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Paige Montague
paigelmontague@gmail.com

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PREEMPTIVE WAR, WAR POWERS, AND INTERNATIONAL COMPLICATIONS: A NEED FOR REFORM

Paige Montague¹

In September of 2002, President Bush addressed the United Nations General Assembly. Citing his concerns that Saddam Hussein had nuclear weapons, he stated, “The first time we may be completely certain he has a nuclear weapon is when, God forbids, he uses one. We owe it to all our citizens to do everything in our power to prevent that day from coming”.² He made it clear that his petitioning for an invasion was about preventing destruction; however, the decision to invade Iraq created what he hoped to avoid—the spread of terrorism and continually-growing international disputes. Although there was not a nuclear war, the Iraqi invasion led to an eight-year long conflict that has largely contributed to the destabilization of the Middle East.³ In its wake, cities have been destroyed, families have been ripped apart, over half a million U.S.

1 Paige Montague is a senior at BYU, she is studying Anthropology and has a passion for international diplomacy. She wishes to give a special thank you to the talented editors of the paper, Elizabeth Young and Joshua Menden, whose hard work and meticulous reading made this paper possible. Furthermore, thank you to Kris Tina Carlston and the BYU Pre Law Review Board for making this journal possible.

2 George W. Bush, President of the U.S., Remarks by the President to the U.N. Gen. Assembly in NY, NY (Sept. 12, 2002) (transcript available at *The White House: President George W. Bush* website).

3 *Should the U.S. Have Attacked Iraq?*, PROCON: THE LEADING SOURCE FOR PROS & CONS OF CONTROVERSIAL ISSUES, <https://usiraq.procon.org> (last updated Mar. 3, 2015, 1:27:05 PM PST).

troops and 165,000 Iraqi civilians have been killed.⁴ The real kicker: no Weapons of Mass Destruction (WMDs) were found.

Yet, all of these negative results could have been avoided if the United States had decided against engaging in what was a qualified as a “preemptive war.” This decision to invade Iraq went against U.N. precedent and was condemned by other permanent members of the Security Council. Yet, the United States still attempted to pass a resolution, known as the “eighteenth resolution,” in support of their aggressive action-citing suspicion of nuclear weapons.⁵ This resolution was withdrawn after the condemnation and affirmation of a negative vote from other Security Council members. However, the United States went forward with the invasion—an invasion which led to a protracted war, extreme loss of life, and negative consequences that continue to resound in the Middle East including the growth of terrorist organizations such as ISIS. Later, in 2003, the former Secretary General of the United Nations, Kofi Annan, clarified the position of the largest international body on the invasion, stating, “I have indicated it was not in conformity with the U.N. Charter. From our point of view, from the charter point of view – it was illegal.”⁶ From this example, we see that despite the United States’ instrumental role in the creation of the United Nations, it does not hesitate in defying U.N. recommendations or undercutting the mandate of the international body.

The Invasion of and War in Iraq is just one of the examples of the extreme negative consequences, both domestically and internationally, that going against the Security Council or the U.N. charter has caused. Unfortunately, the current

4 *Iraqi Civilians*, WATSON INST. INT’L & PUB. AFFAIRS, BROWN UNIV, COSTS OF WAR. [HTTP://WATSON.BROWN.EDU/COSTSOFWAR/COSTS/HUMAN/CIVILIANS/IRAQI](http://watson.brown.edu/costsofwar/costs/human/civilians/iraqi) (last updated Apr. 2015).

5 Steve A. Yetiv, EXPLAINING FOREIGN POLICY: U.S. DECISION MAKING IN THE GULF WARS 221 (2nd ed. 2011).

6 Interview by Owen Bennett-Jones with Kofi A. Annan, Secretary-General of the U.N., BBC World Service at the U.N. headquarters in NY, NY (Sept. 16, 2004).

administration does not show any signs of reversing this trend, stating an “America first” agenda frequently, disregarding the history of those actions hurting America in the long run.⁷ With the newfound shift towards nationalism and away from the increasing pressure of globalization, the United States must be aware of its power, its influence, and the consequences of its actions against international advisement on the common good of the globe. To foster an environment that maintains international peace and security, the United States should adopt an amendment to the Constitution, that aligns it with the purposes of the U.N. Charter by expanding Congress’s role in the War Powers, making it more difficult for the country to engage in preemptive war.

In Part I of this paper I will lay out the background of the United States’ government relationship with the United Nations, the Bush Doctrine, and historical issues regarding U.S. foreign policy and war. In Part II, we will discuss the legality of invading Iraq and how that continues to impact modern foreign policy and the relationship between the United States and the rest of the globe. In Part III, we will discuss why an amendment is necessary to restructure these issues regarding foreign policy, war, and international relationships and how it will help to solve these problems.

I. THE CREATION OF THE UNITED NATIONS AND THE SECURITY COUNCIL

The United States has a unique relationship and history with the United Nations. The U.S government was instrumental in the creation of the United Nations in 1945. The Security Council

7 Donald J. Trump, President of the U.S., Inauguration Speech at the Capitol Building in Washington D.C. (Jan. 20, 2017) (transcript available at *The White House: President Donald J. Trump* website). *See also* Donald J. Trump, President of the U.S., Remarks by President Trump at APEC CEO Summit in Da Nang, Vietnam (Nov. 10, 2017). *and* Donald J. Trump (@realDonaldTrump), TWITTER (June 14, 2016, 5:28 AM), <https://twitter.com/realdonaldtrump/status/742695148241313792?lang=en>.

was established in the fifth chapter of the charter of the United Nations, with the United States of America serving as one of the permanent members of the council.⁸ The council's purpose, above all, is to maintain international peace and security.⁹ This permanent membership on the council not only solidified the long-lasting status of the United States as an international super power, but secured the United States power of a veto vote on U.N. resolutions. However, for all this established power, U.S foreign policy has not necessarily always had an easy relationship with U.N. international policy—even going so far as to directly contradict.

One of the most well-known instances of this is the War in Iraq (as aforementioned in the introduction). In 2002 former-President Bush released his National Security Strategy saying that “America will act against such emerging threats before they are fully formed.”¹⁰ This strategy is what became known as the Bush Doctrine and set the precedent for how the United States government would handle what were viewed as potential international threats, regardless of the international laws and regulations.

The battle between international law and state self-interest is a difficult and on-going one. Recently, there has been a shift to push against the forces of globalization and move towards more America first isolationism. In his fall of 2017 in speech to United Nations General Assembly, President Trump stated that “As President of the United States, I will always put America first, just like you, as the leaders of your countries will always, and should always, put your countries first.”¹¹ He continued to make the position of his administration

8 U.N. Charter art. 23, par. 1.

9 U.N. Charter art. 24, par. 1.

10 John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 Pace Int'l L. Rev. 2, 2 (2003).

11 Donald J. Trump, President of the U.S., Remarks to the 72nd Session of the U.N. Gen. Assembly in NY, NY (Sept. 19, 2017) (transcript available in *the White House: President Donald J. Trump* website).

clear by citing the importance of the constitution to setting the foundation for the American government and its decisions. However, for all the movement to maintain explicit state sovereignty, the abuse of superpower status cannot continue.

II. THE LEGALITY OF INVADING IRAQ

The United Nations clearly sets out its view of preemptive conflict in Article 2 of the U.N. Charter. It states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.¹²

Overall, these purposes referenced above are “To maintain international peace and security,” and inciting a war without sufficient evidence that it could prevent an attack, is clearly out of line with those purposes.¹³ The War in Iraq, was passed on unsustainable evidence and created a greater threat to international peace and security by creating a power vacuum in the Middle East. This scenario could have been foreseen by looking at the decades worth of consequences of earlier Western involvement in developing nations. For clarification, preemptive war and preventative war have a slight distinction. In an Info Memo sent by General Counsel William J. Haynes II to the Secretary of Defense in 2002, this distinction is explained: a “preemptive attack” is one “initiated on the basis of incontrovertible evidence that enemy attack is imminent.”¹⁴ By

12 U.N. Charter art. 2, par. 4.

13 U.N. Charter art. 1, par. 1.

14 Memorandum from William J. Haynes II of the Gen. Counsel of the Dep't of Def. to the Sec'y of Def. (Oct. 16, 2002) (on file with the Rumsfeld Papers Library).

contradiction, a preventative attack or preventative war is one “initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk.”¹⁵ International law recognizes no difference between these two types of war, all merely refer to “the right to use force based on the existence of an imminent threat but prior to an armed attack.”¹⁶

As stated previously, the Secretary General to the United Nations said that the invasion of Iraq went against the U.N. Charter—it was illegal. The United States and United Kingdom, two prominent states who helped lead the coalition to invade Iraq, claimed that it was in fact legal, citing it was in line with existing Security Council resolutions passed during the Gulf War such as Security Council Resolution 678. This resolution reads that the member states may “use all necessary means” to uphold previous resolutions and “restore international peace and security in [Iraq].”¹⁷ In addition, representatives from the United States cited the 2002 U.N. Security Council Resolution 1441, readdressing Iraq’s failure to follow the previous disarmament resolutions.¹⁸ In 2003, then-Secretary of State Colin Powell stated that “Iraq has now placed itself in danger of the serious consequences called for in U.N. Resolution 1441. And this body places itself in danger of irrelevance if it allows Iraq to continue to defy its will without responding effectively and immediately.”¹⁹ Colin Powell clearly aligned himself with President Bush’s view that preemptive action was necessary in Iraq to prevent the country from using WMD.

The other members of the Security Council—France,

15 *Id.* at 13.

16 *Id.*

17 S.C. Res. 678, par. 2 (Nov. 29, 1990).

18 Rachel S. Taylor, *The United Nations, International Law, and the War in Iraq*, WORLD PRESS REVIEW ONLINE. [HTTP://WWW.WORLDPRESS.ORG/SPECIALS/IRAQ/](http://www.worldpress.org/specials/iraq/) (last visited Dec. 7, 2017).

19 *Powell Present U.S. Case to Security Council of Iraq’s Failure to Disarm*, U.N. NEWS CENTRE: WITH BREAKING NEWS FROM THE U.N. NEWS SERVICE. (Feb. 5, 2003), <https://www.un.org/apps/news/story.asp?NewsID=6079&Cr=iraq&Cr1=inspect&Kw1=1441&K>.

China, and Russia—disagreed with the United States’ position, citing Resolution 687 which asserts that the Security Council as a whole must “take such further steps as may be required,” not individual member states.²⁰ They claimed that another resolution must be passed in order to allow such an invasion.²¹

Therefore, the debate regarding the legality of the War in Iraq surrounds whether or not it was in line with the U.N. Charter and previously passed U.N. Resolutions. Because the United States believed that the war was legal in international terms (although that perspective was grounded in uniquely national bias), the executive branch moved forward with the invasion. One of the main domestic failures of allowing such wars to take place include a disregard of previous laws surrounding the declaration of war. Congress itself has not declared war since 1942.²² Most of the wars in history now have come from the President of the United States. Declaring war preemptively is an area which should have many checks and balances because of the serious consequences of engaging in warfare. In fact, there have been laws passed to create more checks in this area; however, legislation provided to give Congress more of a say in the matter, such as the War Powers Resolution of 1973, continue to be violated.²³

III. WHY AN AMENDMENT?

As the United States government continues to expand the Presidential war powers, it increasingly puts the international community as well as the global status of the United States at risk. Although legislation has been passed as an attempt

20 S.C. Res. 687, par. 34 (Apr. 3, 1991).

21 Taylor, *supra* note 16.

22 *Official Declaration of War by Congress*, U.S. Senate. https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Dec. 7, 2017).

23 50 U.S.C. § 1541(1973). See also Alan Greenblatt, *Why the War Powers Act Doesn't Work*, NPR, (June 16, 2011, 1:01 PM ET). <https://www.npr.org/2011/06/16/137222043/why-the-war-powers-act-doesnt-work>.

to limit such powers, it is often abused. Acts such as the War Powers Resolution of 1973 provide such an example. What began as an attempt to curb the expansion of the Presidential war powers resulted in an abuse of the Presidential power to send combat troops into battle where “imminent” hostilities are likely.²⁴ Although it requires Congress to approve such deploys within 48 hours and the President to withdraw such troops within 60 days if not approved, this has never occurred—as no wars have been declared by Congress since 1942.²⁵ Preemptive action of “imminent” conflict should not be easily declared by the President. As such an act is illegal on the international stage, and the ability to do so brings about great risk, ignoring constitutional checks and balances. An amendment that requires Congress to declare war or end war will make such acts unconstitutional and prevent the President from being able to abuse such power. In addition, this kind of amendment will align the United States with the purposes of peace and stability, as outlined in the U.N. Charter, by requiring more checks and balances toward the Presidential war powers, making it more difficult for the country to engage in preemptive war.

An amendment requiring this check and balance must happen as soon as possible. Already, President Trump has worked to expand the Presidential war powers, giving the Department of Defense greater autonomy to conduct military operations independent of the White House, and of course Congress.²⁶ With the President’s current relationship with Twitter, using it to declare policy and aggravate opponents, Trump may declare preemptive war by simply tapping the

24 50 U.S.C. § 1541 (1973).

25 *Official Declaration of War by Congress*, *supra* note 16.

26 Helene Cooper, *Trump Gives Military New Freedom. But With That Comes Danger*, N.Y. TIMES (April 5, 2017).

“send” button.²⁷ Although the President serves as Commander and Chief, Congress is still constitutionally granted the power to declare war in Article I, section 8 of the Constitution. Professor John B. Mitchell of the Seattle School of Law states that war making should not be a unilateral endeavor. He asserts:

Those giving Congress preeminence in war-making emphasize the need for broad-based popular discussion and support for war, given the human and economic burdens war brings to its citizens and the constitutional mandate that Congress has the power to declare war. Advocates of the position that the executive branch should have the lead in waging war look at the law of war as it existed in England prior to the Revolution and to the over 100 times in our history that the executive has used troops without congressional consultation.²⁸

The Framers of the United States Constitution created a system of checks and balances between the three branches of the government so no one branch can overpower the other.²⁹ To achieve this balance, it is essential that the Executive branch respects Congress’ right to exercise its role in deciding whether or not the use of military force is valid and in the overall formulation of

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- 27 Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 12, 2017 5:48 PM), https://twitter.com/realDonaldTrump/status/929511061954297857?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.vox.com%2F2017%2F11%2F12%2F16639462%2Ftrump-kim-north-korea-russia-twitter. (Trump’s calling of Kim Jung Un as “Fat” via Twitter on November 12, 2017 and Trump’s July 2017 Transgender Military Ban that was originally announced via Twitter).
- 28 John B. Mitchell, *Preemptive War: Is It Constitutional*, 44 Santa Clara L. Rev. (2004).
- 29 William P. Rogers, *Congress, the President, and the War Powers*, 59 California L. Rev. 1194, 1196 (1971).

United States Foreign Policy.³⁰ The amendment we propose would establish checks and balances to curb the growing Presidential War Powers by doing what the War Powers Resolution was intended to do: removing the loophole often used by Presidents to leave troops in wars in face of imminent threat after 60 days.³¹

Congress currently has the ability to raise armed forces, control the military budget, and declare war.³² The President's role is the "commander-in-chief," but through loopholes and expanded Constitutional interpretation, that role has expanded to mean having the power to repel attacks to the point where he can unilaterally declare war.³³ This Constitutional solution would make such actions illegal and require Congress to always be involved when the President authorizes troop deployment. This amendment would have three main aspects:

1. Require Congress to approve any Presidential deployment of troops within 48 hours.
2. Require the President to withdraw such troops if war is not officially declared by Congress within 60 days of the deployment.
3. Allow Congress to withdraw troops within a specific amount of time. This time requirement would be set out when Congress officially declares war.

Of course, there is always the question of what happens if Congress wishes to engage in preemptive war. This is obviously a possibility, but a far less likely one, as the majority of Congressmen would be required to support the motion to

30 *Id.* at 28

31 Seth McLaughlin, *Obama Evades Congress, Stretches War Power in Precedent for Trump*, THE WASHINGTON TIMES, (Dec. 25, 2016).

32 U.S. Const. art. I, § 8, cl. 11-16.

33 Memorandum from John C. Yoo the Deputy Assistant Attorney Gen. Office of Legal Counsel to the Deputy Counsel to the President (Sept. 25, 2001) (on file with the Dep't of Justice).

declare war or send troops, and the statistical likelihood of the that is far less than the that of the president choosing to move forward with a preemptive war. In addition, Congress has historically authorized such Presidential war power increases, as was the case in with the Gulf of Tokin Resolution and more recently, the Iraqi Resolution.³⁴ But this amendment to the constitution will make such authorizations of unilateral force unconstitutional and illegal. It will require Congress to be a part of every deployment of troops and every act of war.

This amendment will also help the international community. Preemptive war is viewed as illegal on the international spectrum, as it goes against the UN's purpose "To maintain international peace and security."³⁵ Preemptive war causes international frustration and long-term issues. In a world where these economic and technological trends continue, there is a necessity to maintain positive international relationships. A way to maintain these relationships is for the United States to align itself with the purpose of the U.N. to provide and maintain such international relationships. Acting exclusively in American interests may alienate other nations and damage future economic growth and prosperity.

IV. IN CONCLUSION

Preemptive war should not be easily declared by the President. As shown through the aforementioned examples and the first reference to the failure of the Iraq War, the need for an amendment to solidify Congress' role in declaring war is necessary to limit future issues with engaging in unnecessary war. While Article I of the Constitution grants Congress the power to declare war, the evolution of the Presidential role as Commander in Chief has made the roles unclear to the point that the President has nearly unilateral control over this power.

34 H.J. Res. 1145 (1964) and H.J. Res. 114 (2002).

35 U.N. Charter art. 1, par. 1.

Efforts have been made in the past to curb this growing control but acts such as the War Powers Resolution of 1973 continue to be violated and abused. Thus, something more binding is necessary to check the Presidential misuse of these powers. An amendment offers this solution, as it will make such acts to declare war without Congressional approval unconstitutional.

This amendment would not only be beneficially for the American people, it will also be aligned with the foundations our Constitution was built on. Preemptive war goes against the foundational theory of Locke's social contract (the philosophical underpinnings of the United States Constitution).³⁶ Part of this comes from the basis that because foreign powers can threaten each citizen's security, life, and livelihood, the government upholds its Lockean bargain by providing for the common defense—not the preemptive defense.

With the current globalizing state of our world, the need for international cooperation is critical. Requiring the President to gain Congressional approval in the face of preemptive war will not only align us with the purposes of the international community, it will also help the U.S. to avoid future wars based on unsubstantiated fear and evidence. In order to create a world with a great emphasis on international peace and security, the United States government must adopt a constitutional amendment expanding Congress's role under the War Powers resolution. By increasing Congress' role in the war process, the threat of damaging preemptive war as declared by the President will dramatically decrease, moving the countries of the world to a better, more internationally friendly community.

36 Mitchell, *supra* note 28.