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Bring Back The Draft?

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BRING BACK THE DRAFT?

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INTRODUCTION

By contrasting the institutional incentives of Congress, of the President, and of the courts on warmaking issues, I will argue that recent calls to "bring back the draft"[1] should be taken seriously. I will build my argument around three claims.

First, on warmaking issues, courts lack the institutional incentives to contradict the political process and corresponding cultural norms. Unless Congress and the White House are at logger heads with each other (so that the political process cannot resolve an inter-branch dispute), courts will steer clear of warmaking questions. Courts, instead, will declare the issue nonjusticiable or validate elected-government decisionmaking. Consequently, the question of whether courts *should* resolve war powers disputes is—practically speaking—somewhat beside the point.[2] The relevant question, instead, is whether

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* Goodrich Professor of Law and Professor of Government, College of William and Mary. This Article is an elaboration of my comments at "The President's Authority over Foreign Affairs" Symposium, held at the Georgia State University School of Law on January 31, 2003. This Article builds upon and makes some use of Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65 (2000) and Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CON. COMM. 63 (2002). Thanks to symposium participants and organizers for helpful comments, especially Robert Delahunty, Neil Kinkopf, Louis Fisher, Jeff Powell, and Eric Segall.

1. The most prominent of these is proposed legislation by Congressman Charles Rangel. *See* H.R. 163, 108th Cong. (2003); Charles B. Rangel, *Bring Back the Draft*, N.Y. TIMES, Dec. 31, 2002, at A-19; Daryl Fears, *Draft Stirs Debate Over the Military, Race and Equity: Statistics on Minorities Shares of Service's Risks are Disputed*, WASH. POST, Feb. 4, 2003, at A-3. During 2004, mounting casualties in Iraq prompted Senator Ernest Hollings to introduce legislation to restore the draft. Michael O'Hanlon, *Conscription is the Wrong Prescription*, L.A. TIMES, Apr. 28, 2004, at B-15 (discussing both Hollings proposal as well as a call by Senator Chuck Hagel for a national debate on whether the draft should be restored).

2. The book that inspired this symposium, H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (2002), calls for the political—not legal—resolution of warmaking questions. Powell's book makes use of legal argument to explain why politics is the best forum for the resolution of most warmaking issues. Powell's book is excellent and worth reading. In arguing that courts will either validate or steer clear of political decisionmaking, I do not mean to question Powell's use of legal arguments. My argument, instead, is that the balance of powers on warmaking is, first and foremost, a story about the incentives which animate Congress, the President, and the courts.

the existing balance of powers between Congress and the President is sensible.

Second, with virtually no constituent pressure beating against it, Congress has little incentive to challenge the President on warmaking. In sharp contrast, Presidents have strong incentives to pursue military initiatives. As such, Presidents now dominate war powers decisionmaking. Needless to say, this arrangement makes sense to those who believe in presidential control of warmaking. However, for those (like me) who think that no branch of government should dominate warmaking, the current situation is in need of repair.

Third, serious attention should be paid to reform proposals that make the American people and, with them, Congress more interested in presidential warmaking. In particular, constituent pressure is needed to prod lawmakers to stand up for Congress' institutional prerogatives. On warmaking, proposals to "bring back the draft" are intended to accomplish this feat. Though these proposals may not be sound military policy, the debate over whether such a mechanism is needed to maintain our system of checks and balances is certainly salutary.

I. THE COMPETING INCENTIVES OF CONGRESS AND OF THE PRESIDENT

Why is it that Presidents have the tools and incentives to launch military strikes? Why does the modern Congress seem unwilling to give teeth to the constitutional mandate that it—not the President—"declare war"? More to the point, why does Congress refuse to use its available tools (appropriations, oversight, and threat of impeachment, among others) to check presidential warmaking?

To start, "the rise (and success) of the modern Presidency is the story of the gradual expansion of executive power, seized or ceded to it often in times of crisis."[3] Presidential power, in other words, is much more than the exercise of constitutionally enumerated powers and the power to persuade.[4] Thanks to the singularity of the office, Presidents are well-positioned to advance their interests before Congress, the nation,

3. John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435, 1469 (1999).

4. *See generally* RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENCY (1960).

and the world. Critics of the modern day Presidency, including Theodore Lowi and Jeffrey Tullis, put it this way: "[R]egularly go[ing] over the heads of Congress to the people at large, the powers of the American people have been invested in a single office, making [it] the most powerful office in the world."[5] Even defenders of presidential power recognize that Presidents are motivated to seek power and have the tools to accomplish the task. The opportunities for presidential imperialism are too numerous to count, according to Terry Moe and William Howell, because, when presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power.[6]

When Presidents act, moreover, it is up to the other branches to respond. Witness, for example, executive orders: between 1973 and 1998, Presidents issued roughly 1,000 executive orders. Only thirty-seven of these orders were challenged in Congress. More striking, only three of these challenges resulted in legislation.[7] Presidents thus often win by default, either because Congress chooses to not respond or because its response is ineffective. Furthermore, by end-running the burdensome and ofttimes unsuccessful strategy of seeking legislative authorization, unilateral presidential action expands the institutional powers and prerogatives of the Presidency. In other words, the President's personal interests and the Presidency's institutional interests are often one and the same.

Presidents, of course, sometimes need Congress to enact legislation. In pursuing their health care and faith-based initiatives, Presidents Bill Clinton and George W. Bush had little choice but to turn to Congress. Here, Congress had the upper hand. Rather than doing battle with the President on his own field (enacting legislation that is subject to a presidential veto), Congress forced the President to overcome the

5. JEFFREY K. TULLIS, THE RHETORICAL PRESIDENCY 4 (1987); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED, at x-xi (1985).

6. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 138 (1999).

7. *Id.* at 165-66.

burden of inertia to cajole Congress into action. As such, modern-day Presidents often advance their agenda through unilateral action, not legislative strategies.[8]

Unlike the Presidency, the individual and institutional interests of members of Congress are often in conflict with one another. Though each of Congress' 535 members has some stake in Congress as an institution, parochial interests will overwhelm this collective good. In particular, members of Congress need to be reelected to advance their (and their constituents') interests. For this reason, lawmakers are trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress' power, but each has a strong incentive to free ride in favor of the local constituency.[9]

Nowhere is the gap between legislative and presidential incentives more stark than war powers. For its part, the modern Congress has very little incentive to play a leadership role in warmaking. As I will detail in Part III, one byproduct of an all-volunteer army is that lawmakers feel little constituent or public pressure to reign in presidential warmaking. Correspondingly, fewer and fewer lawmakers have served in the military.[10] With little sense of personal connection to or stake in military matters, lawmakers prefer to focus their efforts on constituent services and other matters helpful to their efforts to retain their seats. In addition, the growing cost of running for office means that legislators have less time to tend to their institutional and constitutional duties.

Presidents, in contrast, often are motivated to seek warmaking power. Presidents achieve status—fame if you will—by leading the nation into battle.[11] Correspondingly, by launching military strikes, a rally-around-the-President phenomenon guarantees a surge of ten percentage points or more in the president's approval ratings.[12] With military technology

8. *See generally* RICHARD NATHAN, THE ADMINISTRATIVE PRESIDENCY (1983). *See also* NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 97-120 (1996) (commenting on abortion).

9. *See* Moe & Howell, *supra* note 6, at 144.

10. *See* Alison Mitchell, *McCain Enlisting Fellow Veterans to Back His Campaign*, N.Y. TIMES, Nov. 11, 1999, at A-24.

11. For an excellent treatment of this question, see William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

12. This phenomenon has been documented by the Gallup News Service. In the wake of the September 11 terrorist attacks and the talk of military action in Afghanistan, the news service posted a study on its Web site comparing President George W. Bush's surge in approval ratings to the surges experienced by other

now enabling Presidents to wage war with few casualties, Presidents have strong incentives to launch such strikes.[13] Also, with Congress playing a diminishing role in war powers, expectations have developed about the President's constitutional powers and responsibilities. Presidents, moreover, fuel these expectations by using the presidential "bully pulpit" to speak the nation's voice on warmaking.

As these expectations of presidential dominance have become entrenched, most members of Congress "find it more convenient to acquiesce and avoid criticism that they have obstructed a necessary mission."[14] Consider, for example, Congress' response to President Clinton's decision to use military force in Bosnia. Senate majority leader Bob Dole stated: "[I]n my view the President has the authority and the power under the Constitution to do what he feels should be done regardless of what Congress does."[15] Likewise, minority leader George Mitchell opposed legislation requiring the president to seek congressional authorization prior to military action in Bosnia because such "prior restraints . . . plainly violate the Constitution."[16] By suggesting that Congress has no role to play, lawmakers now seem more interested in protecting the executive branch than their own institution.

More striking, today's Congress almost always complies with presidential requests for warmaking authority. In the aftermath of the September 11 terrorist attacks, Congress has clearly shown that it will place few limits on presidential warmaking. Outside of purely constituent-driven issues (whether their states and districts are "getting enough money for weapons-building factories or their need for more homeland security money"),[17] lawmakers have largely stood on the sidelines. For example, when asking Congress for authority to attack

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Presidents in times of war. *See* David W. Moore, *Bush Job Approval Reflects Rally Effect: Close to Highest Approval Rating Ever Measured*, Gallup News Service (Sept. 18, 2001), *available at*, http://www.gallup.com/poll/releases/pr010918.asp.

13. Differences in peacekeeping and warmaking are examined in Part III, *infra*.

14. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 1006 (1999).

15. 141 Cong. Rec. S17,529 (daily ed. Nov. 27, 1995).

16. 139 Cong. Rec. 25,483 (1993). After President Clinton deployed troops in 1995, the Senate defeated a "congressional authorization" bill by a vote of 77 to 22. 141 Cong. Rec. S18, 470 (daily ed. Dec. 13, 1995).

17. George C. Wilson, *Thinking About the Draft*, 35 NATL. J. 121 (2003).

Iraq, President George W. Bush made clear that he could go it alone; the only reason he sought congressional involvement was to show the United Nations that he was expressing the views of the American people. Rather than express outrage at this slighting of their authority, Democratic leaders largely echoed the President. Senate majority leader Thomas Daschle spoke of the need for "America to speak with one voice" and Senate Foreign Relations Committee chair Joseph Biden said that broad presidential authority to act preemptively was necessitated by the "speed and stealth with which an outlaw state or terrorists could use weapons of mass destruction."[18]

Congress, moreover, has placed little pressure on the Bush administration's handling of Iraq (at least through April 2004). In June 2003, lawmakers refused to launch an investigation into whether the Bush administration manipulated prewar intelligence on the presence of weapons of mass destruction in Iraq.[19] In November 2003, Congress agreed to an $88 billion supplemental appropriation to support the war effort.[20] More striking, mounting casualties in Iraq have not prompted lawmakers to use their appropriations or oversight powers to meaningfully cabin Bush administration initiatives.[21] While lawmakers have complained about the "administration's general unwillingness to share much information at all involving national security issues,"

18. Jim VandeHei and Juliet Eilperin, *Congress Passes Iraq Resolution; Overwhelming Approval Gives Bush Power to Act Unilaterally*, WASH. POST., Oct. 11, 2002 at A-1.

19. Helen Dewar and Peter Slevin, *GOP Rejects Outside Iraq Probe; Lawmakers: Bush Prewar Claims are Congress' Purview*, CHICAGO TRIB., June 12, 2003, at A-4. Admittedly, the Republican majority made all the difference in blocking this initiative. At the same time, Democratic lawmakers have voted with President Bush on Iraq-related initiatives.

20. Marianne Brun-Rovet and Kim Ghattas, *Congress Backs Iraq Funding, with Conditions*, FINANCIAL TIMES, no. 1, 2003, at 8.

21. I do not mean to suggest that Congress has rubber-stamped all administration proposals. Lawmakers, for example, converted $10 billion out of a $20 billion fiscal year 2004 appropriation into a loan (instead of an outright grant) to support Iraqi reconstruction. John Crawford, *Key Votes' Highly Partisan*, 62 CQ WEEKLY 29-30 (2004). With that said, lawmakers are yet to place meaningful limits on the administration. Budget proposals, including requests for supplemental appropriations, have been approved. More striking, congressional oversight has not placed significant pressure on the administration. Although lawmakers sometimes express disapproval of administration policymaking (especially the administration's failure to share information with Congress), Congress has not used its oversight powers to meaningfully pressure the administration to rethink its decisionmaking. For a recent (April and May 2004) sampling of relevant news stories discussing congressional oversight, see Joseph C. Anselmo & John M. Donnelly, *Congress Steps Up Questioning On Spending Schedule for Iraq*, 62 CQ WEEKLY 973 (2004); John M. Donnelly & Joseph C. Anselmo, *GOP Factions Split on Hill Role in Setting the Defense Agenda*, 62 CQ WEEKLY 1033 (2004); Bradley Graham & Charles Babington, *Probes of Detainee Deaths Reported*, WASH. POST, May 5, 2004, at A-1; Dan Morgan, *House Passes $447 Billion Defense Bill*, WASH. POST, May 21, 2004, at A-3.

Congress has only begun to do little more than ask questions "that should have been asked all along."[22]

A more vivid illustration of Congress' second-class status is the USA Patriot Act (legislation drafted by the Justice Department that grants law enforcement agencies additional powers to tap telephones, conduct searches, monitor the Internet, police financial transactions, and much more). Making use of a secretive expedited procedure, the House and Senate overwhelmingly approved the bill—even though many lawmakers who voted for the Act never had a chance to read it.[23] Civil liberty interests in Congress disapproved of the legislation *but* recognized—as then Senate Judiciary Committee chair Patrick Leahy put it—"it would be difficult" for Congress to challenge the administration legislatively.[24] Indeed, Leahy thought it next-to-impossible for Congress to take an institutional position at odds with the White House. Consequently, Leahy spoke of oversight as civil libertarians' best hope of altering policies "by pressuring the administration to take a second look at their decisions in the face of high profile publicity."[25] Rather than serve as an independent check on presidential warmaking, Leahy saw Congress as little more than an investigative reporter with subpoena power.

II. WHY COURTS DO NOT FILL THE CONGRESSIONAL VOID

With Congress retreating on war powers, courts too have backed away. Presidential warmaking has become the cultural norm, and courts, for reasons I will soon detail, are reluctant to act in ways that frustrate the desires of the political branches and of the American

22. Kirk Victor, *Escalating Hostilities*, NAT'L J., Oct. 4, 2003 (quoting the Brookings Institution's Thomas Mann).

23. *See* Elizabeth A. Palmer, *Terrorism Bill's Sparse Paper Trail May Cause Legal Vulnerabilities*, 59 CQ WEEKLY 2533 (2001). The final version of the statute largely resembled the administration proposal. Although some important changes were made to the bill (most notably, half of the Act's surveillance measures are set to sunset in 2005), lawmakers who value civil liberties simply found it too "difficult to launch a frontal challenge to a popular president before the practical results of his policies are known." Elizabeth A. Palmer & Adriel Bettelheim, *War and Civil Liberties: Congress Gropes for a Role*, 59 CQ WEEKLY 2820 (2001). *See also* Robert O'Harrow, Jr., *Six Weeks in August*, WASH. POST MAGAZINE, Oct. 27, 2002, at 6 (detailing how White House negotiators dominated civil liberty interests in Congress).

24. Palmer & Bettelheim, *supra* note 23, at 2823.

25. *Id.*

people. Furthermore, courts are especially reluctant to buck social norms on war powers. Unlike individual rights issues, where courts have staked out a leadership claim and, in so doing, expanded their power, "[a]ny inept decision about war and peace may have dramatic and readily understood real world consequences that may erode the [judiciary's] prestige and endanger its public respect."[26]

Court decisionmaking conforms to cultural norms for two quite distinct reasons. First, as Chief Justice William Rehnquist reminded us, the "currents and tides of public opinion . . . lap at the courthouse door,"[27] for "judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events."[28] As such, "[j]udges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs."[29] Just as the Supreme Court leaves its mark on American society, so do social forces leave their mark on constitutional law.

Second, as Justice Robert Jackson observed some fifty years ago, "[t]he practical play of the forces of politics is such that the judicial power has often delayed but never permanently defeated the persistent will of a substantial majority."[30] Social and political forces, for example, played a defining role in the Court's reconsideration of decisions on sterilization and the eugenics movement, state-mandated flag salutes, the *Roe v. Wade* trimester standard, the death penalty, states' rights, and much more.[31] Justice Owen Roberts, in explaining the collapse of the *Lochner* era, put it this way: "Looking back, it is difficult to see how the Court could have resisted the popular urge for

26. John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 306 (1993). In explaining why the judiciary's acquiescence to presidential warmaking is understandable, I am not arguing that it is desirable.

27. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986).

28. *Id.*

29. *Id.*; *see also* Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1314 (1937) ("[J]udicial decisions are not babies brought by constitutional storks, but are born out of the travail of economic circumstances.").

30. Robert H. Jackson, *Maintaining Our Freedoms: The Role of the Judiciary*, 19 VITAL SPEECHES OF THE DAY 759, 761 (1953).

31. *See generally* LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1989); LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (3d ed. 2001).

uniform standards throughout the country—for what in effect was a unified economy."[32]

The extraordinary importance of cultural norms is on full display in judicial approaches to war powers disputes. Without the backing of Congress (or the public), courts have left presidential warmaking alone—validating it outright or concluding that they lack jurisdiction to review it. In particular, starting with Vietnam, courts have steered clear of challenges (typically brought by a coalition of lawmakers) to unilateral presidential action. For the most part, court rulings speak of the need for the President and Congress to be in "resolute conflict"[33] before judges will decide war powers issues.

Congress' failure to stake out an institutional position prompted federal courts to toss out on political question grounds lawmaker challenges to Reagan-era military strikes in Nicaragua and El Salvador.[34] Lawsuits challenging President Reagan's initiatives in Grenada and in the Persian Gulf were, ultimately, dismissed on mootness grounds.[35] Courts invoked ripeness to block lawmakers' challenge to the constitutionality of President Bush's ordering offensive actions against Iraq in 1990. "[U]nless the Congress as a whole, or by a majority, is heard from," wrote district court judge Harold Greene, "the controversy here cannot be deemed ripe."[36] In explaining why members of Congress lacked standing to challenge President Clinton's launching of air strikes in Yugoslavia, the court noted that Congress would need to stake out an institutional position for there to be "an actual confrontation sufficient to confer standing."[37] Likewise, lawmaker efforts to bar President George W. Bush from attacking Iraq without a formal

32. OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 61 (1951).

33. *See, e.g.*, Drinan v. Nixon, 364 F. Supp. 854, 860 (D. Mass. 1973).

34. *See* Crockett v. Reagan, 558 F. Supp. 893, 898-99 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202, 204, 210 (D.C. Cir. 1985).

35. *See* Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987).

36. Dellums v. Bush, 752 F. Supp. 1141, 1151 (D.D.C. 1990).

37. Campbell v. Clinton, 52 F. Supp. 2d 34, 43 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

declaration of war were rejected because there was no "clear, resolute conflict" between the executive and the legislative branches.[38]

These rulings are hardly surprising. Lacking the powers of the purse and sword, courts see no reason to protect a Congress that is unwilling to protect itself. As then appellate judge Ruth Bader Ginsburg put it: Congress "has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch. . . . 'If Congress chooses not to confront the President, it is not our task to do so.'"[39] On the other hand, were Congress and the President to stake out conflicting institutional positions, the political process would have broken down. Here, judicial resolution would be appropriate: Congress—not a group of disappointed lawmakers—would be challenging (and, in this way, transforming) the cultural norm of presidential warmaking.[40]

When Congress backs the President, courts tend to validate elected-government decisionmaking. Consider, for example, the Court's acquiescence to the World War II internment of Japanese Americans (an executive branch initiative authorized by Congress). In explaining the Supreme Court's failure to stand up for individual rights in these cases, Earl Warren stated:

> The consequences of the limitations under which the Court must sometimes operate in this area is that other agencies of government must bear the primary responsibility for determining whether specific actions they are taking our consonant with our Constitution. To put it another way, the fact that the Court rules in a case like *Hirabayashi* [or *Korematsu*] that a given program is constitutional,

38. *See* Doe v. Bush, 323 F.3d 133 (1st Cir. 2003).

39. *Sanchez-Espinoza*, 770 F.3d at 211 (quoting Goldwater v Carter, 444 U.S. 996, 998 (Powell, J., concurring)).

40. At the same time, whether courts would conclude that the political process, in fact, has broken down is not at all clear. For example, courts perhaps would send the dispute back to the political branches in hope of a political settlement. Courts sometimes do this in disputes between Congress and the White House over lawmaker requests for information. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 194-95 (4th ed. 1997) (discussing United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976)).

> does not necessarily answer the question whether, in a broader sense, it actually is.[41]

Because the Court understands that it must act in a way that garners acceptance from both the American people and their elected representatives, Court rulings speak as much to the social and political forces beating against the Court as they do to the Justices' best reading of the Constitution.

III. BRING BACK THE DRAFT?

Unless and until the American people pressure Congress to play a more activist role in war powers, the President is likely to determine whether, when, and how America wages war. Were lawmakers to defend their prerogatives, perhaps as a response to public pressure, courts presumably would adjudicate these disputes and might well rule for Congress in cases where the President does not comply with congressional demands. On this point, Vietnam-era litigation is especially instructive. Before popular opposition to the war, courts simply concluded that they lacked jurisdiction to consider challenges to the constitutionality of the war. During "the final round of litigation, when popular and congressional opposition to the war was at its peak,"[42] the courts moderated their position. While affording the president wide latitude to "wind down" the war, courts now argued that the authorization issue was justiciable and that the Gulf of Tonkin Resolution could not substitute for a congressional declaration of war.[43]

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41. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962). 2004 Supreme Court decisions involving the Bush administration's detention of enemy combatants are cut from a different cloth. Unlike *Korematsu* (where Congress formally embraced the World War II internment of Japanese Americans), Congress did not enact legislation codifying Bush administration practices. Moreover, whereas the Iraqi prison abuse scandal has contributed to public disapproval of Bush administration initiatives, the internment policy was politically popular. Consequently, even if the Supreme Court rebukes the Bush administration, I still stand behind the point made in the text about the Court's reluctance to contradict the American people and their elected representatives.

42. David Cole, Youngstown v. Curtiss-Wright, 99 YALE L.J. 2063, 2083 (reviewing HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990)).

43. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611, 614-16 (D.C. Cir. 1973); Holtzman v. Schlesinger, 484 F.2d 1307, 1311 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). For a fuller treatment of this evolution, see Michael Ratner and David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17

The question remains: Is presidential control of warmaking problematic? From my vantage, the answer is an emphatic yes. First, no one branch of government should define the meaning of key constitutional provisions. For reasons that Louis Fisher and I have detailed in other writings,[44] the Constitution is more vibrant and more stable when all parts of government and the American people engage in constitutional dialogues with each other. By having a sense of stake (personal or institutional) in the Constitution, the various branches of government make the Constitution more relevant and enduring. In contrast, if one branch of government controls an issue, the Constitution does not serve as a constraint and, as such, has little independent meaning.

Second, we cannot expect foreign policy and national security to be well-formulated in the hands of an unchecked executive branch.[45] Throughout our history, no branch has consistently demonstrated its wisdom on war powers issues. Neither Congress nor the President (nor the courts) can really assure the nation that it is truly wise on war powers issues; "[t]he only assurance," as Alexander Bickel observed, "lies in process, in the duty to explain, justify and persuade, to define the national interest by evoking it, and thus to act by consent."[46]

Against this backdrop, calls to "bring back the draft" ought to be taken seriously. With fewer and fewer members of Congress serving in the military[47] and with no risk that their constituents will be involuntarily conscripted, the country has good reason—as Senator John McCain put it—"to worry about a greater estrangement, a greater distancing between the Congress, traditional protectors of the military,

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LOYOLA L.A. L. REV. 715, 730-35 (1984).

44. In particular, see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998).

45. I do not mean to suggest, however, that the President is ill-suited to make war powers decisions. The President may well have comparative institutional advantages on warmaking issues. *See* McGinnis, *supra* note 26. For this reason, the President perhaps should be first among equals in the constitutional dialogue on warmaking.

46. Alexander M. Bickel, *The Need for a War-Powers Bill*, THE NEW REPUBLIC 17, 18 (Jan. 22, 1972); *see also* John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1421 (1988) (favorably citing Bickel); Lee H. Hamilton, The Role of Congress in U.S. Foreign Policy, Speech Delivered to the Center for Strategic and International Studies, at 1 (Nov. 19, 1998) (arguing that a better foreign policy is produced by a "creative tension between the President and the Congress").

47. *See* Wilson, *supra* note 17 (noting that "only 35[%] of senators and 27[%] of representatives in this Congress have ever served in the military").

and the military itself."[48] In particular, members of Congress have little sense of personal stake or connection to the military. By bringing back the draft, members will have much greater incentive to take a strong interest in military operations. The draft will touch their children and their constituents in ways that will "bring a greater appreciation of the consequences of the decision to go to war."[49]

Consider, for example, the critical role that the draft played in Vietnam. By 1966, "[c]onscription for the war became a hot issue throughout society as a whole."[50] The draft was perceived as unfair; specifically, student deferments resulted in an unacceptable class bias. Indeed, Secretary of the Navy Paul Nitze thought that "the real strength of the student protest movement" was the widespread perception that college students took "enormous risks" because they "had avoided the dangers that others had taken."[51] For this very reason, President Lyndon Johnson sought to eliminate some student deferments in June 1967. This initiative, however, prodded even greater opposition to the war. According to Joseph Califano (then a special assistant to the President): When a lottery was established and graduate deferments were discontinued, "[s]uddenly the affluent middle class found their sons in harm's way, and all hell broke loose. They began to raise hard questions about the Vietnam War."[52] This public pressure prodded the Congress to play a more activist role and the President to look for a way out of Vietnam. Consider, for example, the War Powers Resolution of 1973. By calling for the "collective judgment" of both the Congress and the President before U.S. troops are sent into combat, lawmakers responded to public pressure to limit presidential war-making.[53]

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48. Thomas W. Lippman, *Socially and Politically, Nation Feels the Absence of a Draft*, WASH. POST, Sept. 8, 1998, at A-13.

49. Rangel, *supra* note 1, at A-19. This does not mean that the families and friends of those who are drafted will be the only ones applying pressure on Congress and the President. *See* Richard A. Lau et al., *Self-Interest and Civilians' Attitudes towards the Vietnam War*, 42 PUB. OPIN. QTLY 464 (1978) (arguing that those who are self-interested hold similar views to those who do not have friends or family in the military). The point, instead, is that all Americans will have a greater sense of interest in war powers.

50. TOM WELLS, THE WAR WITHIN 42 (1990).

51. *Id.* at 145.

52. Joseph A. Califano, Jr., *When There is No Draft*, WASH. POST, Apr. 6, 1999, at A-23.

53. Over time, the War Powers Resolution (due both to prior drafting and lawmaker acquiescence) has bolstered unilateral presidential warmaking. *See* Fisher, *supra* note 14.

In 1973, President Richard Nixon abolished the draft in order to quiet opposition to the war.[54] By relieving "affluent, vocal, voting Americans of the concern that their children will be at risk of going into combat,"[55] an all-volunteer army was seen as a way to free the military of public pressure. This is a byproduct of several factors. First, those who sign up for an all-volunteer army traditionally support the government, including its pursuit of military initiatives.[56] Second, without a broad-based draft, university campuses are no long centers of anti-war activity. The end result is a less engaged public and, correspondingly, less lawmaker interest in military operations. Third, with an ever-declining percentage of veterans in Congress, the military finds itself increasingly isolated from both American society and its civilian leaders.[57]

By bringing back the draft (especially a draft that includes the affluent), the American people would have a stronger sense of stake in military operations. This seems more true today than during the Vietnam era. According to Charles Moskos, "declining birth rates and smaller families makes the loss of children much more traumatic."[58] Furthermore, the advent of 24-hour news networks ensures unrelenting news coverage of any military strike. No doubt, Congress and the President would be affected by this heightened interest.[59] In particular, public opinion constrains presidential warmaking, and the President often looks to Congress as a barometer of public opinion.[60]

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54. *See* Dennis Duggan, *Draft Makes War Personal*, NEWSDAY, Jan. 1, 2003, at A-2; John B. Judis, *Citizen Soldiers*, THE NEW REPUBLIC, June 28, 1999, at 8.

55. Califano, *supra* note 52, at A-23.

56. *See* James Burk, *The Military Obligations of Citizens Since Vietnam*, 31 PARAMETERS 48, 53 (2001) (noting that "[t]raditionally, those who enlisted for military service believed that they were fulfilling an obligation of citizenship").

57. *See* Peter D. Feaver & Richard H. Kohn, *The Gap: Soldiers, Civilians and their Mutual Misunderstanding*, 61 NAT'L INT. 29 (2000); Joseph J. Collins, *The Complex Context of American Military Culture: A Practitioner's View*, 21 WASH. QTLY. 213 (1998).

58. Charles Moskos, *Reviving the Citizen-Soldier*, 147 PUB. INT. 76 (2002) (noting but, ultimately, disagreeing with this claim); Charles Moskos, *Thinking Big*, BOSTON GLOBE, Feb. 9, 2003, at D-12.

59. Consider, for example, media coverage of the death of Johnny "Mike" Spann, the first U.S. operative to die in Afghanistan. By showing video of Spann in Afghanistan shortly before his death, and by interviewing members of his family, among other things, President Bush felt the need to speak of him in his 2002 State of the Union address. *See* Bob Deans, *State of the Union Address: 'Our War Against Terror is Only Beginning'; Bush Vows Victory Will Lift the Economy*, ATL. J. & CONST., Jan. 30, 2002, at A-1.

60. *See* RICHARD SOBEL, THE IMPACT OF PUBLIC OPINION ON U.S. FOREIGN POLICY SINCE VIETNAM (2001) (concluding that public opinion constrains but does not define foreign policy); *id.* at 122 (quoting Secretary of State George Schultz as saying "Congress was my public opinion poll").

In calling attention to how the draft creates incentives for Congress and the American people to check presidential warmaking, I do not mean to suggest that the draft is the only mechanism by which the public will carefully scrutinize war-related decisionmaking. War-time casualties would also reinvigorate public interest in military operations. Consider, for example, Iraq: mounting casualties during the peacekeeping phase of Iraqi operations prompted the George W. Bush administration to modify its strategy.[61] In particular, the administration feared that growing public opposition to the war would complicate the President's bid for reelection.[62] For this very reason, the Bush administration sought to transfer power to the new Iraqi government on June 30.[63] Likewise, in responding to complaints about the hardships faced by reservists and their families, the administration (with the strong support of Congress) backed a fiscal year 2005 appropriations bill that increases military salaries by 3.5% and doubles the allotment for hardship duty.[64] For similar reasons, casualty minimalization has become "an independent operational objective" of military decisionmaking.[65] Aerial precision strikes are therefore preferred to the deployment of ground troops.[66] Unlike casualty minimalization (which operates as an *ex post* check limiting the way presidents fight wars), "bringing back the draft" creates *ex ante* incentives for lawmakers and the American people to question the launching of military strikes.[67]

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61. *See* Warren P. Strobel & John Walcott, *Bush Administration Examining Ways to Change Course in Iraq*, KNIGHT-RIDDER/TRIBUNE NEWS SERVICE, AUG. 29, 2003; Mohammad Bazzi, *U.S., Iraq Strike a Deal; Power Transfer to Transitional Government Seen by End of June*, NEWSDAY, Nov. 16, 2003 at A-3.

62. *See* Richard W. Stevenson, *'America Will Never Run,' Bush Says of Iraq*, N.Y. TIMES, Nov. 4, 2003, at A-23; Dan Balz & Richard Morin, *Bush Poll Numbers on Iraq at New Low*, WASH. POST, May 25, 2004, at A-1 (noting that the President's wartime popularity has dimmed as a result of the prison abuse scandal and increasing casualties).

63. Steven R. Weisman, *U.S. Presidential Politics and Self-Rule for Iraqis*, N.Y. TIMES, Feb. 19, 2004, at A-11.

64. Morgan, *supra* note 21; *see also* Joseph C. Anselmo, *Pentagon Plans for Bigger, Better Army With 'Spike,'* 62 C.Q. WEEKLY 5, 270 (2004).

65. Jeffrey Record, *Collapsed Countries, Casualty Dread, and the New American Way of War*, 32 PARAMETERS 423, 423 (2002). With an all-volunteer army, Presidents no longer "have a ready supply of manpower" and cannot afford the significant loss of life. Doug Bandow, *Mend, Never End, the All-Volunteer Force*, 44 ORBIS 463 (2000).

66. Notably, America's all-volunteer army is too small to sustain a war as large as Vietnam. Consequently, presidents are constrained in how they can fight ground wars. *See* Richard Halloran, *Pentagon takes Renewed Pride in Its Personnel*, N.Y. TIMES, May 16, 1985, at A-1.

67. Ironically, because the draft makes the President more accountable to the American people and the

CONCLUSION

Regardless of whether "bringing back the draft" is sound public policy,[68] Congress has virtually no chance of embracing this initiative. Lawmakers have no incentive to enact a politically unpopular measure designed to put pressure on Congress to play a leadership role in war-related decisionmaking.[69] Nevertheless, for reasons detailed in this essay, it is important to search for a mechanism through which Congress and the American people will be meaningfully engaged in the decision to commit the nation's blood. Let me close by paraphrasing Learned Hand: Our system of checks and balances, like liberty, "lies in the hearts and minds of men and women; when it dies there, no constitution, no law, no court can save it."[70]

Congress, some military analysts think that the draft's renewal might "increase the public's willingness to accept wartime casualties." Moskos, *supra* note 58, at 84.

68. Congressman Rangel's proposal to bring back the draft, for example, may be a smokescreen to pursue partisan political objectives. *Compare* Editorial, *Draft Dodge*, WALL ST. J., Jan. 6, 2003, at A-18 (arguing that Rangel's proposal has "nothing to do with improving the effectiveness of our military and everything to do with the politics of class and race"), *with* E.J. Dionne, *Rangel's Challenge*, WASH. POST, Jan. 24, 2003, at A-27 (arguing that "[i]t is neither race-baiting nor class warfare to suggest that a democratic society has a problem when members of its most privileged classes are not among the first to rally to the colors at a time of trouble" and that Congressman Rangel "deserves our gratitude" for his proposal).

69. A January 2003 *Newsweek* poll, for example, found that only 14% of Americans favored reinstating the draft. Paul Glastris, *First Draft: The Battle to Create Universal National Service that has Just Started*, WASH. MONTHLY, Mar. 1, 2003, at 11 (discussing the *Newsweek* poll). Forty-five percent said they would refuse to consider the idea, and thirty-eight percent were willing to consider reinstating the draft. *Id.*

70. Learned Hand, *The Spirit of Liberty*, in THE SPIRIT OF LIBERTY 189, 190 (Irving Dilliard ed., 3d ed. 1960).