward N. Luttwak, *Strategy: The Logic of War and Peace*, rev. ed. (Cambridge: Belknap Press of Harvard UP, 2001), 221.

when the president fails to consult with Congress and seek concurrence for any significant commitment of forces in hostilities, or when Congress chooses to avoid participating in any such decision, strategic uncertainty will likely be the result.

Unless Congress and the president clearly articulate their objectives through a declaration of war or similar legislative or regulatory equivalent, US armed forces, US allies, and perhaps, most importantly, the enemy, will not be certain of America's resolve and determination. Allies may question whether the United States has the stomach to continue for a lengthy period. Commanders will be uncertain as to the funding available and the degree to which the country will mobilize.

When both political branches participate in any significant commitment of US armed forces, constitutional principles are preserved, and there are also strategic benefits. First, adherence to these principles demonstrates to the world that as a democratic institution, built on the rule of law, the United States remains faithful to the principles and checks and balances established in the Constitution. Second, the government leg of Clausewitz's trinity is strengthened when both branches are involved. Failure to include both political branches means that only half of the power available to the government is employed.

#### PURPOSES AND PROBLEMS ASSOCIATED WITH THE 1973 WAR POWERS RESOLUTION

The stated purpose of the 1973 War Powers Resolution (Resolution)<sup>106</sup> is to "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 such situations."<sup>107</sup> The stated purpose applies the collective judgement of both political branches and should contribute to the idea of certainty on the battlefield for all the reasons discussed. However, because the Resolution has significant defects, it contributes to uncertainty rather than certainty.

A poorly drafted law can end up having the opposite effect that its drafters intended. This appears to be the case with the 1973 War

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106. *The War Powers Resolution of 1973*, Public Law 93-148, 93rd Cong., (November 7, 1973), sec. 1-10.

107. *War Powers Resolution*, sec. 2(a).

Powers Resolution. The Resolution limits a president's power to introduce troops into hostilities where there is (1) a congressional declaration of war, (2) a specific congressional statutory authorization, or (3) a "national emergency created by attack upon the United States, its territories or possessions or its armed forces."<sup>108</sup>

Presidents of both political parties have argued that their power to deploy troops exceeds these three limited circumstances. For example, presidents have asserted that the powers to "rescue Americans abroad, rescue foreign nationals where such action facilitates the rescue of US citizens, protect US Embassies and legations, suppress civil insurrection, implement the terms of an armistice or cease-fire involving the United States, and carry out the terms of security commitments contained in treaties" are inherent in the commander-in-chief emergency power but are not permitted by the 1973 War Powers resolution.<sup>109</sup> Examples of presidents deploying military forces that exceeded the authority of the Resolution include Grenada, Yugoslavia, Haiti, and Libya (in 2011).<sup>110</sup> Even many strong supporters of congressional power agree that the Resolution overly restricts the president in the types of emergency situations he may send armed forces.<sup>111</sup>

The Resolution contains requirements relating to consulting with, and reporting to, Congress. However, because of poor drafting, these otherwise justifiable requirements create issues. Presidents are to "consult" with Congress "before" introducing forces into "hostilities or into situations where imminent involvement in hostilities is clearly indicated."<sup>112</sup> The president must continue to consult with Congress regularly until the forces are removed from the situation.<sup>113</sup> However, the Resolution does not explain with whom among the 535 members of Congress the president is required to consult.<sup>114</sup>

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108. *War Powers Resolution*, sec. 2(c).

109. Congressional Research Service, *The War Powers Resolution: After 34 Years*, 8, citing US Congress, House Committee on International Relations; *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident*. Hearings, May 7 and June 4, 1975, (Washington, U.S. Gov't. Printing Office, 1975), 69.

110. CONG. RECORD, 113th Cong., S441 (Jan. 16, 2014); NWPC, Report, 21.

111. CONG. RECORD, 113th Cong., S441 (Jan. 16, 2014); NWPC, Report, 21.

112. The War Powers Resolution of 1973, sec. 2(c).

113. War Powers Resolution, sec. 3.

114. NWPC, Report, 23.

The president is required to provide a written report to Congress whenever he introduces forces into hostilities or when hostilities have not begun but are imminent. He must report deploying troops to a foreign country “equipped for combat,” even when there is no combat, unless those troops are involved in training exercises.<sup>115</sup> Unless the president is granted a 30-day extension, 60 days after such a report is provided to Congress, the president must remove the forces if Congress does not affirmatively declare war or provide a statutory equivalent.<sup>116</sup> No president has ever filed a report, as required by this section.<sup>117</sup>

Many legal scholars agree that Section 5(c),<sup>118</sup> which requires the president to withdraw troops from hostile areas where Congress issues a “concurrent” resolution to withdraw troops, is unconstitutional. Only one branch of government is required to participate in a concurrent resolution. In *INS v. Chadha*,<sup>119</sup> a case decided by the Supreme Court subsequent to the 1973 War Powers Resolution, the Supreme Court struck down the practice of using one-house legislative vetoes.<sup>120</sup>

The Supreme Court has never decided a case on the constitutionality of the War Powers Resolution. Over the course of its existence, more than 100 members of Congress, acting alone or in small contingents, have petitioned the courts in order to challenge the legality of presidential decisions to deploy American forces. However, Congress as a whole has never sought to compel the president to comply with the Resolution, and, therefore, the Supreme Court has avoided considering the issue.<sup>121</sup> For example, individual members of Congress have redressed the courts for actions in El Salvador, Nicaragua, Grenada, tanker escort duty in the Persian Gulf, the first Iraq war, and Kosovo.

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115. *The War Powers Resolution of 1973*, sec. 4.

116. *War Powers Resolution*, sec. 5. See generally, NWPC, *Report*, 24.

117. NWPC, *Report*, 24. Presidents have reported to Congress approximately 115 times. However, they have not reported entirely consistent with the requirements of the War Powers Resolution. In only one instance, the Mayaguez situation, has a President stated that the forces were being introduced into hostilities or imminent hostilities as required by Section 4(c). Congressional Research Service, *The War Powers Resolution: After 34 Years*, summary page.

118. *The War Powers Resolution of 1973*, sec. 5(c).

119. *INS v. Chadha*, 462 U.S. 919 (1983).

120. NWPC, *Report*, 21, citing *INS v. Chadha*, 462 U.S. 919 (1983). Unlike a statute that requires the approval of both houses of Congress, a concurrent resolution only requires the vote of one house of Congress.

121. NWPC, 21.

In each case, the judicial branch avoided making a determination on the constitutionality of the Resolution due to the courts' determination to leave issues of national security to the political branches.<sup>122</sup>

In addition to its apparent constitutional defects, from a policy standpoint, some have argued that the Resolution is detrimental to the operational effectiveness of US forces. The Resolution places troops and civilians abroad at greater risk and has the potential to negatively affect a strategy based partially on deterrence.<sup>123</sup>

Critics of the Resolution point out that in 1983 members of Congress cited the Resolution and insisted on specifically knowing how long the Marines would be stationed in Lebanon. Having a precise timetable would certainly have benefited terrorist groups in terms of their own strategy and whether they could simply outlast the United States.<sup>124</sup> When the US agreed to reflag ships traveling through the Persian Gulf in the late 1980s, there was some concern that this reflagging action required the president to report to Congress the possibility of hostilities. Some in the international community may have been concerned that the notice to Congress of possible hostilities could have been a masked indication of the real US intent to use the reflagging operations as a pretext to introduce combat forces in the area for follow on combat activities in the region.<sup>125</sup>

Critics argue that the Resolution places citizens abroad at greater risk because the Resolution does not permit the president to send troops to rescue Americans overseas.<sup>126</sup> Americans overseas may have been placed at greater risk in Vietnam had the president sought congressional authority to conduct a rescue when Vietnam collapsed, in Grenada when Cubans took control of that county, and in Panama when Americans were subject to attack prior to the removal of Manuel Noriega. Certainly, Congress would have granted authority to rescue in these cases; however, having to seek permission takes time when time is often of the essence. When secrecy and surprise are paramount, having to go to Congress, when it is arguably not required by the Constitution to do so and when doing so might threaten compromise of

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122. NWPC, 18, 19.

123. Turner, *Repealing the War Powers Resolution*, 129.

124. Turner, 140.

125. Turner, 145–146.

126. *The War Powers Resolution of 1973*, sec. 2(c).



the entire operation, is something the Americans waiting to be rescued and the forces selected to conduct the operation cannot afford.

Although presidents have asserted the Resolution is unconstitutional, various presidents have made decisions in order to avoid triggering certain provisions of the Resolution, thereby placing troops at risk. For example, US soldiers in El Salvador were not allowed to carry M16s in order to avoid triggering the “equipped for combat” provisions.<sup>127</sup> Similarly, Marines in Lebanon were not permitted to carry loaded weapons and were held to very defensive rules of engagement so that the president would not have to report to Congress that the Marines were facing “imminent involvement in hostilities.”<sup>128</sup>

As with the creation of many laws, there are potential unintended consequences. The timetables in the Resolution grant the president the ability to operate up to 90 days in certain cases without reporting to Congress. Critics of the Resolution have argued that a president may elect to bring far greater military force to bear on an opponent than is reasonable in order to ensure any military action would be complete prior to exceeding the time limits listed in the Resolution.<sup>129</sup> Conversely, these same time tables might give strength to an enemy trying to hold on for 90 days and incite the enemy to surge and to create maximum US casualties in during that same 90-day period.<sup>130</sup> Not requiring a president to report for 90 days invites the president to participate in military adventurism that does not exceed 90 days.

Finally, the Resolution limits a president’s authority to introduce forces into hostilities based on a mutual defense treaty unless Congress specifically grants the Executive the power to deploy forces into hostilities as part of congressional implementation of such a treaty.<sup>131</sup> This means that in a regional arrangement, such as NATO, in which an attack on one is considered to be an attack on all, the president could not come to the defense of an ally without first getting a green light from Congress. The constraint might give potential treaty partners cause for concern because although the president is promising

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127. Turner, *Repealing the War Powers Resolution*, 139. See also Congressional Research Service, *The War Powers Resolution: After 34 Years*, 12–17.

128. Turner, 139. See also Congressional Research Service, 12–17.

129. Turner, 147.

130. Turner, 148–149.

131. *The War Powers Resolution of 1973*, sec. 8(a)(2).

support, his promise is contingent on congressional support and the time it takes to secure that support.

#### DEFECTS CURED IN THE PROPOSED WAR POWERS CONSULTATION ACT OF 2014

Although the War Powers Commission concluded that the 1973 Resolution is unworkable, the Commission concurs that creating an effective legislative framework requiring both branches to participate in any decision to commit US armed forces is worth pursuing. They proposed a statute, The Proposed War Powers Consultation Act of 2009, which addresses the shortcomings of the 1973 Resolution by “eliminating aspects of the War Powers Resolution of 1973 that have opened it to constitutional challenge,” and by “promoting meaningful consultation between the branches without tying the President’s hands.”

The War Powers Consultation Act of 2014 (hereinafter referred to as the Act), which closely mirrors the Proposed War Powers Consultation Act of 2009, also focuses on “providing a heightened degree of clarity and striking a realistic balance that both advocates of the Executive and Legislative Branches should want.”<sup>132</sup> Senators McCain and Kaine, with some minor drafting changes, have adopted all of the Commission’s recommendations in the Act.<sup>133</sup>

First, if the proposed Act becomes law, it will repeal the 1973 War Powers Resolution.<sup>134</sup> Second, the Act does not seek to “define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative Branches of government.”<sup>135</sup> The Act defines “significant armed conflict” as any conflict “expressly authorized by Congress,” or “any combat operation by US armed forces lasting more than a week or expected by the president to last more than a week.”<sup>136</sup>

The drafters of the proposed Act wanted to involve the Congress “only where consultation seems essential.”<sup>137</sup> As an example of the application of the definition of significant armed conflict, the Commission points out that President Ronald Reagan’s “limited air strikes

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132. NWPC, *Report*, 30.

133. S. 1939, War Powers Consultation Act of 2014.

134. S. 1939, §4.

135. S. 1939, §2(b).

136. S. 1939, §3(a)

137. NWPC, *Report*, 36.

against Libya would not be considered ‘significant armed conflicts,’” but, conversely, the “two Iraq Wars clearly would be.” The latter two would have required consultation, while the former would not have.<sup>138</sup>

Certain types of combat or combat-like operations are specifically exempted from the definition of significant armed conflict. For example, the definition of significant armed conflict would not be triggered when the president is acting to “repel attacks, or prevent imminent attacks” against the “United States, its territorial possessions, its embassies, its consulates, or its Armed Forces abroad.”<sup>139</sup> The definition also exempts “limited acts of reprisal against terrorists or states that sponsor terrorism.”<sup>140</sup> Other types of troop deployments expressly exempt from the coverage of the definition of significant armed conflict include foreign humanitarian disaster relief, acts to prevent criminal activity abroad, covert operations, training, and missions to protect or rescue US citizens or military or diplomatic personnel abroad.<sup>141</sup>

By removing the protection and rescue of Americans abroad from the definition of significant armed conflict, the drafters remedied a defect that was often pointed to in the Resolution. The Act would not, for example, define significant armed conflict to include a Grenada-like rescue of American citizens. This would enable planners and operators directed by the president to rescue an American, such as the rescue of Captain Richard Phillips, who was taken hostage by Somali pirates from the *Maersk Alabama*,<sup>142</sup> to comply with such a presidential order without concern for whether congressional approval is required.

Unlike the 1973 Resolution of 1973, the proposed Act clearly prescribes with whom in Congress the president must consult.<sup>143</sup> The Act

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138. NWPC, 36.

139. S. 1939, War Powers Consultation Act of 2014, §3(b)(1).

140. S. 1939, §3(b)(2).

141. S. 1939, §3(b)(3)-(7). One term in the Act that should be clarified. What do the drafters mean by covert operations? Is covert being used here in a more informal use of the concept, meaning operations conducted in secrecy, or is it a statutory term of art? Is the language in the act broad enough to include activities such as clandestine intelligence gathering activities, or is it meant to be limited to a statutory covert action where the president must submit findings as defined by and in accordance with 50 U.S.C. §5093?

142. Robert D. McFadden and Scott Shane, “In Rescue of Captain, Navy Kills 3 Pirates,” *New York Times*, April 12, 2009. <https://www.nytimes.com/2009/04/13/world/africa/13pirates.html>.

143. S. 1939, War Powers Consultation Act of 2014, §§5, 6.

directs the president to consult with certain listed members of Congress “before ordering the deployment of United States Armed Forces into significant armed conflict.”<sup>144</sup> However, the drafters thoughtfully added, where the “need for secrecy or other emergency circumstances preclude carrying out the consultation required” before deploying forces, the president must consult with the members of Congress listed in the Act not later than “three calendar days after the beginning of the significant armed conflict.”<sup>145</sup>

The Act further requires the president to “consult regularly” with the “Joint Congressional Consultation Committee” that is created by the Act, regarding “matters of foreign policy and national security.”<sup>146</sup> Where a “significant armed conflict” is involved, the statute requires continued consultation every two months.<sup>147</sup>

In addition to consultation, the Act requires the president to submit a written “classified” report to Congress “setting forth the circumstances necessitating the significant armed conflict, the objectives, and the estimated scope and duration of the conflict.”<sup>148</sup> The president must submit the report prior to ordering or approving sending of troops into significant armed conflict. As with the requirement to consult, where there is a need for “secrecy” or where “emergent circumstance” exists, he must “submit the report within three calendar days after the beginning of any significant armed conflict.”<sup>149</sup> The Act also creates an annual classified written report requirement due no later than 15 April each year regarding all on-going significant armed conflicts and all other operations described in section 3 of the Act other than covert operations.<sup>150</sup>

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144. S. 1939, §6(b)(1)(a). Consultation is not defined in the Act. It does not appear that the drafters equate prior consultation with prior approval. The act states that the consultation is to occur far enough in advance of the actual planned operation to allow “sufficient time for the exchange of views regarding whether to engage in the significant armed conflict.”

145. S. 1939, §6(b)(2).

146. S. 1939, §6(c).

147. S. 1939, §6(b)(1)(B).

148. S. 1939, §6(b)(1)(B).

149. S. 1939, §6(b)(2).

150. S. 1939, §6(d)(1) and (2). Operations described in 3(h) are those that are exceptions to significant armed conflict such as exercises, foreign disaster relief and covert operations.

Section 7 has been described as “the heart” of the Act.<sup>151</sup> It provides strategic, operational, and tactical certainty to soldiers on the battlefield because it requires both political branches to participate, on the record, in any decision to use American forces in significant armed conflict. As previously discussed, any successful military operation requires that the political branch inform the military precisely what its objectives are to be. Without that crucial input from the government, the military is left shooting in the dark, trying to build a strategy without guidance from the political arm.

Whereas the 1973 War Powers Resolution required virtually nothing of Congress and placed requirements only on the president, the Act will no longer allow Congress to avoid its duties and sit in silence and then later complain that the president failed to consult Congress. I believe that this required courage on the part of Senators Kaine and McCain to propose this legislation that would force their colleagues to take a stand publically and be counted. This may be the unfortunate reason the Act now sits in the Senate without movement. Perhaps this Act intimidates some in Congress because it will require them to take a stand on all significant armed conflicts.

The Act states that “not later than 30 days after the deployment” of troops into a “significant armed conflict,” if Congress has not “enacted a formal declaration of war or otherwise enacted a specific authorization for the use of military force,” the “Joint Consultation Committee shall introduce a joint resolution of approval.”<sup>152</sup> Both houses of Congress have seven days to vote for or against the resolution of approval. A vote of yes, signed by the president, means there is law in support of the operation. A vote of no can be vetoed by the president, but then it is subject to a two-thirds override. If a vote of no survives, the president is unlikely to receive any support, financial or otherwise, for the operation. A court challenge, where Congress has voted no, might create a situation in which the Supreme Court decides that the political question has been settled, and the Supreme

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151. NWPC, *Report*, 39. The authors of the report were actually writing about Section 5 of the Proposed 2009 War Powers Consultation Act. However, the 2014 War Powers Consultation Act is essentially a mirror image of the 2009 proposal with some drafting modifications. One of those changes is that the former section 5 is now section 7 in the Act. Therefore, section 7 in the Act is now “The heart” of the Act.

152. S. 1939, War Powers Consultation Act of 2014, §7(a)(1).

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Court might provide a ruling on the matter.<sup>153</sup>

In Section 7, the drafters recognize that the Constitution's framers of the Constitution intended that Congress play a role in foreign affairs and influence the use of military force abroad. Unlike the 1973 Resolution, the 2014 Act does not require the president to remove forces from hostilities when Congress fails to act. Forcing those in Congress to vote early either places the entire strength of the government behind the action or, in the alternative, requires the removal of troops when the entire body politic, and, by extension, the American people, does not support the effort. While the Act does not delineate which branch has primacy in war-making decisions, or who ultimately has the responsibility to decide, or exactly which roles the respective branches are to play, it does establish a framework stipulating that each branch is required to participate and work together in a cooperative and deliberative fashion when deciding whether to employ military force.<sup>154</sup>

## CONCLUSION

It is in the United States' best interests to pass into law the War Powers Consultation Act of 2014, on the grounds that it will encourage shared decision making for any significant use of the armed forces. Joint, rather than unilateral, congressional and presidential foreign policy decisions to use the military are more consistent with the national security framework of the Constitution. The framers intentionally built a framework that would prevent an overly aggressive government from engaging military forces without deliberate and thoughtful consideration,<sup>155</sup> but one that would also be able to take resolute action and defend itself and its interests when necessary.<sup>156</sup>

Both branches of government have certain indispensable keys relating to the effective use of the military as an instrument of power.<sup>157</sup>

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153. See generally, S. 1939, War Powers Consultation Act of 2014, §7.

154. NWPC, *Report*, 41.

155. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 633 (Douglas, J. concurring, 1952). Justice Douglas explains, "Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers."

156. Ely, *War and Responsibility*, 3.

157. *Myers v. United States*, 272 U.S. 52, 293 (1926). The Supreme Court wrote:

The constitutional requirement for the near-simultaneous use of these keys creates a shared power framework. However, presidents have often been willing to commit troops without first consulting Congress, and Congress has simply gone along with the presidential decision. This phenomenon has been described by one scholar as “Executive custom and Congressional acquiescence.”<sup>158</sup>

The Act preserves the spirit and objectives of the 1973 War Powers Resolution while correcting its perceived defects. The Act facilitates the participation of both political branches of government in any decision to commit forces in any significant operation while addressing the constitutional and policy defects associated with the Resolution. Passage of the Act should not only serve to protect the American people from an adventurous president, but citizens will also benefit because the Act seeks to force a reluctant Congress to debate and participate in these most important governmental decisions.

The Act will go a long way toward restoring the balance of power established in the Constitution. In a democracy built on the rule of law, it is imperative that the government comply with the ideals enunciated in the Constitution even though this might, on occasion, mean more time and debate. The Act carves out reasonable exceptions to the consultation and voting requirements for situations when time is of the essence. However, absent an emergency leaving little or no time to deliberate, Congress is the peoples’ branch of government, and the people need to be heard when their sons and daughters are sent into harm’s way.<sup>159</sup> In addition, the time limits set by the Act are such that Congress will have to act in a swift and deliberate fashion.

Moreover, when the government adheres to constitutional provisions in matters of national security, strategic advantages will follow.

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The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

158. Dycus et al., 49.

159. J General Alexander Haig testified at his confirmation hearing for Secretary of State, “Heaven help us as a nation if we once again indulge in the expenditure of precious American blood without a clear demonstration of popular support for it. I think the legislature is the best manifestation of popular support.” Ely, *War and Responsibility*, 5, citing Hearings before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 39 (1981).

First, in the general sense, the government appears strong when it complies with its own rules. Because the government routinely ignores the 1973 War Powers Resolution, the centerpiece legislation on war powers, it appears the US has little concern for the rule of law when it comes to the use of its armed forces. If the government complies with the Act, the US will not appear to be panicked or stressed but will demonstrate a calm determination to adhere to the rule of law even under circumstances when high anxiety would be predictable and disobedience perhaps even justified. Second, with regard to the specific conflict involved, when both branches of government support a military action, it will be clear to allies, neutrals, and enemies alike that the US means business and is willing to use its military power to resolve the issue. Demonstrating a unity of effort may deter our adversaries and assure our allies. Third, a declaration of war or similar statutory pronouncement would have the pragmatic advantage of legal sanction and all that that entails. A declaration of war or similar vote as required by the Act would serve to mobilize the American public.<sup>160</sup>

And finally, US commanders and soldiers on the ground we be in a better position to plan and execute military operations. The political objectives established by the policy makers will be more clear. Commanders will have a better idea of how the civilian leadership defines success when national interests are at stake. Where the entire government supports a military action, commanders and soldiers will have reason for faith that the government will provide the resources and personnel required. As has been said, “Unless Congress has unequivocally authorized a war at the outset, it is a good deal more likely to undercut the effort, leaving it in a condition that satisfies neither the allies we induced to rely on us, our troops who fought and sometimes died, nor for that matter anyone else except, conceivably the enemy”<sup>161</sup> Congress can easily strangle any war effort when it has not been consulted in advance.<sup>162</sup>

Of course, there are potential risks involved with any attempt to shore up the Constitution with statutory law. First, any legislative framework carries with it the possibility of creating new and unfore-

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160. Harry G. Summers Jr., *On Strategy: A Critical Analysis of the Vietnam War* (Novato: Presidio, 1982), 14, 16, 17, 19.

161. Ely, *War and Responsibility*, 3.

162. Ely, 5.



seen problems. An overly ambitious attempt to create a more shared balance of power between the Executive and the Legislature could cause the system to take on the nature of a more parliamentary form of government, which, when viewing the European experience since 9/11, and our own experience during the Revolutionary War, may not be in the United States' best security interests.

Others may argue that we do not need a legislative solution that attempts to mandate exactly how the two branches are to balance the war-making power. What we currently have works. Our current system, as flawed as it may be, is one born both of constitutional theory and the "gloss" of historical practice. As Justices Jackson and Douglas teach us in *Youngstown*,<sup>163</sup> both political branches have participated to varying degrees in the decisions to use the armed forces. These two justices seem to suggest that the Constitution created a theoretical framework of balanced or shared power, leaving it to history and application to fill in the details. Statutory refinements may only serve to frustrate the application of the Constitution.

Lastly, some may wonder whether the Act would be followed any more strictly than the 1973 War Powers Resolution has been. As with the 1973 War Powers Resolution, there is no guarantee that one or both political branches will not simply ignore the law. Furthermore, the Supreme Court may be just as reluctant to enforce or interpret the Act as it has been with the War Powers Resolution, relying on the political question doctrine.

These potential risks are minimal as compared to the likely benefits of the Act. The potential restoration of a balanced and shared war-making power, as originally intended by the framers, outweighs the risks. After more than 45 years of War Powers Resolution experimentation, the drafters of the Act have been able to create a statute that will alleviate the constitutional and policy problems that are associated with the Resolution while preserving the Constitution's spirit and intent. And as a pragmatic benefit, compliance with the Act will lead to greater strategic certainty. From this foxhole, that sounds like a strategy worth pursuing.

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163. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).



## MAGNITSKY TO MUELLER

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*Phil Varney*

### INTRODUCTION

On December 6, 2012, President Barack Obama signed into law the Sergei Magnitsky Rule of Law Accountability Act. The law was implemented as a means of punishing Russian officials involved in the wrongful death of Sergei Magnitsky; a Russian lawyer who had, prior to his arrest, named several Russian law enforcement officials in a testimony accusing them of tax fraud which resulted in the theft of some \$230 million from the Russian people. This resulted in Sergei's arrest by the same officials he had accused. After a year in substandard prison conditions resulting in declining health, Sergei Magnitsky died. While the official cause of death was ruled to be complications due to a heart attack, Sergei's family and colleagues believe his death to be a result of physical abuse by prison guards.<sup>1</sup> With the implementation of the Magnitsky Act, the United States Government was able to respond to this abuse of human rights without resorting to nationwide sanctions or military intervention. The act froze the assets and restricted the travel of those accused of being involved with Magnitsky's death, many of whom being top Russian officials, had become independently wealthy through their abuses of human rights.

While it was unknown what the scope of the effect on the Putin Regime would be at the time, the intensity of the Russian response to these acts provides valuable information into how Vladimir Putin uses the Russian oligarchy to his financial and political benefit, and how the Magnitsky Act directly threatens his authority within. The Russian government attempted to respond through issuing a similar list of US

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1. Rosie Grey, "Bill Browder's Testimony to the Senate Judiciary Committee," *The Atlantic* (July 25, 2017), [www.theatlantic.com](http://www.theatlantic.com).

government officials who would no longer be allowed to enter the country, as well as banning all adoptions of Russian children to the United States. This same adoption legislation was what Donald Trump Jr. said to be the topic of the now infamous meeting on June 9, 2016, between members of the Trump campaign with representatives from the Russian government, who claimed to have damaging information on Trump's opponent Hillary Clinton. This provides a link from the death of Sergei Magnitsky, to Robert Mueller's special investigation in Russian meddling in the 2016 election. This report will highlight notable facts and figures within this timeline of events while also examining the impact of the decisions that created these sanctions, with the intent to show the reader that there is a tangible connection between recent corruption within Russia and the Trump Administration.

## BACKGROUND

In order to understand the Putin regime's current position, it is necessary to track its political involvement back to the fall of the Soviet Union. The newly formed Russian government under the leadership of President Boris Yeltsin began to dissolve its ownership of Russia's industry in an attempt to promote privatization. This was done through a system of vouchers, which denoted a certain stake in a given industry. These vouchers were distributed to every Russian citizen, who were given free reign to retain, sell, or purchase more vouchers where they could. Instead of revitalizing the economy as hoped, many vouchers were acquired by various Russian oligarchs. One such group, known as the *Semibankirschina* (seven bankers) controlled over half of Russia's finances in the late 1990s.<sup>2</sup> The long-term effects of this voucher system and its benefit to the oligarchy are still present within Russia's political and financial system.

The newly opened market and quick strides toward privatization attracted international interest as well. With a vast amount of resources, assets, and labor now moving into the private sector, many international investors were able to achieve great wealth with even the most basic understanding of investment and economics. One such investor, if not the most prominent of them, was an American man named Bill

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2. Kirill Vishnepolsky, "Словарь русского публичного языка конца XX века," *Kommersant.ru*. (June 23, 2003), <https://www.kommersant.ru/doc/390624>.

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Browder. After graduating with an MBA from Stanford in 1989, Browder focused his career on investment projects in Eastern Europe, which proved to be beneficial for him with the fall of the Berlin Wall in the same year. After several initial successes, he founded Hermitage Capital Management in Moscow. The following decade proved to be extremely successful for the firm, and Bill Browder became the largest foreign investor in the country.

It was in this time that a notable political shift began in Russia. The election of Vladimir Putin as president signaled a potential conflict with the oligarchy who had previously been aligned with Boris Yeltsin, and had provided substantial financial support to Putin's political enemies. This conflict came to a halt after the arrest of the Yukon Oil Group CEO Mikhail Khodorkovsky, the richest man in Russia and a central figure to the oligarchy. While the indictment was on charges of tax evasion and fraud, it was seen by many as retaliation for Khodorkovsky's resistance to Putin both financially and politically. The trial was broadcast, depicting the plaintiff in a cage. Khodorkovsky was sentenced to nine years in prison, and his company was dissolved with shares being sold below market value. While the trial was disputed for a lack of due process, it most likely achieved any desired result that Putin may have had to quell any formidable resistance to him.<sup>3</sup> There is widespread speculation as to the terms of any possible agreements that were made between Putin and the remaining Oligarchs; with some estimating as high as a 50% cut to be paid to Putin himself.<sup>4</sup> However, it is important to note that it was at this time the remaining oligarchs began to align themselves politically with the Putin Regime.

This led to a political shift in Russia that heavily affected Bill Browder. Both Browder and Putin were adversaries of the oligarchy, but after the supposed power shift following the Khodorkovsky verdict, Browder found himself in direct confrontation with the President. This resulted in his expulsion from Russia in 2005.

When it became clear that this expulsion came as a direct order from the Putin Regime, Browder began to divest all of Hermitage Capital's financial stake in Russian companies. The fund fully divested before a June 2007 raid by Russian government officials, in which all

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3. Neil Buckley, "Khodorkovsky Trial Unfair, Human Rights Court Finds," *Financial Times* (July 25, 2013), <https://www.ft.com/>.

4. Bill Browder, *Red Notice* (New York: Simon and Schuster, 2015), p. 109.

legal documentation and computers were confiscated. According to Browder, it was with these confiscated items that these officials were able to perpetuate a fraud in which they transferred company ownership away from Browder to a man named Viktor Markelov, a convicted criminal. Under this new ownership, they applied for a tax refund totaling \$230 million dollars, which had been paid by Hermitage earlier as a capital gains tax from all the sales made to transfer the firm's money out of Russia. The payout from the Russian government was made one day later; it was the largest tax rebate in the country's history.<sup>5</sup>

With Browder's taxes left unpaid, the Russian government charged Browder with tax evasion. In the proceedings that followed, Hermitage Capital was represented by the firm Firehouse Duncan. Sergei Magnitsky, an auditor and lawyer for the firm, was tasked to investigate the source of the fraud as well as who had filed for the tax rebate. Magnitsky testified openly about his findings, accusing various officials involved. With the hope that this would open an official government investigation into the proposed corruption, Sergei was instead arrested in November 2008 and accused of aiding Hermitage in their supposed fraud. After eleven months of appeals, accompanied by copious notes from Magnitsky as to conditions of his incarceration, he developed crippling gallstones and pancreatitis. On November 16, 2009, eight days before he was to be released if not brought to trial, Sergei Magnitsky died. Prison officials ruled cause of death to be a heart attack, and refused to run an autopsy. This contrasts with the claims of those close to Sergei who say that his death was a due to a severe beating by prison guards; compounded by a lack of medical care for gallbladder stones, pancreatitis and calculous cholecystitis.<sup>6</sup>

Following his death, several of his colleagues, including his employer Jamie Firestone, worked with Bill Browder on exposing Sergei's death as a politically motivated assassination and not death by natural causes, as well as bring to justice those in power who they believed ordered Sergei to be mistreated in prison and eventually killed. Through viral media outreach and extensive lobbying efforts, they were able to secure support from Senator Ben Cardin of Maryland and Senator

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5. Joe Nocera, "Unyielding, an Oligarch vs. Putin," *New York Times* (November 5, 2010), <http://www.nytimes.com>.

6. Philip Aldrick, "Russia Refuses Autopsy for Anti-corruption Lawyer," *Daily Telegraph* (November 19, 2009, 2018), <https://www.telegraph.co.uk>.

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John McCain of Arizona to be the initial sponsors of what became the Magnitsky Acts.

## SANCTIONS

It is important to understand the influence of sanctions in today's geopolitical environment, as well as the history of sanctions within the US. The ability to regulate trade through the imposing of economic sanctions gives the United States Congress power to directly engage government-sponsored human rights abuses without resulting to military intervention.<sup>7</sup> The scale of these sanctions is left up to Congress. Sanctions can be imposed internationally to regulate practices known for human rights abuses such as the diamond trade or narcotics. In cases where against an entire government are to be taken, such as with North Korea or Syria, sanctions can be nationwide. More commonly, however, the United States will choose to target specific foreign individuals, so as to highlight an event or behavior as opposed to an entire nation. This type of sanction was employed by the Magnitsky Act to target those involved in Magnitsky's death, as opposed to the Russian government directly.

The two most common forms of sanctions against an individual are the freezing of assets and the suspension of travel visas. This protects countries like the US from indirectly enabling illicit activity by acting as a haven for corrupt individuals. In an ever-globalizing economy, sanctions from one foreign nation can create a snowball effect.

As a point of context, it is also worth mentioning that the sanctions resulting from the Magnitsky Act are not the only ones currently harming the Putin Regime. On February 27th, 2014, Russian forces seized Crimea's Parliament building as an attempt by Vladimir Putin to annex the region. This prompted the imposing of several sanctions against Russia from the United States, Canada, and the European Union; with several more countries joining in the months that followed including Japan, Switzerland, and Australia. While the Russian Government did retaliate in kind, it was not able to avoid financial crisis in that same year which was attributed to the sanctions.

## THE MAGNITSKY ACT (UNITED STATES)

Introduced to the House of Representatives on April 19, 2012,

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7. US Constitution. art I. sec 8.

The Magnitsky Act (H.R. 4404, later H.R. 6156) calls “To impose sanctions on persons responsible for the detention, abuse, or death of Sergei Magnitsky, and for other gross violations of human rights in the Russian Federation, and for other purposes.”<sup>8</sup> The summary of the bill is simple, but its language is worth dissecting. In section 2 subsection 2, as a means of highlighting Russia’s role as a member of the international community, the bill lists The Russian Federation as follows:

(A) is a member of the United Nations, the Organization for Security and Co-operation in Europe, the Council of Europe, and the International Monetary Fund;

(B) has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and the United Nations Convention against Corruption; and

(C) is bound by the legal obligations set forth in the European Convention on Human Rights.<sup>9</sup>

The drafters of the bill felt it necessary to remind Russia (as well as any interested party) the requirements associated with the benefits of these international organizations. It serves as pretext for the incoming list of grievances surrounding Magnitsky’s death, as well as other human rights abuses.

The Bill goes on to cite a report from July 6, 2011, detailing the findings of an investigation led by former Russian President Dmitry Medvedev’s human rights council. The report coincides with every substantial finding made by Magnitsky’s own report and testimony which resulted in his arrest. The remainder of section 2 of the Bill highlights contradictions between the Putin Regime’s stance and published fact, critiques of the use of law within the Russian legal system, and the names of other murdered individuals either directly or indirectly through Russian government corruption.

While the bill passed both the House and the Senate with strong majorities, there was notable resistance which underlines the state of US foreign policy toward Russia at the time, especially in regard to

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8. Sergei Magnitsky Rule of Law Accountability Act of 2012. Congress.gov. (April 19, 2012), <https://www.congress.gov/bill/112th-congress/house-bill/4405>.

9. Sergei Magnitsky Rule of Law.

the executive branch. In the bill's infancy, the implementation of the Magnitsky sanctions came in direct conflict in with the administration of President Barack Obama.<sup>10</sup> The administration had set a goal to reset relations with Russia; believing anti-Russian sentiment within the government to be antiquated notions from the Cold-War era. As the Russian Federation prepared to enter the World Trade Organization in 2012, there was a fear that sanctions like this would deter the US from lucrative trade agreements. Despite the lobbying efforts from the Department of State and National Security Council, the bill passed with 84% in the House of Representatives and 92% in the Senate.

#### MAGNITSKY ACTS (INTERNATIONAL)

Upon securing legislative victory in the United States, Bill Browder began to lobby governments all over the world to support similar legislation. While not all pieces of legislation are named after Sergei Magnitsky, the laws listed below are inspired at least in part by the memory of his death, and aim to discourage political corruption from resulting in unjust imprisonment and death.

On December 8, 2016, the Estonian Parliament became the first European government to impose Magnitsky-related sanctions when it amended its *1998 Obligation to Leave and Prohibition on Entry Act* to include language that banned those from entry who were involved in the “death or serious damage to health of a person” or their “unfounded conviction . . . for criminal offence on political motives.”<sup>11,12</sup> The law was introduced by Eerik-Niiles Kross, an MP and former national security chief. During the deliberation, Magnitsky's case was cited, as well as the case of an Ukrainian air force pilot Nadiya Savchenko. Savchenko was captured by Russian forces in June, 2014, and falsely charged with killing two Russian-State journalists.

After a unanimous vote in the House of Commons, the United Kingdom amended its Criminal Finances Bill to become the third country to impose these sanctions. While not imposing any travel restrictions, this measure (named after Magnitsky) gave the government

10. Jamila Trindle, “The Magnitsky Flip-Flop,” *Foreign Policy* (May 15, 2014), <http://foreignpolicy.com>.

11. Andrew Rettman, “Estonia Joins US in Passing of Magnistky Law,” *EU Observer* (December 9, 2016), <https://euobserver.com>.

12. “Obligation to Leave and Prohibition on Entry Act,” *Riigi Teataja* (December 8, 2016), <https://www.riigiteataja.ee>.



power to freeze assets of any individual who was or would be labeled as a human rights abuser.<sup>13</sup> The amendment was proposed by MP Dominic Raab, who in his address to parliament stated that according to information leaked through the Panama Papers, at least £30 million of the tax funds stolen from the Hermitage payment was laundered through the UK.<sup>14</sup>

On October 19, 2017, despite threats of a “tit-for-tat” retaliation from the Russian government and a unanimous vote in its House of Commons, Canada passed the *Justice for Victims of Corrupt Foreign Officials Act*, also known as the Sergei Magnitsky Law.<sup>15</sup> The law gave the government the power to freeze assets and suspend visa privileges for Russian officials linked to Sergei’s death, as well as any other individual guilty of human rights violations throughout the world.

On November 16, 2017, Lithuania amended article 133 of Lithuanian Law on the Legal Status of Aliens as introduced by Chairman Gabrielius Landsbergis of the Homeland Union-Lithuanian Christian Democrats.<sup>16</sup> This unanimous vote came on the eighth anniversary of Sergei Magnitsky’s death. This law was introduced as a ban of entry for anyone who had been involved in human rights abuses.<sup>17</sup>

#### EXTERNALITIES AND RUSSIAN BACKLASH

Responses from President Putin show his adamance in insisting that he had no involvement in Sergei Magnitsky’s death. When asked about the recent passing of the Magnitsky Acts in Canada, Putin replied that “When the situation with Magnitsky, who lost his life in prison, occurred, I was not working in foreign policy or security. I was Prime Minister of the Russian Federation.”<sup>18</sup> It is worth mentioning

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13. “UK House of Commons Passes the Magnitsky Asset Freezing Sanctions,” *Organized Crime and Corruption Reporting Project* (February 21, 2017), <https://www.occrp.org>.

14. Peter Walker, “MPs Pass Bill Allowing Police to Seize UK Assets of Human Rights Abusers,” *The Guardian* (February 21, 2017), <https://www.theguardian.com>.

15. “Canada Passes Version of Magnitsky Act, Raising Moscow’s Ire,” *Radio Free Europe* (October 19, 2017), <https://www.rferl.org>.

16. “Lithuania: Parliament Adopts Version of Magnitsky Act.” *Organized Crime and Corruption Reporting Project* (November 16, 2017), <https://www.occrp.org>.

17. “Republic of Lithuania on the Legal Status of Aliens,” (April 29, 2004), <https://e-seimas.lrs>.

18. RussiaInsiderTV. “Putin Slams Bill Browder for Robbing Russia: Magnitsky Act Excuse for Anti-Russian Hysteria,” *YouTube* (October 24, 2017), <http://www>.

that the direct level of Putin's involvement in Magnitsky's death is still relatively unknown, although his aggressive stance toward Bill Browder is indisputable. In describing Browder, Putin said the following.

Underneath are the criminal activities of an entire gang led by one particular man, I believe Browder is his name, who lived in the Russian Federation for ten years as a tourist and conducted activities which were on the verge of being illegal. . . . By buying Russian company stock without any right to do so, not being a Russian resident, and by moving tens and hundreds of millions of dollars out of the country, and hence avoiding any taxes not only here but in the United States as well.<sup>19</sup>

Apart from denying any wrongdoing in both the tax fraud claims as well as Magnitsky's death, the Russian Federation enacted sanctions in order to respond to the Magnitsky Acts in kind. A public posthumous hearing was held for Magnitsky, where he was found guilty. A similar trial was also held for Bill Browder, who refused to attend and was sentenced to nine years in prison should he ever return to Russia. A number of US government officials were also banned from entry into Russia.

The most infamous sanction however relates to the ban on adoptions of Russian children to families in the United States.<sup>20</sup> This was seen as an attempt to erode support for the act from American families seeking to adopt Russian children, with the hopes that they would rally greater support in Congress. As noted by *The Atlantic*, "At the time the adoption ban was passed, the Russian Federation had more orphaned and abandoned children than it did after the end of World War II." The law received international backlash, and even prompted a response from Prime Minister Medvedev, who served as Russian President from May 2008–May 2012 being both preceded and succeeded by Vladimir Putin. Many articles exist that attempt to explain why the Putin regime would punish Russian children for an act of Congress, with many citing possible desperation by Putin and the oligarchy to end these sanctions by any means possible.

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[youtube.com/watch?v=e4UVDuS\\_caM](https://www.youtube.com/watch?v=e4UVDuS_caM).

19. RussiaInsiderTV, "Putin."

20. Julia Ioffe, "Why Does the Kremlin Care So Much about the Magnitsky Act?" *The Atlantic* (July 27, 2017), <https://www.theatlantic.com>.

In an attempt to publicize Sergei's story, several notable works have been produced. The primary source being *Red Notice*, written by Bill Browder it serves as a memoir of his life leading up to Magnitsky's death and his attempt to bring those involved in his death to justice. The book's title refers to the type of notice issued by Interpol as a means of issuing an international arrest warrant. It has since become a New York Times #1 best seller.

The 2011 documentary *Justice for Sergei* by Hans Hermans and Martin Matt is an hour-long film, used by Browder to display to international governments in an attempt to have them implement similar sanctions.<sup>21</sup> A documentary entitled *Sergei Magnitsky—Behind the Scenes* was meant to serve as the antithesis to Browder's claims.<sup>22</sup> It asserted that Magnitsky was not beaten while in jail and that Browder and Magnitsky had conspired against the Russian government to embezzle the \$230 million. At the behest of California's Republican Representative Dana Rohrbacher, the film was screened on June 13th, 2016 despite backlash from several civil rights organizations. Among those lobbying on behalf of the film's release was Natalia Veselnitskaya, a Russian Lawyer who would meet with Donald Trump Jr. four days before the film was to be shown.

#### TRUMP CONNECTIONS FROM CANDIDACY TO PRESIDENCY

The meeting between Veselnitskaya and Trump Jr, while not the only meeting between members of the Trump Campaign and Russian government officials, did become a center of controversy during July 2017 when news of the meeting became common knowledge to the public. Veselnitskaya, who for many years previous had represented Russian oligarch Pytor Katsyv and his family, reached out to the Trump campaign through publicist Rob Goldstone. She offered incriminating evidence against Hillary Clinton as part of the Russian "government's support for Mr. Trump." According to emails released by Trump Jr, his response was "If it is what you say it is I love it especially later in the summer."<sup>23</sup> Once the meeting had been reported on by the *New York*

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21. *Justice for Sergei*. Produced by Irina Anatsheva. Directed by Hans Hermans and Martin Maat, April 26, 2011, <https://www.youtube.com/watch?v=x6PQNF-cog3s>.

22. Mike Eckel, "Controversial Film on Sergei Magnitsky's Death Set for US Screening," *The Guardian*, 10 June, 2016. <https://www.theguardian.com>.

23. Jo Becker, Matt Apuzzo, and Adam Goldman, "Trump Team Met with

*Times*, Trump Jr. was quoted on July 8 saying:

It was a short introductory meeting. I asked Jared [Kushner] and Paul [Manafort] to stop by. We primarily discussed a program about the adoption of Russian children that was active and popular with American families years ago and was since ended by the Russian government, but it was not a campaign issue at the time and there was no follow up.<sup>24</sup>

The following day, after reporting emerged that opposition research was discussed, Trump Jr. made the following statement to the *New York Times*:

After pleasantries were exchanged, the woman stated that she had information that individuals connected to Russia were funding the Democratic National Committee and supporting Ms. Clinton. Her statements were vague, ambiguous and made no sense. No details or supporting information was provided or even offered. It quickly became clear that she had no meaningful information.<sup>25</sup>

As president, Donald Trump has signaled that his Administration may be more willing to cooperate with the Putin regime.<sup>26</sup> In a February 6, 2017, interview with Fox News personality Bill O'Reilly, Trump rebuffed O'Reilly's claim that Vladimir Putin was "a killer" by saying "Do you think our country is so innocent? Do you think our country is so innocent?"<sup>27</sup> Later in the month on February 16, the president stated in a news conference:

I would love to be able to get along with Russia. Now, you've had a lot of presidents that haven't taken that tack. Look where we are now. Look where we are now. So, if I can—now, I love to negotiate things, I do it really well, and

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Lawyer Linked to Kremlin During Campaign," *The New York Times* (July 8, 2017), <http://nytimes.com>.

24. Liam Stack, "Donald Trump Jr's Two Different Explanations for Russian Meeting," *The New York Times* (July 9, 2017), <http://nytimes.com>.

25. Jo Becker, Matt Apuzzo, and Adam Goldman, "Trump's Son Met with Russian Lawyer After Being Promised Damaging Information on Clinton," *The New York Times* (July 9, 2017), <http://nytimes.com>.

26. "Trump: Getting Along with Russia Is a Good Thing," Real Clear Politics (November 12, 2017), <https://www.realclearpolitics.com>.

27. Andrew Kaczynski, Chris Massie, and Nathan McDermott, "80 Times Trump Talked about Putin," CNN (January 23, 2018), <http://www.cnn.com>.

all that stuff. But—but it's possible I won't be able to get along with Putin.<sup>28</sup>

The general sentiment put forth by the resident in these statements may be connected with the Trump administration's decision on January 29, 2018, to disregard a new round of sanctions passed by Congress several months prior. The bill calling for these sanctions (H.R. 3364) passed the House of Representatives with 97% of the vote and the Senate with 98%.<sup>29, 30</sup> These sanctions in particular were implemented in response to "Russian President Vladimir Putin [who] ordered an influence campaign in 2016 aimed at the United States presidential election."<sup>31</sup> While these sanctions are not directly related to the death of Sergei Magnitsky, and those sanctions currently have not been disrupted, it is worth noticing that the Trump Administration has established precedent for disobeying Congressional actions aimed at punishing the Putin Regime.

#### POSSIBLE OUTCOMES FOR THE MAGNITSKY ACTS

Within the current political system there are three distinct possibilities with regard to the Magnitsky Acts in the future: The sanctions will remain constant, neither expanding nor shrinking; there will be an expansion of Magnitsky related legislation throughout the world; or the Trump administration will seek to diminish the effect of the laws either through legislative action or a refusal of enforcement.

If the Magnitsky laws remain constant in the countries where they have been enacted, without any other legislation being introduced, this will still serve as a major loss for the Putin regime.<sup>32</sup> While no solid figures exist outlining the extent of wealth and corruption from the Russian oligarchy, the release of the Panama Papers helped highlight several purchases and transfers that can provide some insight into these figures. Purchases involving luxury yachts, private ski resorts, and massive company acquisition provide greater levels of accuracy to a 2007

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28. Kaczynski, Massie, and McDermott, "80 Times."

29. Govtrack.us. <https://www.govtrack.us/congress/votes/115-2017/s175>.

30. Govtrack.com, Govtrack, [www.govtrack.us/congress/votes/115-2017/h413](http://www.govtrack.us/congress/votes/115-2017/h413).

31. "Countering America's Adversaries through Sanctions Act," July 24, 2017, Congress.gov.

32. Luke Harding, "Revealed: The \$2bn Offshore Trail That Leads to Vladimir Putin," *The Guardian* (April 3, 2016), <https://www.theguardian.com/news/2016/apr/03/panama-papers-money-hidden-offshore>.

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leak from within the Kremlin claiming Putin's worth to be approximately \$40 billion.

The outcome of more Magnitsky legislation growing throughout the world seems at this point to be the most likely.<sup>33</sup> Most recently, a contingent of European officials are calling for the European Union to enact its own form of Magnitsky acts. These calls have come from multiple members of European Parliament across the political ideological spectrum, including former Belgian Prime Minister Guy Verhofstadt. Acts like this would intensify the already strenuous relationship between the EU and the Kremlin, whose feud over the annexation of Crimea is ongoing. With enough world powers currently imposing Magnitsky sanctions, an inclusion of the EU would increase the snowball effect and act as a political bridge for many other countries looking to diminish human rights abuses.

With the recent refusal of enforcement on congressionally-approved sanctions, the outcome of the Trump Administration choosing to roll back the Magnitsky Act is a possible, albeit improbable, outcome. Had these acts been implemented through an executive order by President Obama, they could have been easily overturned by President Trump just as many of the Obama-era orders have been. Because the Magnitsky Acts were made law by Congress, it is far more difficult for the President to intervene and impossible to do so on the executive powers alone. The amount of assets frozen within the United States is unknown to the public, but given the Russian interference and attempts to demean the reputation of Bill Browder and Sergei Magnitsky, it can be assumed that it is an amount which the Putin Regime is willing to risk great political consequence to obtain. Another externality would be the threat of other countries threatening to abandon their own legislation should the United States choose to do so.<sup>34</sup> This may not be as great a possibility seeing as how the Trump administration has yet to impose legislation that is acted upon by other nations. It is worth noting that after President Trump's announcement of his administration's plan to exit the Paris climate accords, no other country followed suit, opting instead to remain with the majority. While a US

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33. Dalibor Rohac, "After Canada, It Is Time for the EU's Magnitsky Act," *AEIdeas* (November 1, 2017), <http://www.aei.org>.

34. Carlos Ballesteros, "The U.S. Is Now the Only Country Not in the Paris Climate Agreement," *Newsweek* (November 7, 2018), <http://www.newsweek.com>.

termination of the Magnitsky Act would be a political upheaval of the current international movement, there is adequate evidence to show that it would continue within the international sphere.

## CONCLUSION

On July 16, 2018, President Trump met with Vladimir Putin for a summit in Helsinki. Three days prior to this meeting, Special Counsel Robert Mueller had indicted 12 Russian intelligence agents in connection to the alleged hacking of the 2016 election.<sup>35</sup> Putin extended the offer to allow these agents to be interviewed by American investigators in exchange for access to several US diplomats as well as Bill Browder; the man responsible for the advocacy and implementation of the Magnitsky Acts all over the world. While this is not the first attempt of the Kremlin to gain access to Browder, this latest public attempt shows that these acts have succeeded in capturing Putin's personal attention. As of the writing of this report, the current White House stance on whether or not an exchange will occur is unsure.

There is no reason to doubt that corruption within the Russian government was responsible for the death of Sergei Magnitsky, and that the Magnitsky Acts throughout the world have been highly effective in disrupting Russian state-sponsored activity that has been deemed illegal by the governing bodies that have adopted these sanctions. If the effectiveness of these acts has taught us anything, it is that punishments enacted through sanctions are to be aimed at individuals as opposed to the Russian government as a whole. In understanding the network implemented at the behest of a Putin-controlled oligarchy, it becomes clearer to understand how the Kremlin operatives attempted to use the 2016 presidential election to advance their own political agenda. With a direct line of correlation between Sergei Magnitsky and the Trump administration, it is important to realize that President Trump is not the primary agent in this event, but rather one of many moving pieces in a political struggle that has lasted over a decade. It is in the interest of the United States to keep these connections in mind as it further investigates Russian meddling in the 2016 election as well as the implementation of further sanctions against the Kremlin.

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35. Bill Browder, "I'm Bill Browder. Putin Made a Mistake When Talking about Me," *Time* (July 17, 2018), <http://time.com>.



## THE ARCTIC FRONTIER: RUSSIA, CHINA, AND THE UNITED STATES

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*Elliott Thomas*

The Arctic is becoming a geopolitical hot spot for many nations. Russia's policies and claims in the Arctic are part of a long-term strategy and it has already laid the foundation in terms of infrastructure, military, and demographics to maintain an advantage in the region. China is beginning to scout new trade routes to cut the costs of shipping through the Arctic as well as working with Russia to establish a tie to the region. If the United States is to prevent Russia and China from dominating the Arctic and maintain stability in the region, they will need to provide infrastructure, improved Arctic policy, and up-to-date technology.

Russia has begun to build its military presences in the Arctic region. Russia's nuclear-powered submarine, the *Yuri Dologoruky*, launched an intercontinental ballistic missile near the Barents Sea in the Arctic. The Arctic is a region that Moscow has put high on their agenda for military development. The Russian government has vowed to grow its military presence in the region by 2030.<sup>1</sup> With the increase of Russian military in the Arctic, the question is not whether the United States should drill for oil or natural gas, but should the United States establish an active, permanent presence in the Arctic region. The Arctic has been on the Kremlin's agenda since the 1930s, it was not until 2009 that Russia began to focus on securing energy resources in the region, making the area a top priority for Russian foreign policy.<sup>2</sup> In April 2016, the Russian ministry of Defense announced its newest military base

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1. Damien Sharkov, "Russia Fires Ballistic Missile in Arctic Military Tests," *Newsweek* (June 26, 2017), <http://www.newsweek.com>.

2. Leonhardt Van Efferink, "Arctic Geopolitics—Russia's Territorial Claims, UNCLOS, the Lomonosov Ridge," *Exploring Geopolitics: The Academic Faces in the Geopolitical Debate* (May 1, 2015), <http://www.exploringgeopolitics.org>.



located on Franz Josef Land, an archipelago consisting of 191 islands belonging to Russia in the Barents Sea, less than 700 miles from the North Pole.<sup>3</sup>

The Report on Arctic Policy by the International Security Advisory Board (ISAB) states that Russia controls more than 50 percent of the Arctic coastline, 40 percent of the land beyond the Arctic Circle, and 42 percent of the population. Because of their control, Russia is likely to become less cooperative with other Arctic-bordering neighbors. Those countries, including the United States, would be more likely to suffer in the development of their economic pursuits, such as establishing shipping routes, utilizing natural resources, and protecting territorial claims.<sup>4</sup> The ISAB informed the US Department of State (DoS) in March of 2015, that Russia conducted a military exercise in the Barents Sea consisting of 41 warships, 15 submarines, 38,000 ground troops, and 110 aircraft. Russian President Vladimir Putin personally oversaw the exercise. Russia has stated it has increased its military presence in the Arctic in order to protect its resources.

Russia's disproportionate occupation of the Arctic coastline gives it a geographical advantage as well as a sense of entitlement to the region. If Russia gained control over the Arctic region, it would have a strong grip on resource allocation, territorial claims, and taxation on shipping routes.<sup>5</sup> Russia values its influence and ability to dominate the region as a way of asserting itself into an international leadership role.<sup>6</sup> Due to environmental changes, the Arctic's melting ice is opening up new trade routes and access to \$35 trillion in natural resources. As the polar ice thins, new sea lanes open, promising to provide economic strength, trade, and commerce.<sup>7</sup> Russia is poised to exploit these changes and take advantages of every available opportunity.

The United States continues to negotiate maritime boundaries to protect its interests in the region. Since the United States is not a

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3. Brit McCandless, "What's at Stake with Russia's Arctic Military Buildup," *60 Minutes Overtime* (September 10, 2017), <https://www.cbsnews.com>.

4. US Department of State, "Memorandum for Under Secretary Gottemoeller," International Security Advisory Board (ISAB). ISAB Study on Arctic Policy (April 7, 2015), <https://www.state.gov/t/avc/isab/262342.htm>.

5. US Department of State, "Memorandum."

6. McCandless, "What's at Stake."

7. Barry Scott Zellen, *Arctic Doom: The Geopolitics of Climate Change in the Arctic* (Santa Barbara: Praeger, 2009).

member of the United Nations Convention on the Law of the Seas (UNCLOS), it is unable to secure international legal titles to sites more than 200 nautical miles off its own coast that are considered part of its Exclusive Economic Zone (EEZ), whereas Russia has submitted territorial claims that would allow it to expand its borders beyond the original 200 nautical miles.<sup>8</sup> Data released by the University of New Hampshire suggests that the foot of the continental slope off Alaska is more than 100 nautical miles from the United States' coastline. This data could support the United States' rights to natural resources of the sea floor beyond 200 nautical miles from the coast.<sup>9</sup> However, because the United States has not ratified the UNCLOS treaty, they cannot submit these claims to UNCLOS.

The EEZ grants territorial rights 200 nautical miles off the coast of a state. Under this law, the state has the right to fish, place installations, and use this zone for economic purposes. If any country claims that its continental shelf extends beyond 200 nautical miles from its original boundaries, that country must submit evidence to justify such a claim to the Commission on the Limits of the Continental Shelf (CLCS).<sup>10</sup> Russia's strategy regarding the Arctic has been to secure Russia's claims to its continental shelf territories beyond the EEZ limits set by UNCLOS.<sup>11</sup> Moscow asserts that the majority of the Arctic's natural resources lies within its continental shelf and should be under Russia's control. The United States, Russia, Norway, Canada, and Denmark have all claimed parts of the Arctic continental shelf.

The Arctic region has already provided Russia with 12 to 15 percent of its total Gross Domestic Product, mainly oil and gas. In August 2007, Russia conducted an undersea voyage to extend its territorial claim beyond the 200 nautical mile boundary, successfully planting a Russian flag on the seabed under the North Pole. According to the US Geological survey, the Arctic holds roughly one-quarter of the world's undiscovered oil, natural gas, diamonds, gold, platinum, tin, manganese, nickel, and lead.<sup>12</sup> The official reason for this underwater voyage was to support Russia's territorial claim beyond its 200 nautical mile

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8. Van Efferink, "Arctic Geopolitics."

9. Zellen, "Arctic Doom."

10. Van Efferink, "Arctic Geopolitics."

11. Van Efferink, "Arctic Geopolitics."

12. Angela Stent, *The Limits of Partnership: US-Russian Relations in the Twenty-First Century* (Princeton: Princeton University Press, 2015), 205.

boundary.<sup>13</sup> Other countries bordering the Arctic want a share of this bounty and have begun to take advantage of the EEZ provisions by shipping, drilling, and exploring the Arctic waters. Meanwhile, the United States has fallen behind other Arctic bordering nations when it comes to economic and national security concerns.

In May 2014, the US Government Accountability Office (GAO) released a study suggesting that the United States focus on developing a stronger policy towards the Arctic, particularly through participation in the Arctic Council, an intergovernmental agency formed to coordinate interaction among the Arctic States: Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States.<sup>14</sup> Congressmen Tim Bishop (NY-01) and Rick Larsen (WA-02) participated in the study. Bishop stated, "If the United States hopes to maintain its presence in the Arctic, it is time to get serious about the region." Larsen added, "The Arctic is the Northwest Passage of the 21st century, but today's GAO report is another sign that the United States is falling behind in Arctic policy. [ . . . ] Our country has major commercial, environmental and security interests in the region and we should start prioritizing them."<sup>15</sup> On March 16, 2017, Larsen and Representative Jim Sensenbrenner (R-Wis) introduced a bill to establish a US Ambassador at Large for Arctic Affairs. No further action has been reported since the bill.<sup>16</sup>

The GAO report underlines that there is much more the United States should be doing to protect its interests, both economic and security-related. The GAO identified that six key governmental agencies do not have a unified direction when dealing with policy towards the Arctic: (DoS), Environmental Protection Agency (EPA), National Nuclear Security Agency (NNSA), National Oceanic and Atmospheric Administration (NOAA), US Fish and Wildlife Service, and US Global Change Research Program). These agencies struggle to formulate a specific agenda and are inconsistent in their participation in the Arctic

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13. Van Efferink, "Arctic Geopolitics."

14. US Government Accountability Office, "Arctic Issues: Better Direction and Management of Voluntary Recommendations Could Enhance US Arctic Council Participation" (May 16, 2014), <https://www.gao.gov/products/GAO-14-435>.

15. Congressional Arctic Working Group, "GAO: US Can Do Better on Arctic Policy" (February 23, 2015), Congressional Arctic Working Group, <https://congressionalarcticworkinggroup-larsen.house.gov>.

16. "Sharkov, "Russia."

Council. Although the DoS has the lead role of the United States' participation in the Arctic Council, the GAO suggests that the six agencies combine efforts and strategy to obtain the resources needed to strengthen policy towards the Arctic.<sup>17</sup>

In September 2017, the DoS implemented strategies based on the recommendations of the GAO findings. Firstly, the DoS refined a strategy to pilot the United States' representation and coordination between the six agencies in the Arctic Council.<sup>18</sup> Secondly, the DoS asked for feedback from other agencies that could be applied to each agency's recommendations. Lastly, DoS submitted a proposal to the other Arctic States that the Arctic Council authorize regulations on policies. Policy submissions should be practical, achievable, prioritized, and limited in number. The Arctic States considered and accepted the proposal. The Chair of the Senior Arctic Officials has asked those who submitted policy recommendations to the Arctic Council to adhere to the regulations put forth by the DoS.<sup>19</sup>

The Obama Administration recognized that the United States has an important economic interest in the Arctic, yet took little action beyond the field of scientific study focused on preserving the natural environment of the region.<sup>20</sup> Commander David M. Slayton and Mark E. Rosen are members of the US Arctic Security Working Group. They have criticized the United States' scientific approach towards the Arctic region. Rosen and Slayton claim this is a region where the buildup of Russian military threatens the security of the United States. They maintain that the rapid melting of the polar ice caps is not only creating new trade routes, but also new problems that have the potential to cause sufficient damage to the global economy. Although scientific considerations and safe and responsible growth for the Arctic are important, Rosen and Slayton argue there is a sense of urgency in dealing with Russia's presence in the Arctic.<sup>21</sup>

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17. US Government Accountability Office, "Arctic Issues."

18. US Government Accountability Office, "Arctic Issues."

19. Don Young and Rick Larsen, "The United States Needs to Turn Its Attention to the Arctic Ocean," *The Washington Post* (August 1, 2014), <https://www.washingtonpost.com>.

20. David M. Slayton and Mark E. Rosen, "Another Region Where the Russian Military Threatens to Dominate the US," CNN (March 14, 2014), <http://www.cnn.com>.

21. Slayton and Rosen, "Another Region."

Rosen and Slayton argue that the United States' Arctic policy should consider four points: The first is to demonstrate leadership in the Arctic. Whereas the United States has no leadership presence in the Arctic, Russia exercises a leadership role. The second point is to invest in infrastructure and establish a military presence in the region to protect US Security and commercial interests in the Arctic. The United States does not have a military presence in the Arctic either to protect its interests or to protect the United States. Third is for the United States to establish leadership over the maritime domain worldwide. Enforcing maritime boundaries and laws would prevent controversial expansion by any one country. The final point bade by Rosen and Slayton is to promote and establish offshore natural resources in the Arctic, including "national, international, maritime and geopolitical governance structures" that will build those enterprises.<sup>22</sup> These enterprises will not only secure the United States' interests in the Arctic, but would establish a dedicated presence in the region.

If the United States were to be proactive and engage in a stronger policy towards the Arctic, it could essentially undercut Russia's ability to hold a monopoly on gas and oil markets in the region. Melting ice sheets allow greater travel through the Arctic waters and may lead to the possibility of more efficient trade routes between the two coasts of the United States than going through the Panama Canal. Other benefits could include "a forward base for the Coast Guard, ports and harbors, research facilities and search-and-rescue centers."<sup>23</sup> However, Russia dominates the majority of the Arctic coast and could impede the United States' ability to use the trade routes. The United States has fallen behind in infrastructure and technology in the region and continues to fall behind while Russia moves forward.<sup>24</sup>

Icebreaker ships help navigate and break ice in the Arctic Circle. They are designed to cut through the ice opening up waterways for trade, military, and travel. Another shortsightedness of the US in the Arctic is its lack of icebreaker ships. While the US has only two functional icebreakers, Russia has 22 icebreakers and has built another that is the largest in the world.<sup>25</sup> With several countries claiming territories

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22. Slayton and Rosen, "Another Region."

23. US Department of State, "Memorandum."

24. US Department of State, "Memorandum."

25. Young, "The United States."

in the Arctic, the US Coast Guard has requested more icebreakers.<sup>26</sup> In an interview with Coast Guard Vice Admiral Fred Midgette, he voiced concerns that Russia continues to outspend the United States on these important technological capabilities for the changing nature of the region. Midgette said “If you look at what Russia is doing, there is almost a mini arms buildup going on in the Arctic.”<sup>27</sup> The Coast Guards’ current heavy-duty icebreaker, the Polar Star, is seven years past its 30-year service. In order to maintain the Polar Star, parts had to be found online using eBay and borrowed from a sister ship that was damaged beyond repair. The crew sails with a year’s supply of food just in case the ship breaks down in the ice.<sup>28</sup> Having new up-to-date icebreakers would allow the United States to be more competitive with Russia and provide the United States the ability to quickly react to developments in the region.

Russia is the only country that has produced nuclear-powered icebreakers, the latest having dual nuclear engines that are far superior to gas-operated icebreakers. The new icebreaker, *Sibir*, weighs 33,500 tons and is 576 feet long and is one that is nuclear powered. Vyacheslav Ruksha ensures claims this nuclear ship assures Russian Dominance in the Arctic. Ruksha stated, “Nuclear energy ensures Russia’s undisputed leadership in the far north . . . but only with nuclear icebreakers can our country fully unveil all possibilities and advantages of the Northern Passage to the world.”<sup>29</sup>

In addition to those countries bordering the Arctic, China has targeted the region. China has begun manufacturing icebreakers even though it does not have a territorial claim to the Arctic waters. China took a closer look into the Arctic in the fall of 2017 when a Chinese ship conducted a voyage to test a trading route along the Northwest Passage.<sup>30</sup> China is anticipating an increase of the amount of shipping

26. Carter Evans, “US Coast Guard Falls Behind Russia in New Arctic Arms Race,” *CBS Evening News* (December 18, 2017), <https://www.cbsnews.com/news>.

27. Evans, “US Coast Guard.”

28. Evans, “US Coast Guard.”

29. Tom O’Connor, “Russia Leads World with New Nuclear Icebreaker Ship, Putin’s Latest Arctic Move,” *Newsweek* (September 25, 2017), <http://www.newsweek.com/russia-deploys-worlds-largest-and-most-powerful-nuclear-icebreaker-ship-bring-670621>.

30. Adam Taylor, “China Sent a Ship to the Arctic for Science. Then State Media Announced a New Trade Route,” *Washington Post* (September 13, 2017), <https://www.washingtonpost.com/news>.

it will do once the Arctic opens. The Chinese voyage raised concern that the country is scouting a major shipping route through disputed territories in the Arctic. The Northwest Passage is not the only route in China's scope, but also the Northeast Passage, which runs along the top of Russia, avoiding the use of the Suez Canal.<sup>31</sup> A shipping frigate from China to New York through the Arctic would cut 3,000 miles and save an estimated \$2 million on fuel rather than going through the Panama Canal. This can be argued as a benefit rather than a cost, however, China's use of the Northeast Passage will likely forge an economic strength between China and Russia. This potential relationship between Russia and China could damage economic interests of the United States in the Arctic.

Even though China does not have a direct connection to the Arctic Circle, they have not given up developing ways to gain an economic foothold in the region. The Belt and Road Initiative (BRI) is an infrastructure project involving 60 countries and designed to stimulate the global economy and link China with the world through sea, land and rail. China and Russia have agreed to help each other with BRI projects, giving China a direct link to the Arctic through Russia. The Arctic is becoming the new frontier for territory expansion.<sup>32</sup>

The ISAB report suspected that "China's expressed interest in the Arctic is to exert influence as a rising regional power, through partnerships with Arctic countries and a presence in the region, in order to pursue its economic interests and political influence."<sup>33</sup> The strategic director of the Arctic Institute, Malte Humpert, stated,

It's the last frontier, at least, from an outsider perspective. It's a mysterious place with plenty of opportunity, from a geopolitical perspective, fishing perspective, or resource perspective. There are no police standing around the Arctic, surveillance or constant military awareness.<sup>34</sup>

China is taking advantage of the lawless frontier and is not likely to back down from a chance to gain economic growth from the region

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31. Taylor, "China Sent a Ship."

32. Eleanor Ross, "How China's Arctic Empire Will Upset the Global Balance of Power." *Newsweek* (July 14, 2017), <http://www.newsweek.com/chinas-arctic-goals-620794>.

33. US Department of State, "Memorandum."

34. Ross, "How China's Arctic Empire."

despite not bordering the Arctic or being a member of the Arctic Council.

The current Arctic policy of the United States is to support the following objectives:

Meeting US national security needs, protecting the Arctic environment and conserving its living resources, ensuring environmentally-sustainable natural resource management and economic development in the region, strengthening institutions for cooperation among the eight Arctic nations, involving the Arctic's indigenous communities in decisions that affect them, and enhancing scientific monitoring and research on local, regional, and global environmental issues.<sup>35</sup>

With the increase of Russian military in the Arctic and China's forward advances, the United States would benefit by fortifying their presence and strengthening policy towards the Arctic region. Control of the Arctic by Russia or China would result in a negative and powerful influence on the world economy. While the United States and Russia both want to defend their interests in the Arctic, the United States does not have a permanent presence in the Arctic. The argument then exists that the United States establishing military bases in the Arctic to offset Russia's military presence, could increase the potential for another arms race between the two nations. However, a military presence from the United States would affirm a long-lasting commitment to the Arctic region.

Global trade drives the world economy. The melting Arctic holds new potential for more efficient trade with the world, however, there is a possibility that Russia's military strength in the Arctic and China's insistence in the region will soon be able to hold the Northern Trade Routes at ransom.<sup>36</sup> The Northern Trade Routes must remain open, not just for the United States, but for other countries seeking to expand their economy, infrastructure, and trade within the Arctic Frontier.

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35. US Department of State, Office of Ocean and Polar Affairs, "US Department of State Diplomacy in Action," <https://www.state.gov/e/oes/ocns/opa/arc/>.

36. Zellen, "Arctic Doom."







## THE SCHENGEN FACTOR: BORDER CONCERNS IN FRANCE AND THE UNITED KINGDOM

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*Nathan Van Aken*

While international terrorism is not a new issue in the world, it has become increasingly politicized in the last decade. Given the recent string of attacks in Europe, it is no surprise that, as in the United States, various European nations have begun to make immigration and border control one of their top political priorities. In Europe, these reforms are met with the inborn problems that face any modern nation trying to stem immigration as well as several problems unique to each country, specifically those that are signatories to the Schengen Agreement. Due to the complexities of each situation, this paper will focus on two specific countries, France and the United Kingdom. It will analyze these two countries' stances on immigration policies and attempt to understand the different reactions that each has had. While France has continued as part of both the European Union and the Schengen, the United Kingdom has instead gone forward with a plan to secede from the EU, a process known colloquially as Brexit. The countries' varied responses to these problems cannot be fully understood without an in-depth look at both the attacks that have occurred in each of these countries as well as an understanding of their imperial and colonial background.

The overarching goal of this article is to better understand the reason that so many attacks have occurred in both the UK and France. The question "Is the United Kingdom safer outside of the EU?" will be addressed. Further, the significance of France's membership in both the EU and the Schengen zone has left them vulnerable to more severe or more frequent terrorist attacks. It is impossible to look at each individual Schengen member and dissect their history in such a short article. Instead, I have chosen to focus on two of the largest and most

familiar examples for most readers. In the end, this paper will show that while there are definite differences in the nature and intensity of the terrorist attacks that have occurred in France and Great Britain, the differences have more to do with the divergent histories of the two nations and less to do with their membership in the Schengen Agreement. Both countries have colonial and imperial pasts that influence the nature of modern terrorism much more than issues such as membership in supranational organizations. In order to prove this, I will first address some of the sources used in this paper; second, I will give a colonial background for each country in question; third, I will look at the nature of the attacks and the background of the attackers; fourth I will connect all of this to the Schengen and the influences there, and, finally, I will restate the evidence and conclude the paper.

#### LITERARY ANALYSIS

An important piece needed to understand the background of terrorism in these two countries lies in understanding the formation of the European Union and the roles that France and the United Kingdom play in it. The complex relationship that Europe has with its borders may be difficult for many Americans to understand. Coming from a culture that has been diverse since its very inception, it is difficult to understand the intense and heated problems that many smaller nations face when they are being co-opted by larger nations. At the heart of the problems covered in this article is the issue of borders. In his book, *Cultures of Border Control: Schengen and the Evolution of European Frontiers*,<sup>1</sup> Ruben Zaiotti looks the definitions of borders in a European context. He says,

Borders represent the very essence of statehood . . . and one of its most visible embodiments. . . . At the same time, borders are a powerful symbol of identity and historical continuity, both for the state as institution and for the peoples they contain. Their protection is therefore a matter of “national security,” and the exclusive responsibility of central governments.<sup>2</sup>

With this background, one can more easily understand the Schengen,

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1. Ruben Zaiotti, *Cultures of Border Control: Schengen and the Evolution of European Frontiers* (Chicago: University of Chicago Press, 2011).

2. Zaiotti, *Cultures*, 2-3.

the EU, and the UK's wariness to get involved with either organization.

In his book *Understanding the European Union: A Concise Introduction*,<sup>3</sup> John McCormick gives an introduction to the EU and the powers that played major roles in its creation as well as the current state of those powers within the EU. He gives many different reasons for the EU's creation but identifies three main reasons why it was possible to form the EU in the late 20th century. First, he says that public loyalty to state has been compromised by economic, social, and political divisions.<sup>4</sup> Second, he says, "International borders have been weakened by the building of political and economic ties among states."<sup>5</sup> And third, he says that states have not always been able to meet the needs for "security, prosperity, and human rights" that their citizens desire.<sup>6</sup> McCormick and Zaiotti give similar definitions for what citizens of a state want, and then McCormick says that these states have largely failed to meet these needs. Because of this, it was necessary for a supranational organization to exist.

In his book, McCormick also gives various examples of states that choose to opt out of different parts of the European Union. Readers will be familiar with the UK's decision to withdraw from the European Union, colloquially known as Brexit. As McCormick's book was written before the June 23, 2016, vote, it does not include this, but does give examples of ways that the UK held itself aloof from the EU. First, McCormick explains ways in which the EU states have been able to work together. For example, he cites that "almost any citizen . . . can live and work in any other EU member state, open a bank account, take out a mortgage, transfer capital, get an education, and both vote and run in local and European elections."<sup>7</sup> He also mentions the trade and immigration reforms that allow for easier movement of goods and people within the EU. This agreement is known as the Schengen Agreement or SA.<sup>8</sup> However, he also parenthetically mentions the reason for which the UK has largely opted out of these agreements: "Britain has stayed out of most elements of Schengen, claiming its special problems

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3. John McCormick, *Understanding the European Union: A Concise Introduction* (London: Palgrave Macmillan, 2017).

4. McCormick, *Understanding the European Union*, 3.

5. McCormick.

6. McCormick.

7. McCormick, 148.

8. McCormick, 147–148.

as an island state.”<sup>9</sup> This reason of “special problems” that the UK faces as an island state is given for many of the UK’s special exemptions. In essence, the UK prefers to have more direct control over its currency, trade, and immigration and thus refuses to join with the EU in the SA. This justification has been touted recently in light of the multitude of terrorist attacks across Europe, and the UK has increasingly moved towards a more isolationist viewpoint after these attacks. These claims will be analyzed in the remainder of this article, with the goal being to attempt to better understand if the UK’s opting out of the SA has actually led to more border security.

#### COLONIAL BACKGROUND

While parts of the colonial past of these two countries may be familiar to most Americans, the imperial histories of France and the UK extend much further than the American continent. Both countries have a long and sordid history in Northern Africa and the Middle East. France has been especially involved in North Africa since Napoleonic times, as Charles X, reappointed king after the defeat of Napoleon, attempted to take advantage of a political faux pas to invade Algeria in 1830. The French would rule in some form or fashion in Algeria until the 1960s, and France became so integrated into Algeria that it was known as “French Algiers,” an official part of the French Empire, not simply as a French colony. Indeed, France’s influence in Africa extended much further than modern-day Algeria. It would expand to most of North Africa, in an area known as the Maghreb.

Since then, France has had trouble integrating its Arab citizens into the empire as a whole. While Algerians were considered to be full French citizens, that did not stop the government from treating them differently. Additionally, many Algerians permanently relocated to France. In “The Muslim Veteran in Postcolonial France: The Politics of the Integration of Harkis After 1962,”<sup>10</sup> Sung Choi talks about the difficulties faced by the French government in integrating the “harkis,” Algerian soldiers who were conscripted into service or volunteered to fight against Algeria in the Algerian War, which ended in 1962. Choi says that motivations of the harkis were not usually ideological;

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9. McCormick, 59.

10. Sung Choi, “The Muslim Veteran in Postcolonial France: The Politics of the Integration of Harkis after 1962,” *French Politics, Culture & Society* 29, no. 1 (Spring 2011): 24-45.

instead they derived from coercion by the French army, from retaliation against FLN marquis fighters who harassed anyone with suspected French loyalty, or from financial incentive.<sup>11</sup> Another particularly interesting motivation that Choi gives was that “some men became harkis by following in the footsteps of their fathers or grandfathers who had fought in the two World Wars.”<sup>12</sup> The fact that many Algerians had been serving the French army for decades shows that Algeria was an ingrained part of France, and many saw the two as part of the same whole, a country that stretched across the Mediterranean.

While France had much direct involvement with its Mediterranean neighbors, the UK was somewhat more removed from their Middle Eastern colonies. At the same time that France was conquering the Maghreb, England was exerting political and financial power over Egypt and beginning to ingrain itself into the politics of the Indian subcontinent. Like France, the UK also used its colonies throughout both world wars as front-line troops. With these colonial expansions and wars came many Muslim immigrants to the mother country. In his piece, “Gaps and Bridges in the Diaspora Cultural Life of the Asian-English Muslims in England in *Buddha of Suburbia*” by Hanif Kureishi,<sup>13</sup> historian Mumtaz Ahmad looks at a novel entitled *Buddha of Suburbia* and analyzes the plight faced by Muslim and Buddhist immigrants in the UK. In his review, Ahmad talks about hybrid and liminal cultures in the context of the United Kingdom. He says,

The stress on hybrid and liminal is crucial because colonial discourses have set up clear distinctions between pure and discrete cultures. Colonial discourses which are the creation of colonial power followed the policy of dividing the world into self and other in order to rationalize the material inequalities and economic disparity central to the colonial rule.<sup>14</sup>

Here, Ahmad identifies the center of the problem faced by both the United Kingdom and France. By seeking to separate as distinct the

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11. Choi, 26.

12. Choi, 26.

13. Mumtaz Ahmad, “Gaps and Bridges in the Diaspora Cultural Life of the Asian-English Muslims in England in *Buddha of Suburbia* by Hanif Kureishi,” *Scholedge International Journal of Multidisciplinary & Allied Studies* 3, no. 9 (2016): 197–207.

14. Ahmad, 201.

peoples who they were actively colonizing, these two nations, along with other European nations, fractured the cultures they were trying to influence. Both through political instability and a cultural identity crisis, areas such as the Middle East and North Africa were destabilized. When, in the twentieth century, these countries began to assert their freedom, they were ill equipped to do so, leading to a host of problems that will be addressed later in this article.

#### TERROR ATTACKS CONSIDERED

To properly understand the terrorist attacks in both France and the UK, a distinction must be made. The United Kingdom has been in a pseudo-war for decades on its borders with Ireland, and acts of terror related to this war will not be included in this article. Instead, the focus will be on Islamic radical attacks made in both Britain and France. As has been stated before, both France and Britain have special relationships with the Islamic world, with France being the more intertwined in the region since the 1830s. The most recent string of attacks began in January of 2015 with the attack on the satirical magazine, Charlie Hebdo. In her piece, "Terrorism discourse on French international broadcasting: France 24 and the case of Charlie Hebdo attacks in Paris,"<sup>15</sup> Eva Polonska-Kimunguyi gives an excellent analysis of the attacks as well as attempts to unravel the claims that these attacks came from outside of France and are therefore not due to French internal problems. When addressing the motivation for the attacks, Polonska-Kimunguyi says, "The cartoons of Prophet Mohammed published by Charlie Hebdo, considered offensive by followers of Islam, were the reason behind the attack."<sup>16</sup> She then goes on to describe the "othering" process that the media so readily adopted in the wake of the attack, as have so many in the wake of similar attacks around the world. This process of "othering" will be covered in a later section of this article, for now it is important to establish a timeline of the events in both France and the UK so that they can be examined critically.

An even more brutal and familiar terror attack occurred on November 13, 2015, which involved a total of three explosions going off

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15. Eva Polonska-Kimunguyi and Marie Gillespie, "Terrorism Discourse on French International Broadcasting: France 24 and the Case of Charlie Hebdo Attacks in Paris," *European Journal of Communication* 31, no. 5 (October 2016): 568-583.

16. Polonska-Kimunguyi and Gillespie, 569.

in several different parts of Paris and leaving over 130 dead and hundreds more wounded. In the article entitled “Paris Attacks: What Happened on the Night?”<sup>17</sup> the BBC gives a detailed breakdown of the events as they occurred. The first explosion occurred at 9:20 p.m. in the Stade de France during a soccer match. Shortly after, a series of coordinated gun attacks occurred in different places in Paris, mostly targeting popular bars and restaurants, followed by a bombing of the Boulevard Voltaire and ending in the deadliest shooting of the night in the Bataclan concert hall. These series of attacks were perpetrated by several men of Middle Eastern descent. ISIS later claimed credit for all of these attacks.<sup>18</sup>

While the events in question are unquestionably tragic, the responses to these attacks bear further analysis. Almost immediately, there were talks of increased isolationism and calls for more border security. Interestingly enough, when the attackers are analyzed, the calls for increased isolationism fall flat, as most of the preparators, nine of the 11, were French or Belgian nationals, most of Moroccan or Algerian ancestry.<sup>19</sup> The other two attackers were of Syrian ancestry; all of the 11 had strong ties to ISIS and known French ISIS recruiters. However, the suspected ringleader in the attacks, Abdelhamid Abaaoud, was a native of neighboring Belgium who grew up in Molenbeek.<sup>20</sup> Therefore, when analyzed more closely, the fact that nearly all of the perpetrators were either French or Belgian shows that even if more stringent immigration policies existed, only two of the 11 would have possibly been denied entry to the country.

In addition to the idea that isolationism would not have prevented the attacks, journalist Peter Coy wrote a compelling piece in *Bloomberg Weekly*, entitled “Paris Attacks Can’t Lead to a Closed Europe.”<sup>21</sup> In his piece, Coy claims that democracy thrives on openness:

The tragedy is that walls hurt those who obey the law more than terrorists. . . . What’s worse, isolating entire commu-

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17. “Paris Attacks: What Happened on the Night,” *BBC News*, December 9, 2015. <https://www.bbc.com/news/world-europe-34818994>.

18. “Paris attacks: What Happened.”

19. “Paris Attacks: Who Were the Attackers,” *BBC*, April 27, 2016. <http://www.bbc.com/news/world-europe-34832512>.

20. “Paris Attacks: Who Were the Attackers.”

21. Peter Coy, “Paris Attacks Can’t Lead to a Closed Europe,” *Bloomberg BusinessWeek* (November 23, 2015): 12.



nities and nations because potential terrorists live among them often backfires, engendering more of the hatred that it's meant to protect against.<sup>22</sup>

In essence, Coy claims that walls, or, more generally, stricter immigration laws, tend to isolate people and can actually lead to more terrorism because of the fear that such isolationist tactics create. Coy further quotes political science professor Jamal Nasser of California State University at San Bernardino when he says,

Hope, not walls, is the best protection against terrorism. You cannot build a wall around the world. . . . People will find a way, tunnel under walls, fly over. They will find a way if they are determined to bring about violence . . . when there is light at the end of the tunnel, people will move forward and try to improve their lives.<sup>23</sup>

Nasser's call for hope echoes much of what has been written in the wake of many terrorist attacks. Furthermore, as has been mentioned previously, there are inborn dangers for "otherizing" groups of people when radical attacks occur.

#### ROLE OF OTHERIZING IN TERROR ATTACKS

As mentioned, Eva Polonska-Kimunguyi wrote an interesting piece analyzing Franco-Muslim interactions and the ways they have been portrayed in the media post 9/11. She says that in the US and abroad, the media has "portrayed Muslims as uncivilized, anti-modern, anti-democratic, and terrorists, fundamentalists, radicals, militants, barbaric, and anti-western."<sup>24</sup> This portrayal, she claims, has led to a culture in which any attack has been blamed on Islam, instead of radicalism and fundamentalism. She cites statistics that put current Muslim populations in France around 6 million, with about 80% being from North Africa and only about 10% coming from the Middle East.<sup>25</sup> This presents a problem regarding the narrative of the media when the media claims that radical Muslims from the Middle East are responsible for the majority of terror attacks. As stated above, even the Paris attacks were not, to a large extent, perpetrated by Middle Eastern terrorists.

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22. Coy, 12.

23. Coy, 13.

24. Polonska-Kimunguyi and Gillespie, "Terrorism Discourse," 570.

25. Polonska-Kimunguyi and Gillespie.

Furthermore, Polonska-Kimunguyi interprets the reasoning behind deep-seated mistrust between Muslim groups and the French as a whole. She says, “The relationships between the French society and Muslims became characterized by mutual suspicion: the French exhibit taste-based discrimination against Muslims and Muslims perceive French institutions as systematically discriminatory and therefore dislike the French.”<sup>26</sup> This relationship, not immigration, lies at the heart of the recent unrest in France. Centuries of mistrust and abuse from both sides have led to a culture that oppresses a specific population, in this case Muslims. That population, in turn, mistrusts and acts out against the government in any way that they can. Some disenfranchised youth, seeking for a way to react, turn to militant groups such as ISIS for supplies and a purpose. These groups furnish them with the supplies needed to carry out horrendous acts of terror, which, in turn, feeds the cycles of hate and mistrust. Thus, Nasser’s words ring true: “Hope, not walls, is the best protection against terrorism.”<sup>27</sup> Similarly, in the UK, there is a deeply ingrained cultural divide between Muslim and British groups. These divides, such as the ones in France, have led to a series of horrific attacks that now bear analysis.

While no one attack best captures terror in Britain like the November 2015 Paris attacks, there have been many large- and small-scale attacks that show a significant rise in Islamic terror attacks in the country. The BBC published an article on June 19, 2017, attempting to catalogue British terror attacks in 2017 up to the article’s publication date.<sup>28</sup> This came in the wake of the Manchester arena attack, in which no one was killed, but more than 200 men and women were wounded. Most of the attacks in this article seem to follow a similar cycle to that of France; they are mostly carried out in large, popular areas with some coordination between several attackers. Another interesting similarity comes when the attackers are looked at more closely. For example, Salman Abedi, the man responsible for the Manchester arena attack, was born in Manchester in 1994 to Libyan refugee parents.<sup>29</sup> Again, a native-born Muslim was responsible for the attacks.

26. Polonska-Kimunguyi and Gillespie, “Terrorism Discourse,” 572.

27. Coy, “Paris Must Not,” 13.

28. “London Bridge Attack: Timeline of British Terror Attacks,” *BBC News*, June 19, 2017. <http://www.bbc.com/news/uk-40013040>.

29. Martin Evans, “Everything We Know about Manchester Suicide Bomber Salman Abedi,” *The Daily Telegraph*, May 26, 2017, <https://www.telegraph.co.uk>.

This attack, as well as the others, led to intense debate over the effects that Brexit may have on UK security, with some saying that it would make the country safer and others claiming it would actually make it more vulnerable.

#### BREXIT, THE SCHENGEN, AND EU BORDER SECURITY

Speaking in response to Prime Minister Theresa May, the EU's prime Brexit negotiator Michel Barnier claimed that the UK's exit of the EU would lead to Britain's decreased security. He said, "British defense research facilities will not be able to benefit from EU funding, London will not be able to assume command of European operations."<sup>30</sup> The piece from which I am quoting actually opposes this point of view, but Barnier's comment still bears analysis. When Britain leaves the EU, they will no longer be able to act in tandem with Europol or other European wide defense agencies. This would likely make it much harder to apprehend criminals or terrorists who manage to leave UK borders. In addition, the situation between North Ireland and Ireland will likely become much more difficult, possibly leading to a weakening of the borders. While it is not the role of this paper to speculate about the effects that Brexit will have on the UK, it is important to note that one of the main reasons given for Brexit is the increase of border security in response to acts of terrorism.<sup>31</sup> However, it is difficult to defend this position when most of the attacks are coming from citizens within the UK itself.

One final effect of Brexit on both the UK and EU is that of security data and the potential problems that both sides may face if a deal is not reached by Theresa May's 2019 deadline. In a *Guardian* article entitled, "A Brexit No-deal Would Aid Terrorism in the UK and across Europe,"<sup>32</sup> former NATO secretary general Anders Fogh Rasmussen warns that the situation could be disastrous if there is no deal reached

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30. James Crisp, "Britain Will Be Vulnerable to Terrorists after Brexit, Claims Lead EU Negotiator as He Stokes Security Fears," *The Telegraph* (August 28, 2017), <https://www.telegraph.co.uk/news>.

31. Philip Stevens, "Memo to May: Britain Needs European Security," *Financial Times* (February 13, 2018), <https://www.ft.com/content/5726a77c-10a0-11e8-8cb6-b9ccc4c4dbbb>.

32. Anders F. Rasmussen, "A Brexit No-deal Would Aid Terrorism in the UK and across Europe," *The Guardian* (November 14, 2017). <https://www.theguardian.com/commentisfree>.

on how the EU and UK will share their security data. While data has flowed freely between all EU members, the UK's exit makes the process much more difficult. Of this, Rasmussen says,

If the UK left the EU without a deal, it is difficult to see how countries such as Germany, which put a premium on civil liberties, would allow sensitive personal data flows to the UK without a clear legal framework to oversee it. Such a move would not be an act of malice, but a hard reality to ensure people's data was being used, stored and transferred in a legal manner.<sup>33</sup>

Rasmussen's main fear is that it will be much harder to share data and work together in tandem, which will make restricting the movement of criminals much harder. However, all of this is not relevant when terrorism is increasingly perpetrated by native-born citizens. Instead of erecting walls and working out data sharing plans between the EU and UK, working on a solution for stopping home-grown terrorist attacks would be more beneficial to all parties involved.

## CONCLUSION

When viewed as a whole, the attacks carried out in the UK and France are heartbreaking and difficult to assess. While it is simple for the media to blame radical Islam and the "other" of Middle Eastern terror, as Polonska-Kimunguyi says, "Stereotypes and fear of terrorists have led to sweeping changes in governmental practices in the West, including curtailing of civil liberties and increased support for racial profiling."<sup>34</sup> These fears are then used and accepted by Middle Eastern terrorist groups who, in turn, attempt to radicalize disenfranchised, native-born youths to attack their home country. While the most memorable attack against the US (9/11) was perpetrated by foreign-born terrorists, this is not the case everywhere, especially in Europe. The fact of the matter is that centuries of mistrust stemming from both religious and racial biases have aided the increase of terrorism in France and the UK much more than open borders ever could have.

As has been previously cited, almost all of the perpetrators of these attacks were native born, so the issue of immigration is not even at play here. Even in the US, terrorist attacks have been perpetrated by

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33. Rasmussen, "Brexit."

34. Polonska-Kimunguyi and Gillespie, "Terrorism Discourse," 570.

native-born citizens, such as the San Bernardino shooting in 2015, which was carried out by one man who was US-born and a woman who was legally and lawfully in the country. When dealing with such ingrained prejudices as those held by parties on both sides of this issue, it is difficult to suggest a solution. But at least we can diagnose correctly the cause. Europe's hatred and mistrust, not the Schengen's open borders, have led to terrorist attacks. If either the French or British wish to suggest that foreigners invading a sovereign country lead to acts of terror, those theories would have been better posed to Charles X or Queen Victoria, not the current administrations.



## DETENTION OF TERRORIST PROPAGANDISTS

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*Jonathan McConnell*

### ABSTRACT

With online radicalization and support increasing at rapid rates, a solution is needed to eradicate the ever-increasing threat to western society. This paper serves as a proposal for threat neutralization in a practical manner. The detention of United States citizens and foreign nationals acting as wartime enemy propagandists will serve as a realistic function that will help stop the war on terror. The elements which define one as a propagandist are outlined and explained harnessing the power of current legislation, regulations, treaties, and international precedents that support the detention of enemy propagandists. All persons engaged in the dissemination of enemy propaganda or the support of jihadist networks will be captured and detained as an Unlawful Enemy Combatant (UEC). Full enforcement of National and International laws support the elimination of propaganda.

### INTRODUCTION

To effectively combat against the threat that terrorist propaganda poses to the free world, strong and immediate action is required. While not currently an existential threat to the United States, terrorist (jihadist) propaganda poses a serious threat to the health of the nation, rising generations, one's online presence, as well as the broader threat to global security. Terrorist threats are realized in varying degrees from sympathy and acceptance to waging violence and jihad against others resulting in the loss of life.

Propaganda influences and directs action through the tens of thousands of Twitter accounts that support major terrorist organizations such as ISIS, Al-Qaeda, and Al-Shabab in addition to Boko Haram,

Hamas, Hezbollah and Abu Nidal Organization (ANO). Anonymity and the lack of central governance within the online sphere leaves wide open the realm of lawlessness. This lawlessness can be abused by terrorist organizations with malintent. To prevent further support, sympathy, violence and jihadist movements, a solution must be sought to combat the dissemination and rise of terrorist propaganda.

An unlawful enemy combatant is “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated force.”<sup>1</sup>

Propaganda is defined as creating a hatred toward the enemy, dehumanization of that enemy, or creating a false image in the minds of civilians and soldiers. Finally, it is a form of psychological warfare and has the intent to destabilize and undermine enemy efforts and morale. Per these definitions, the International Covenant on Civil and Political Rights (ICCPR) outlaw propaganda in article 20 of the treaty.<sup>2</sup>

#### PROPOSAL

This author proposes that American citizens and foreign nationals caught engaging in terrorist propaganda operations, online or otherwise, who demonstrate material support including communication in behalf of terrorist organizations, be detained as unlawful enemy combatants according to the Law of War (LOAC). Swift and thorough operations wherein Unlawful Enemy Combatants or UECs are captured and detained sends a strong message to terrorists such as The Islamic State of Iraq and the Levant or ISIL, Al-Qaeda, Al-Shabab, and others. The use of mass media to persuade the public has been significant, and terrorist organizations are reinventing internet use to further their ideology. History demonstrates that propaganda has a dark side that leads to war, crimes against humanity, and genocide. Terrorist groups have evolved and harnessed the potential of mass media, television, and the internet to recruit, train, communicate with,

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1. United States Department of Defense, DoD Detainee Program, 2310.01E. Washington, D.C. (September 5, 2006).

2. United Nations Human Rights Council, *International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI)*. New York: United Nations.

and indoctrinate members.<sup>3</sup>

Al-Manar, the extremely popular Islamic television provider, is an effective tool for negative propaganda. The station broadcasts 24 hours a day and is funded and controlled by Hezbollah<sup>4</sup> (Smith, 2010). Programming choices include news programs, talk shows, documentaries, music videos, and other choices. The viewership is estimated to reach 10-15 million viewers per day. High level officials have declared the purpose of the network to encourage individuals to “seek blood and death while encouraging others to commit acts of violence, including suicide missions.”<sup>5</sup> The psychological operations represented by Al-Manar broadcasting is intended to have far-reaching repercussions beyond the immediate target. Al-Manar is a source of “dangerous propaganda, expressing an ideology of hate, terrorism and militant Islam.”<sup>6</sup>

Social media and the internet as a medium for dissemination of propaganda allows UECs to engage with global audiences susceptible to violent messages. Without a governing influence, vulnerable populations are at high risk for radicalization to terrorist ideologies and actions. Vulnerable populations include disenfranchised populations or individuals who are likely to turn to violence as a reply to political trends. Immigrants, refugees, minorities, and oppressed populations or communities are all potential examples of vulnerable populations. The threat of radicalization that these groups pose to the nation and the western world is real.

The detention of propagandists from terror-based organizations such as ISIL and Al-Manar that use social media, print, and the internet as a medium for pushing propaganda will result in striking fear in the hearts of terrorist organizers and sympathizers. The likelihood of decreasing the influence or potentially crippling said organizations through the detention of their networks is real.

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3. Sarabeth Smith, “What’s Old Is New Again: Terrorism and the Growing Need to Revisit the Prohibition on Propaganda,” *Syracuse Journal of International Law & Commerce*, 37 no. 2 (2010), 299–337, <https://heinonline.org/HOL/Page?handle=hein.journals/sjilc37&id=307&collection=journals&index=>

4 Smith, “What’s Old.”

5. Mark Dubowitz, “Countering the Threat from Terrorist Media,” Jewish Policy Center, Summer 2010, <https://www.jewishpolicycenter.org/2010/05/31/terrorist-media-threat/>.

6. Sally Chapman, “Coalition Against Terrorist Media.” Center for Homeland Defense and Security. Retrieved from <http://www.hsdl.org>.



## DEFINITIONS

Propaganda: information, especially of a biased or misleading nature used to promote or publicize a particular political cause or point of view. The dissemination of propaganda as a political strategy.<sup>7</sup>

Material support: writing, editing, transporting, “liking,” “tweeting” or “retweeting,” supporting, spreading, sharing, posting, commenting with intent, promoting or engaging in the overall dissemination of propaganda.

Intent: the desire or act which gives momentum to support terrorist beliefs or goals.

## Psychological Operations (PSYOP):

planned operations to convey selected information and indicators to foreign audiences to influence the emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals. PSYOP are a vital part of the broad range of US diplomatic, informational, military, and economic activities. PSYOP characteristically are delivered as information for effect, used during peacetime and conflict, to inform and influence. When properly employed, PSYOP can save lives of friendly and/or adversary forces by reducing adversaries' will to fight. By lowering adversary morale and reducing their efficiency, PSYOP can also discourage aggressive actions and create dissidence and disaffection within their ranks, ultimately inducing surrender. Countering adversary propaganda, misinformation, disinformation, and opposing information to correctly portray friendly intent and actions, while denying others the ability to polarize public opinion and affect the political will of the United States and its multinational partners within an operational area.”<sup>8</sup>

## Unlawful Enemy Combatant (UEC):

a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful ene-

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7. “Propaganda | Definition of Propaganda in English by Oxford Dictionaries.” Oxford Dictionaries. <https://en.oxforddictionaries.com/definition/propaganda>.

8. Joint Chiefs of Staff, *Joint Publication 3-53, Doctrine for Joint Psychological Operations*, ix. James Hawkins, ed., United States.

my combatant (including a person who is part of the Taliban, al-Qaida, or associated forces.<sup>9</sup>

#### INTERNET-BASED LAWLESSNESS

The online world poses new and difficult means of restricting propaganda. The lack of central regulation combined with the anonymity of online forums and the ability to mask one's true identity and location open the floodgates for terrorist organizations to actively recruit, train, and indoctrinate members while offering support and encouragement to active members. For example, the desire to have approval of one's peers has nearly always preceded public expressions for a desire of action to fight or do something at home or abroad.<sup>10</sup> While radicalization is not a quick process, the online forums have increased the degree of intensity and speed of radicalization. Many jihadists are radicalized in less than two years.<sup>11</sup> The success of jihadist organizations depends upon how quickly recruits can be radicalized. Social media is a prime outlet to exploit vulnerable members of any society.

Terrorist propaganda persists today because of an inability to regulate the content. Social media organizations such as Twitter do not regulate terrorist accounts. Jabhat al-Nusra (JN) used Twitter to disseminate content of video shot on the battlefield in Syria and posted for mass consumption on YouTube that resulted in more than 76,000 tweets containing more than 34,000 links wherein viewers were connected to web-based propagandist content.<sup>12</sup> Through data mining a network of more than 20,000 active Twitter accounts and a collection of YouTube video files have been viewed more than 450,000 times.<sup>13</sup> At the height of ISIL's social media campaign in 2014, more than 80,000 followers supported the aggressive propaganda scheme. As a result of public outcry, the mass scale of accounts was suspended, which simply drove ISIL to devise more profile accounts. Large numbers of people

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9. United States Department of Defense. DoD Detainee Program, 2310.01E. Washington, DC (September 5, 2006), <https://www.jag.navy.mil>.

10. Jytte Klausen, *Behavioral Study of the Radicalization Trajectories of American "Homegrown" Al-Qaeda-Inspired Terrorist Offenders*, Office of Justice Programs' National Criminal Justice Reference.

11. Klausen, *Behavioral Study*.

12. Nico Prucha and Ali Fisher, "Tweeting for the Caliphate: Twitter as the New Frontier for Jihadist Propaganda," *CTC Sentinel* 6, no. 6 (2013): 19–23.

13. Prucha and Fisher, "Tweeting for the Caliphate."

are still being actively groomed and radicalized.

The internet is a borderless entity with an endless interconnected network of websites. These websites allow the flow of information from leaders to supporters, and among supporters, which allows ISIL franchises and affiliates to take advantage of anonymity. The paradigmatic shift in terrorism caused by the Internet “lies in the possibility to bypass censorship and communicate directly with external audiences.”<sup>14</sup> The threat of radicalization will continue to develop as the means and content of the internet evolves with increasing high-fidelity imagery.

#### SPREAD OF TERRORIST PROPAGANDA

One cannot wage war under present conditions without the support of public opinion, which is tremendously molded by the press and other forms of propaganda.  
General Douglas MacArthur, US Army.<sup>15</sup>

While social media is a new phenomenon for terrorist organizations to spread their influence and terror, the internet and even print publications are still worth the attention of agencies and institutions that wish to see the spread of radical ideas halted. For example, printed materials like *Inspire* and *Dabiq* magazines seek to appeal to and radicalize English-speaking Muslims through strategic designs. The opening article of “*Inspire*” begins by quoting Allah: ‘And inspire the believers to fight’ [al-Anfal: 65]<sup>16</sup>

#### LEGALITY AND TREATIES SUPPORTING DETAINMENT

As part of the proposal to detain propagandists, the following standards have been utilized. These standards originate from international documents, treaties, governing documents, as well as national and military codes and doctrines.

The legislation presented is in accordance with the international law of war. The United Nations, North Atlantic Treaty Organization

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14. Hanna Rogan, “Al-Qaeda’s online media strategies: From Abu Reuter to Irhabi 007,” 15-92. Oslo: Norwegian Defense Research Establishment (December 1 2007), <https://archive.org/stream/AQOMS/AlQuedaMediaStrategy#page/n0/mode/1up>.

15. Joint Chiefs of Staff, *Doctrine for Joint Psychological Operations*, ix.

16. Haroro Ingram, “An Analysis of *Inspire* and *Dabiq*: Lessons from AQAP and Islamic State’s Propaganda War,” *Studies in Conflict and Terrorism* 40, no. 5 (2016): 357-75, doi:10.1080/1057610X.2016.1212551.

(NATO), and the United States are party to the International Covenant on Civil and Political Rights (ICCPR). Article 20 of the ICCPR states that “Any propaganda for war shall be prohibited by law” as well as “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>17</sup> According to this legislation, any and all publications which include online social media accounts, broadcast television, print materials, and videos are illegal.

To further support the detainment of enemy propagandists, the Military Commissions Act<sup>18</sup> defines and determines an unlawful enemy combatant:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaeda, or associated forces).

Section 704 of the USA Freedom Act prohibits “material support” for terrorists. Material support is defined as the “training, expert advice, or resources.”<sup>19</sup> The USA PATRIOT Act prohibits the “affording material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives or training to perform the terrorist act.”<sup>20</sup>

The First Amendment of the US Constitution grants its citizens the right to the freedom of speech and the press. This does not, however, cover everything that is spoken or written by her citizens. Those things not covered include but are not limited to: inciting violence or panic, hate speech, or providing material support to terrorist organizations, granted by extension of the USA PATRIOT Act.<sup>21</sup>

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17. United Nations Human Rights Council, *International Covenant on Civil and Political Rights*.

18. United States Department of Defense. *DoD Detainee Program*.

19. Jim Sensenbrenner, H.R. 3162, 07th Congress (2001–2002): *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Congress.gov.

20. Sensenbrenner, H.R. 3162.

21. Sensenbrenner, H.R.3162.

### DETENTION STANDARD

If the Proposal is accepted, detainees would be held in accordance with the standards outlined in the Department of Defense Directive, 2310.01E. This directive allows for a detainee to be held until hostilities have ceased or until the individual is deemed no longer a threat.<sup>22</sup>

### EXPECTED OUTCOME

With a detailed and strategic plan combined with supporting legislation (national and international) to detain terrorist propagandists, one would expect a decrease in radicalization and violence. Because of the supporting laws and the esteem of the United States with its high detention standards, it is expected that the allies of the United States would support efforts to capture and detain unlawful enemy combatants engaging in dissemination of propaganda. Further one would expect that radicalization within the borders of the United States and other western nations would significantly decrease. Tensions between western nations and the Middle East would likely deescalate.

This proposal creates a tangible consequence for the dissemination of propaganda. The use of this proposal will likely prevent future terror groups and radicalization of homegrown and international terrorist sympathizers. The risk of capture and detainment for an unspecified length of time serves as a deterrent for large scale radicalization.

### CONCLUSION

The development of the Internet has connected people in ways never before experienced. While the internet can be used for positive purposes, there are individuals and groups that utilize and capitalize on the unregulated social media sites to promote and incite violence while simultaneously declaring war on the United States. To combat radicalization and assist in threat neutralization, this paper serves as a reminder to fully enforce the power of United States law to attack propagandists head on and prevent further violence caused by terrorism. Anyone, US citizen or not will be detained as an unlawful enemy combatant for being engaged in propaganda operations and detained until a decision of rehabilitation solutions or an end of hostilities.

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22. United States Department of Defense, *DoD Detainee Program*.



## CONTRIBUTORS

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**Dr. Kori Schake**, as Deputy Director-General, oversees the International Institute for Strategic Studies' world-class research programme and acts as a driving force behind initiatives to enhance the Institute's work and profile, including developing new funding opportunities and deepening links with governments, the private sector, and the expert and opinion-forming communities internationally on strategic issues.

During her illustrious career, Kori has held policy positions across government, academia, and think tanks, including working with both the military and civilian staffs of the Pentagon, in the White House at the National Security Council, and at the US State Department as Deputy Head of Policy Planning.

She has authored a number of books, most recently *Safe Passage*, an account of the transition from UK to US power on the global stage, published by Harvard University Press in November 2017.

**Professor Michael L. Smidt** recently retired from the U.S. Army Judge Advocate General's Corps. In 1976, Mike enlisted in the U.S. Army as a paratrooper infantryman with the 82nd Airborne Division. After leaving active duty, he enlisted as a weapons sergeant, with the U.S. Army Reserve, 12th Special Forces Group. During his time as an army reservist, he became a police officer with the San Diego Police Department and completed his bachelors degree part time. After three years as a police officer, Professor Smidt left law enforcement to attend law school. After graduating from California Wester School of Law, he went to work as a prosecutor with the Office of the City Attorney in San Diego. He decided to return to the Army as a Judge Advocate in January of 1990. His last assignment was as the senior legal advisor at U.S. Strategic Command. Professor Smidt also serves as the senior

legal advisor at the U.S. Special Operations command and the Chief of Operation Law at U.S. Northern Command. In addition to serving in various assignments in operational law and military justice throughout his career, he also served as the Staff Judge Advocate for the 1st Infantry Division. Professor Smidt was also a professor of Operation and International Law at the U.S. Army Judge Advocate General's School. Professor Smidt has an LL.M. from the University of Virginia School of Law and an M.S.S. from the U.S. Army War College. Among others, his awards include two Bronze Stars, Master Parachutist Wings, and a Special Forces Tab.

**Jonathan McConnell** is a patriot with love for America. He is a junior at Utah Valley University majoring in both National Security Studies and Emergency Management. Jonathan is combining his passion for the great outdoors, national security and disaster relief. He hopes to one day oversee prevention efforts and large-scale disaster relief operations for FEMA.

**Elliott Thomas** is a senior at Utah Valley University majoring in Criminal Justice with a minor in national security studies. His goal is to have a career in federal law enforcement or in the national security community. During the summer of 2018 Elliott completed an internship with the Institute of World Politics (IWP). While interning, he worked with the Paladin7 Counter-terrorist Group, which monitored terrorist activities as well as domestic crimes. Elliott is attached to a weapons and tactics team that analyzes the methods and ways terrorists carry out their attacks. Elliott has a passion for law enforcement and counter-terrorism. The internship with IWP gave him the skills necessary to move forward in the national security field.

**Phil Varney** studied international business and finance at UVU. During his time as a student, he was engaged in several extracurricular organizations, including the Center for the Advancement of Leadership, UVU Ambassador Program, UVU Student Alumni, and the UVU Foundation Ambassadors. His fondest memories, however, come from organizing the student delegation to lobby the Utah State Legislature in 2015-2016 on behalf of UVU in its effort to secure funding

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for the upcoming Noorda Center for the Performing Arts. In 2017 he left Utah to intern in Washington DC for the office of Representative Chris Stewart of Utah's 2nd Congressional District. While working on the Hill, he spearheaded research involving the EPA, Utah's public lands debate, and the Russian interference within the 2016 Presidential election. Phil recently left DC to join Amazon's corporate office in Prague, where he and a small team are consolidating supply-chain efforts within Amazon's European operations.

**Nathan Van Aken** is a senior at Utah Valley University. He majors in Integrated Studies with emphases in History and Peace and Justice Studies. After graduation he will pursue a Ph.D. in history with the goal of teaching at the collegiate level. Within history, and peace and justice, Nathan's main interests lie in international and world history. He particularly enjoys the study of the colonial and post-colonial eras, specifically the situations and problems that arise whenever two different cultures clash, as seen through the lens of immigration. Nathan has taken several courses related to national security, including courses on the Arab Spring and the Modern Middle East. He is the founder and president of the UVU chapter of European Horizons, a student-led organization with the goal to educate students on European and transatlantic relations that the issues facing Europe today.





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