

**PRECEDENT SUPPORTING THE CONSTITUTIONALITY OF
SECTION 5(b) OF THE WAR POWERS RESOLUTION**

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I. INTRODUCTION

Debate materialized over the constitutionality and efficacy of the War Powers Resolution (WPR) after President Obama ordered bombing operations on Libya in March 2011¹ without obtaining

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1. Newshour, *Libya, War Powers Start White House, Congress on Collision Course* (PBS television broadcast June 15, 2011), *available at*

Congressional authorization to use military force. Under the veneer of the North Atlantic Treaty Organization (NATO), Obama conducted military strikes for three months at a cost of \$716 million, but he did not deploy U.S. ground soldiers into combat.² Republican Speaker of the House John Boehner warned that the President had exhausted the WPR's 60-to-90 day time frame for using military force without obtaining official congressional approval.³ Ten members of the House filed a lawsuit to cease bombing as a violation of the WPR.⁴ To vindicate operations, the White House provided a 38-page report to Congress and asserted that the WPR had not been contravened because "U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops."⁵ Pentagon lawyers disagreed,⁶ and George W. Bush Administration Legal Counsel Jack L. Goldsmith stated that "[t]he administration's theory implies that the president can wage war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution's time limits."⁷

This contention implicates section 5(b), which is arguably the most controversial and potentially unconstitutional WPR provision.⁸ Given that the WPR was intended to restrain presidential power, the application of section 5(b) is peculiar because it ostensibly opened a window for the President to use military force within a restricted time frame by merely consulting with and reporting to Congress.⁹ This

http://www.pbs.org/newshour/bb/politics/jan-june11/warpowers2_06-15.html?print; Editorial, *When a President Goes to War: Obama's Decision to Join the Attack on Libya Rests on a Parsing of the War Powers Resolution*, L.A. TIMES (Mar. 27, 2011), <http://articles.latimes.com/print/2011/mar/27/opinion/la-ed-warpower-20110327>; Alan Greenblatt, *Why The War Powers Act Doesn't Work*, NPR, June 16, 2011, <http://www.npr.org/2011/06/16/137222043/why-the-war-powers-act-doesnt-work>.

2. Greenblatt, *supra* note 1; Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=print>.

3. Savage & Landler, *supra* note 2.

4. Greenblatt, *supra* note 1.

5. Savage & Landler, *supra* note 2 (citing this as advice from White House counsel Robert Bauer and State Department legal adviser Harold Koh).

6. Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html?pagewanted=print>.

7. Savage & Landler, *supra* note 2.

8. David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 944, 1070 n.529 (2008).

9. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50

Article addresses the constitutionality of section 5(b) within the context of precedent.

Part II reviews the design of the Constitution that Presidents and Congresses have routinely understood, endorsed, and observed before war power ambiguity dawned in 1950. Part III considers the Korean and Vietnam Wars, which afforded precedent to proponents of Executive power expansionism. The backlash to presidential boldness in using the U.S. military was Congress's reaffirmation of authority by enacting the WPR. Part IV addresses the post-WPR momentary interventions relevant to section 5(b). Part V concludes with a suggestion to contextually clarify the WPR.

II. CONSTITUTIONAL STRUCTURE AND EARLY CASES

A. *Structural Interpretation of War Powers*

Constitutional war powers endow Congress with the prerogative to “declare war;” “grant Letters of Marque and Reprisal,” which involve military force short of “war;” the authority to “make Rules for Government and Regulation of the land and naval Forces;” “to organize, fund, and maintain the nation’s armed forces;” “make Rules concerning Captures on Land and Water;” “raise and support Armies;” and “provide and maintain a Navy.”¹⁰ The President, on the other hand, is endowed with one war power: to execute those powers commensurate with the title “Commander in Chief of the Army and Navy.”¹¹ Numerical comparison of constitutional provisions and underlying policy intentions evince that Congress was intended to be the dominant branch in war powers.¹²

In practice, these clauses designate that, during peacetime, Congress legislates for, funds, and supports the military,¹³ while the

U.S.C. §§ 1541–1548 (2010), at § 3, 4, 5(a)–(b)), available at http://avalon.law.yale.edu/20th_century/warpower.asp [hereinafter “WPR”].

10. U.S. CONST., art. I, § 8, cls. 11–14, 18. Of course, Letters of Marque are no longer used, but the clause is raised to depict Framers intent.

11. U.S. CONST. art. II, § 2, cl. 1.

12. W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 29–30 (1981) (emphasizing that the text of Constitution clearly balances in favor of Congressional dominance); Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the “Zone of Twilight,”* 44 ST. MARY’S L.J. 1 (2012).

13. Barron & Lederman, *supra* note 8, at 958–61, 971–72, 1026–27; Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 322–23, 331–32 (2008); Charles Tiefer, *Can Appropriation Riders Speed Our Exit from*

President administrates and superintends the military.¹⁴ When affronted with potential military confrontation, Congress authorizes the use of force,¹⁵ and may circumscribe Executive operations during battle.¹⁶ However, Congress cannot interfere with exclusive Executive prerogatives of the Commander in Chief during approved military operations.¹⁷ The President, as Commander in Chief, or a delegate of Executive authority, directs troops, approves battle plans, executes tactical battlefield operations,¹⁸ and normally signals when the war or hostilities terminate.¹⁹ Separation of powers responsibilities then return to peacetime, the status quo.

Congress has sanctioned the use of the U.S. military pursuant to

Iraq?, 42 STAN. J. INT'L L. 291, 302 (2006) (citing 27 Op. Att'y Gen. 259, 260 (1909)).

14. *Loving v. United States*, 517 U.S. 748, 772 (1996) (the President's role "require[s] him to take responsible and continuing action to superintend the military"); Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 320–22 (2005); David Gray Adler, *George Bush as Commander in Chief: Toward the Nether World of Constitutionalism*, 36 PRESIDENTIAL STUD. Q. 525, 526–30 (2006).

15. LOUIS HENKIN, CONSTITUTIONALISM: DEMOCRACY, AND FOREIGN AFFAIRS 26 (1990); 4 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 443 (Henry Cabot Lodge ed., 1904) (only Congress can "declare war" to authorize the use of armed forces); Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1200 (2005) ("The Constitution was intended to prohibit presidential wars.").

16. THE FEDERALIST NO. 69, at 6 (Alexander Hamilton) ("The President is to be Commander-in-Chief of the army and navy of the United States. . . It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy."); Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 OHIO ST. L.J. 391, 438 (2008) ("Congress has regulated in minute detail the manner in which armed forces may be deployed, enacted detailed rules governing the conduct of those forces, set forth rules of engagement, authorized the President to conduct hostilities limited in geographic scope, time, the type and number of forces that could be used, and the objects and purposes for which force could be used."); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45, 50 (2007).

17. *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."); Derek Jinks & David Sloss, *Is the President Bound By the Geneva Conventions?*, 90 CORNELL L. REV. 97, 171 (2004).

18. Jinks & Sloss, *supra* note 17, at 171 (It is generally agreed "that the President has exclusive authority over battlefield operations, and that Congress's war powers are constrained by the need to avoid interfering with the President's Commander-in-Chief power during wartime.").

19. *Ludecke v. Watkins*, 335 U.S. 160, 169 n.13 (1948) ("Congress leaves the determination of when a war is concluded to the usual political agencies of the Government."). Congress could include a sunset clause in a use of force authorization. Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SECURITY L. & POL'Y 53, 102 (2006).

the explicit language of the Constitution for large-scale military operations on nine occasions. Congress has “declared war” five times: the War of 1812, the Mexican–American War, the Spanish–American War, World War I, and World War II.²⁰ The other four authorizations include the Gulf of Tonkin Resolution for the Vietnam War in 1964, the Gulf War to expel Iraqi soldiers from Kuwait in 1991, the response to the September 11 terror attacks in 2001, and the approval to use force against Iraq in 2002.²¹ Prior to the Korean War in 1950, government officials, courts, and scholars concurred that the President must obtain authorization from Congress before ordering the use of military force in all hostilities other than self-defense.²²

B. Historical Examples: Exigent Circumstances

James Madison affirmed that the President could only unilaterally order military force to “repel sudden attacks” on the U.S. and that Congress had to approve any other use of force.²³ The Framers delineated this exigent circumstance as a safeguard during intervals when Congress might not be in session.²⁴ In *Martin v. Mott*, the Supreme Court held that lacking congressional consent, the President has only “a limited power, confined to cases of actual invasion, or of imminent danger of invasion.”²⁵ In *Ex Parte Milligan*, Justice Chase affirmed that the President possesses “inherent authority” to command the U.S. military into battle only when there is a threat to national sovereignty.²⁶

20. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2063 (2005). There was also the “Quasi-War with France,” which was a limited and confined conflict. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.). Chief Justice Marshall held that Congress authorized the Quasi-War with France even without a formal declaration, *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 724 (1997).

21. Lori Fisler Damrosch, *On Democratic Ground: New Perspectives on John Hart Ely: War and Responsibility: Comment: War and Uncertainty*, 114 YALE L.J. 1405, 1408 (2005).

22. Bejesky, *supra* note 12. *See also supra* notes 15–16.

23. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 476 (1987).

24. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1937) (statements by Charles Pinckney, James Madison, and Elbridge Gerry); EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 32 (1982); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1966).

25. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827).

26. Dr. Saby Ghoshray, *Illuminating the Shadows of Constitutional Space While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L.J. 295, 307 (2008) (citing

Consider two prominent early examples in which the Executive did initiate unilateral actions related to war for imperatives, and the contention that ensued over the appropriate interpretation of those exigencies. In June 1807, British warships attacked the Chesapeake off the coast of Virginia, and the Jefferson Administration contracted to purchase timber for one hundred gunboats and materials for gunpowder.²⁷ Three months after the purchases, President Jefferson acknowledged Congress's appropriations power and recognized that authorization was required for the acquisition, but he justified his actions as necessary to defend the nation against the imminent possibility of war with Britain.²⁸ He presumed Congress would authorize the purchases had it been in session;²⁹ Congress agreed and paid for the resources.³⁰ The Chesapeake attack was a preliminary hostility that led Congress to declare war on Britain in the War of 1812.³¹ The purchase was for an emergency situation to defend the country against an imperial power, and it did not involve ordering soldiers into hostilities.

President Abraham Lincoln's orders during the American Civil War present the most prominent case of a President unilaterally prescribing military operations without congressional approval. The Civil War also presents the most persuasive example in American history of a nation-threatening emergency. In 1861, the Confederate Army initiated war against northern states when Congress was not in session.³² Relying on the Militia Act of 1795 and the Insurrection Act of 1807, Lincoln recruited 75,000 new militia and obstructed Southern ports.³³ Additionally, Lincoln executed actions that were not sanctioned by existing legislation.³⁴ For example, the President

Ex Parte Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring)).

27. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 171–72 (1976).

28. Thomas Jefferson, *Annual Message to Congress* (Oct. 27, 1807), in 17 ANNALS OF CONG. 14–17 (1807).

29. *Id.*

30. Act of Dec. 18, 1807, ch. 4, § 2, 2 Stat. 451.

31. ANGUS KONSTAM, SCOURGE OF THE SEAS: BUCCANEERS, PIRATES, AND PRIVATEERS 171–72 (2007).

32. Barron & Lederman, *supra* note 8, at 997; David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1185 (2006).

33. Barron & Lederman, *supra* note 8, at 997–98.

34. See, e.g., Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1815–16 (2010) (Clinton L. Rossiter wrote about Lincoln's power: "The eleven weeks between the fall of Sumter and July 4, 1861. . . one

violated congressional appropriations statutes by advancing expenditures from the public treasury for purchasing arms, transporting troops, and procuring other items, without preapproval from Congress.³⁵ Perhaps his most contentious maneuver involved detaining Americans suspected of treason without upholding the right of habeas corpus because the detentions were purportedly “necessary to preserve the nation.”³⁶

When Lincoln justified these actions, the President repeatedly acknowledged that Congress possessed the final word,³⁷ that he was responsible for operations without statutory authority, and that he proceeded by necessity to ensure that “the Government was saved from overthrow.”³⁸ Although Congress ratified most of Lincoln’s orders within months of his actions,³⁹ Congress also restricted Executive power. The Habeas Corpus Act of 1863⁴⁰ and the Posse Comitatus Act of 1878⁴¹ addressed the dangers of suspending habeas corpus and utilizing the military for domestic policing operations in the future. With regard to heeding existing confines of authority, Professors Barron and Lederman note:

[President] Lincoln himself never once asserted a broad power to disregard statutory limits, not even during his well-known exercise of expansive executive war powers at the onset of hostilities or when confronted with statutes that challenged his own tactical choices later in the war.⁴²

man was the government of the United States . . . [which] makes this the paragon of all democratic, constitutional dictatorships.”).

35. Barron & Lederman, *supra* note 8, at 1002.

36. *Id.* at 999; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101, 135 (1807) (Defendants were charged with treason for waging war against the United States, and the Court held that it is Congress’s plenary power to suspend the writ of habeas corpus and that there was insufficient evidence to hold the defendants.).

37. Barron & Lederman, *supra* note 8, at 998.

38. *Id.* at 1003 (citing CONG. GLOBE, 37th Cong. 2d Sess. 2383 (1862)).

39. *Id.* at 1003–05.

40. *Id.* at 1007–08.

41. Posse Comitatus Act, § 15, 20 Stat. 145, 152 (1878) (The Act was designed to prevent the President from using the military as a domestic police force “for purposes of executing laws, except . . . [as] may be expressly authorized by the Constitution or by act of Congress.”); *Ex parte Milligan*, 71 U.S. 2, 50–53 (1866) (noting instances of using the military for domestic policing and preventing rebellions, including during the Revolutionary War, Shay’s Rebellion, and General Jackson’s occupation of New Orleans).

42. Barron & Lederman, *supra* note 8, at 993.

C. *Recent Ambiguity in War Power Actions*

If the President possessed a unilateral war power authority from the Constitution beyond defending the nation, U.S. historical records would not contain querulous congressional scrutiny and contrite presidential explanations. Nonetheless, more recently, Presidents have unilaterally ordered troops into dozens of military conflicts short of being designated a “war,”⁴³ and endorsed a multitude of covert operations that sometimes necessitated military confrontation.⁴⁴ Additionally, there have been hundreds of cases in which the President deployed armed forces outside the U.S. (without congressional authorization and when there was a risk of hostility), and sometimes these deployments erupted into conflict.⁴⁵ From precedent, one might construe that Congress’s constitutional war powers authority has perceptively waned.⁴⁶ The Constitution requires Congress to declare war and to endorse lesser grades of military confrontation.⁴⁷ However, no President has gone to Congress for an official “Declaration of War” since Franklin Roosevelt in 1941, and there have only been four congressional authorizations to use military force for large-scale military hostilities.⁴⁸

Alternatively, the lack of congressional authorization for small-scale military confrontation may not be compelling evidence that the Executive has deliberately transgressed congressional power, or that such precedent should garner a perception that the President has an inherent authority to unilaterally initiate hostilities. Generally

43. MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTION AFTER KOSOVO* (2001); Mary L. Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1703–04 (2010); CONGRESSIONAL RESEARCH SERVICE, *INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2008* (Richard F. Grimmett ed., 2009); Bradley & Goldsmith, *supra* note 20, at 2050 (“[M]ost uses of military force in U.S. history, including significant military engagements such as the Korean War and the Kosovo bombing campaign, have been initiated without express congressional authorization.”).

44. *See generally* WILLIAM BLUM, *KILLING HOPE* (2004); Matthew Fleischman, Note, *A Functional Distribution of War Powers*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 137, 157 (2010); Bradley & Goldsmith, *supra* note 20, at 2067.

45. HENKIN, *supra* note 15, at 100 (2d ed. 1996); U.S. Dep’t of State, *The Legality of the United States Participation in the Defense of Vietnam*, 75 YALE L.J. 1085, 1101 (1966) (125 uses of force by 1966).

46. *See generally* PETER IRONS, *WAR POWERS* (2005); Treanor, *supra* note 20, at 696 (listing scholars who advocate a pro-executive war powers balance and noting that it could be favorable for the president to have strength and flexibility without being undermined by legislators).

47. *See supra* Parts II.A–B.

48. *See supra* Part II.A.

speaking, the American military has undertaken a more global presence since World War II with Congress's assent, and U.S. soldiers are commonly stationed in many foreign countries.⁴⁹ The President has not always sought congressional approval when deployments were not expected to result in conflict or when only low-intensity conflict was possible, whereas Presidents have requested Congress's approval and thereby complied with constitutional authorization requirements for situations expected to involve high-intensity combat.⁵⁰

If the President does not anticipate conflict with a deployment, requesting an authorization from Congress may not be rational. The public, Congress, U.S. soldiers, and foreign States may be bewildered by the expectation of combat and flabbergasted by the decision to present such a signal. Likewise, when there is a possibility that minor operations could result in combat, it seems unlikely that the President will seek congressional authorization when war costs are low and the likelihood of victory is high.⁵¹ Successful unilateral action could receive accolades, and there is minimal risk that a President would be punished for a successful unilateral military action with minor combat.⁵² Alternatively, a President may prefer to obtain prior congressional approval to diffuse political responsibility if conflict occurs or something goes awry, or to alert the adversary of an elevated domestic resolve.⁵³ The next section surveys these possibilities with examples to address Congress's war powers authority and the constitutionality of section 5(b) of the War Powers Resolution.

49. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 41–42 (2011).

50. Michael Mandel, Note, *A License to Kill: America's Balance of War Powers and the Flaws of the War Powers Resolution*, 7 CARDOZO PUB. L. POL'Y & ETHICS 785, 815 (2009); Fisher, *supra* note 15, at 1217–18 (members of Congress note that during the Korean War troops had been dispatched over one hundred times when there was a risk of combat).

51. Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1015 (2006).

52. See *supra* notes 43–45; *infra* notes 117, 125–135, 145–148, 156–159, 163–168 (noting many examples of unclear congressional authorization prior to the President ordering military action, but Congress has been reluctant to punish for potential transgressions of war powers).

53. Nzelibe, *supra* note 51, at 998.

III. CONTEXT OF THE WAR POWERS RESOLUTION

A. *The Korean War*

The Korean War generated a constitutional conundrum. President Truman deployed troops into Korea and used military force without Congressional authorization for what would be prolonged and massive warfare.⁵⁴ Louis Fisher wrote: “[The] allocation of power was understood by all three branches until President Harry Truman went to war against North Korea in 1950. He never came to Congress for authority before he acted or at any time thereafter. Similar false claims of authority have been made by Presidents since that time.”⁵⁵ Professor Trimble explained: “Although the Korean War is cited as a precedent by the [E]xecutive branch for a general presidential war-making power, it is the only major war that Congress did not authorize in advance. Its ‘precedential’ value seems limited given the unique political context in which it occurred.”⁵⁶ Indeed, it is lamentable that later Presidents became more assertive with war powers when the Korean War presented an unprecedented international element and a disconcerting domestic predicament.

First, for the international dimension, the United Nations (U.N.) had recently been constituted and member State expectations for rules and resolutions were untested. The Truman Administration sourced the UN as authority and emphasized that he was contributing air and sea support to Korean soldiers in conformity with the U.N. Charter and “the resolutions of the Security Council of June 25 and June 27,” which required North Korea to withdrawal forces.⁵⁷ Article 43 of the

54. GARY R. HESS, PRESIDENTIAL DECISION FOR WAR: KOREA, VIETNAM, AND THE PERSIAN GULF 26 (2001); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 135 (1973) (“Truman. . .dramatically and dangerously enlarged the power of future presidents to take the nation into major war.”); Christopher A. Preble, *The Founders, Executive Power, and the Military Intervention*, 30 PACE L. REV. 688, 697 (2010); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 759 (2008).

55. Fisher, *supra* note 15, at 1199; SCHLESINGER, *supra* note 54, at 136 (dating the concept of presidential unilateralism to the Truman Administration); Barron & Lederman, *supra* note 8, at 1098, 1106 (There was a “well-established pedigree in the period before 1950” regarding war powers allocations, but presidents thereafter began to invoke more “preclusive executive war powers claims.”).

56. PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 230 (2002).

57. Fisher, *supra* note 15, at 1209–10, 218–19, 223 (citing 23 DEP’T ST. BULL. 46 (1950)). The United National Participation Act created an “act of popular sovereignty” that required the US to view national security through an international lens that required

U.N. Charter requires members to provide armed forces and other assistance by special agreement,⁵⁸ and the Security Council did request that all member States render assistance accordant with the resolutions.⁵⁹ However, the Korean War was not U.N.-controlled and progressed into a U.S. war with primarily the U.S. providing troops.⁶⁰ Later Presidents and other States did not adopt Truman's interpretation of a per se obligation to furnish military support when the Security Council authorizes a use of force.⁶¹

Second, there was paltry opposition from Congress when Truman took unilateral action.⁶² After U.S. soldiers were dispatched, some congressional Republicans argued that it was not a "war," that troops had been deployed over one hundred times when there was a risk of war, and that the Commander in Chief should be given discretion.⁶³ Democrats underscored that circumstances necessitated countenancing the President with political unity.⁶⁴ However, the second Red Scare, or "McCarthyism," commenced shortly before the

reinterpreting previous war powers jurisprudence. DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 120–22 (2005) (sovereign delegation of authority to empower international institutions); David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of War Powers*, 70 U. COLO. L. REV. 1491, 1492, 1521 (1999). Truman technically deployed military force before the Security Council Resolutions were adopted. Fisher, *supra* note 15, at 1200; Special Message to the Congress Reporting on the Situation in Korea, 1950 PUB. PAPERS 527, 529 (July 19, 1950).

58. U.N. Charter, art. 43.

59. Truman explained: "[T]he Security Council called upon all members of the United Nations to render assistance to the United Nations in the execution of this resolution. In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support." Louis Fisher, *The Korean War: On What Legal Basis did Truman Act?*, 89 AM. J. INT'L L. 21, 32 (1995) (quoting 1950 PUB. PAPERS 491, 492).

60. Louis Fisher, *Historical Survey of the War Powers and the Use of Force*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES 22 (Gary M. Stern & Morton H. Halperin eds., 1994).

61. Of course, the U.S. primarily provided the military support, whereas other members did not. Also, in UN authorized peacekeeping operations predominant in the 1990s, not all members provided support. *See infra* Part IV.B.

62. 96 CONG. REC. 9320-23 (1950).

63. Fisher, *supra* note 15, at 1217–18. One reason may have been that the risk of war was viewed as an exigent circumstance that deployment of troops was merely precautionary. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable if not invite, measures of 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 abstract theories of law.").

64. Fisher, *supra* note 15, at 1218.

Korean War and affected the domestic milieu.⁶⁵ Members of Congress or citizens who challenged the Executive's interpretation of "communist threats" or the use of military action to confront a communist adversary could have been excoriated or subjected to Un-American Committee proceedings.⁶⁶ As an example of presidential temerity during the Red Scare, in 1951, after dispatching soldiers into combat in Korea, Truman declared he possessed unilateral authority to "send troops anywhere in the world" without congressional authorization.⁶⁷ Later Presidents were not so bold.⁶⁸ McCarthyism impacted millions of government and private sector employees for nearly ten years,⁶⁹ but was later renounced as a suppressive overreaction that chilled First Amendment rights. Accordingly, Truman's unilateralism during the Korean War should not confer precedential significance to "inherent authority" war power theorems. Later interpretations of the President's war power rarely incorporated the national embarrassment of McCarthyism. Instead, once the Executive claims a power, it may not want to relinquish that authority⁷⁰ irrespective of the context underlying the precedent that ostensibly conveyed expansionism.

B. *The Vietnam War*

Similar to the 2003 Iraq War, the congressional authorization for the Vietnam War was premised on scanty facts. The Vietnam War launched after an alleged attack in the Gulf of Tonkin⁷¹ that never occurred. The Johnson Administration conveyed false information to Congress and the American public.⁷² Louis Fisher wrote that Johnson pursued his "self-interest" by promoting a national interest with "deception, misrepresentation, distortion, gross understatements, and

65. Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. at 19–29 (forthcoming Fall 2012).

66. *Id.*

67. Harry S. Truman, The President's News Conference, PUB. PAPERS 17, 19 (Jan. 11, 1951).

68. Eisenhower entered office and sought congressional approval for military operations in the Middle East and in the Formosa Straits. Fisher, *supra* note 60, at 23.

69. Bejesky, *supra* note 65, at 19–29.

70. Barron & Lederman, *supra* note 8, at 1111.

71. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384, 384 (1964).

72. IRONS, *supra* note 46, at 187; JAMES BAMFORD, BODY OF SECRETS 299 (2001); Damrosch, *supra* note 21, at 1409.

outright lies.”⁷³ In a statement to Congress near the end of the Vietnam War, Senator Fulbright remarked: “Insofar as the consent of this body is said to derive from the Gulf of Tonkin Resolution, it can only be said that the resolution, like any other contract based on misrepresentation, in my opinion, is null and void.”⁷⁴ Congress repealed the Gulf of Tonkin Resolution in January 1971,⁷⁵ but the Vietnam War had already prolonged for seven years. During this time, Americans demarcated between those who staunchly supported U.S. soldiers fighting communism in Asia,⁷⁶ and those who dissented against the draft and accentuated that the Vietnamese people had been embroiled in a long liberation movement to end French colonialism.⁷⁷

Nonetheless, prior to the end of the Vietnam War the U.S. executed bombing campaigns and launched a ground troop invasion into Cambodia in the spring of 1970.⁷⁸ When Nixon was later queried over his failure to apprise Congress of the bombing operations, he claimed Congress had no “right or need to know.”⁷⁹ Assistant

73. Fisher, *supra* note 15, at 1210 (citing TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963–1964, at 88, 95, 213–14, 370, 380 (Michael R. Beschloss ed., 1997); 110 CONG. REC. 18, 549 (1964) (statement by Rep. Fascell); H.R. MCMASTER, DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEF OF STAFF, AND THE LIES THAT LED TO VIETNAM 330, 333–34 (1997)).

74. Damrosch, *supra* note 21, at 1409; JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 19–20 (1993).

75. Cooper-Church Amendment, Pub. L. No. 91-652, 84 Stat. 1942 (1971); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 486 (2011).

76. BAMFORD, *supra* note 72, at 330–31 (Pentagon officials discussed how they would deceive the media); *Vietnam War*, GlobalSecurity.org, <http://www.globalsecurity.org/military/ops/vietnam2.htm> (last visited Oct. 14, 2012) (contending that the “overarching geopolitical aim behind the United State’s involvement in Vietnam was to contain the spread of communism in Southeast Asia”).

77. Senator Mike Gravel, *Ending the Moral Crisis of the Vietnam War*, at 3, Symposium on the Thirtieth Anniversary of the Pentagon Papers, National Press Club (June 5, 2001), available at <http://www.mikegravel.us/files/vietnam.pdf> (noting that Ho Chi Minh “directed repeated appeals to Washington” to intervene against French colonial rule, but “[b]y 1950, Washington had revealed . . . all-out support of French colonial interests, in direct violation of its commitment to self-determination). Expenditures may have been instrumental to President Nixon’s failure to comply with the IMF Gold Standard in 1971. See IRONS, *supra* note 46, at 183; M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 745 (2008); Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT’L L. 91, 152 n.414 (2012) (U.S. expenditures rose from an estimated \$10 billion to \$150 billion in actual expenditures).

78. IRONS, *supra* note 46, at 192; IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 193 (Jeremy Brecher, Jill Cutler & Brendan Smith eds., 2005).

79. 34 CONG. Q. WEEKLY REP. 2299 (1973).

Attorney General William Rehnquist wrote a memorandum to Nixon and opined that the Vietnam War could legally encroach into Cambodia as a means of self-defense for US troops.⁸⁰ Rehnquist explained that “by crossing the Cambodian border to attack sanctuaries used by the enemy, the United States has in no sense gone to war with Cambodia.”⁸¹ Congress disagreed after learning of incursions into contiguous countries and sought to prevent “the introduction of American ground combat troops into Laos or Thailand” in the Department of Defense Appropriations Act of 1970,⁸² and to thwart incursions into Cambodia in the Special Foreign Assistance Act of 1971.⁸³

The 1971 Act stated that “none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisors to or for Cambodian military forces in Cambodia.”⁸⁴ In April 1973, members of Congress brought suit to discontinue bombing operations. The lower federal courts issued an injunction to halt the bombing, claiming Nixon acted unconstitutionally in expanding the Vietnam War, but four months later the U.S. Supreme Court held that the case involved an unreviewable political question.⁸⁵

C. Result: The War Powers Resolution

In response to negative public sentiment over the Vietnam War and actions in Cambodia, Congress adopted the WPR in 1973, which ostensibly cramped perceptions of presidential discretion in the use of

80. IN THE NAME OF DEMOCRACY, *supra* note 78, at 193–94; Tiefer, *supra* note 13, at 309.

81. IN THE NAME OF DEMOCRACY, *supra* note 78, at 194.

82. Department of Defense Appropriations Act of 1970, Pub. L. 91-171, § 643, 83 Stat. 469, 487 (1969); Department of Defense Appropriations Act of 1972, Pub. L. 92-204, § 742, 85 Stat. 716, 735 (continuing prohibition) (1971).

83. Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 7(a), 84 Stat. 1942, 1943 (1971).

84. *Id.*; Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 916 (1994) (arguing that the action was a “tactical necessity for the Cambodian border incursion” that Congress could not restrict).

85. *Holtzman v. Schlesinger*, 414 U.S. 1321, 1321–22 (1973). In vacating the preceding reapplication to vacate stay, Justice Douglas noted that he was not passing judgment on the constitutionality of the bombing in Cambodia, but that death is irrevocable and denial of the application would catapult airmen and Cambodian peasants into the death zone. *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319–20 (1973).

force.⁸⁶ Nixon vetoed the Resolution, but the veto was significantly overridden and became law.⁸⁷ Senator Eagleton explained: “We in Congress were frustrated with our failure to override eight successive Presidential vetoes, and, considering the tremendous pressures then created by the Watergate scandal, it is understandable how this Congress overrode President Nixon’s war power veto.”⁸⁸

Section 2(a) of the WPR states that the “purpose of this joint resolution is to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities”⁸⁹ Section 2(b) reminds that “Congress shall have the power to make all laws necessary and proper for carrying [the Resolution’s applicability] into execution”⁹⁰ Section 2(c) points out that the President, as Commander in Chief, can only introduce “United States Armed Forces into hostilities” in three circumstances—(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”⁹¹ These three circumstances are authoritatively accordant with the consensus opinion on the allocation of constitutional war powers prior to the Korean War.⁹² The WPR merely reiterated 150 years of consensus, notably by emphasizing that Congress’s province over using force is unconstrained by semantic interpretations of the term “war.”⁹³ The WPR expressed the intention intrinsic to “declaring war” and other provisions in the Constitution by assuring national interest is represented when the U.S. uses force against another country and when U.S. soldiers face potential harm.

86. Sudha Setty, *The President’s Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL L.J. PUB. POL’Y 247, 254 (2008) (other measures included an independent counsel framework, fortifying the power of the General Accounting Office, and passing the Freedom of Information Act).

87. 119 CONG. REC. 36, 198 (1973) (75–18 Senate vote); *id.* at 36, 221 (284-to-135 House vote).

88. J. Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U. L.J. 57, 61 (2007) (citing *A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings before the S. Comm. on Foreign Relations*, 95th Cong. 4–5 (1977)).

89. WPR, *supra* note 9, § 2(a).

90. *Id.* § 2(b).

91. *Id.* § 2(c).

92. Bejesky, *supra* note 12.

93. *Id.*

Many Presidents have preferred not to outright accede that the Resolution may impose restrictions on military actions that the Executive would elect to take unilaterally, and as implicit in the commander-in-chief authority.⁹⁴ But there is division over the level of compliance. Some scholars advance that Presidents have ignored and violated the Resolution,⁹⁵ and others disagree and maintain that Presidents have respected the provisions.⁹⁶ Petitioners challenged certain sections of the WPR as unconstitutional,⁹⁷ but Courts have refused to consider these cases.⁹⁸ Perhaps section 5(b) is the most controversial, but Presidents have largely complied with the provision's constraints.⁹⁹ Section 5(b) states:

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States

94. John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1664 (2002).

95. See Richard F. Grimmett, Cong. Research Service, *War Powers Resolution: Presidential Compliance 2* (2004), available at <http://www.fas.org/man/crs/IB81050.pdf>; ELY, *supra* note 74, at 61; MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 103–07 (1990); BARBARA HINKLEY, LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS 99 (1994); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988); Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1065–66 (2005) (every president since Nixon violated it); Gary Minda, *Congressional Authorization and Deauthorization of War: Lessons From the Vietnam War*, 53 WAYNE L. REV. 943, 984 (2007) (“the War Powers Resolution has largely been ignored”); Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330 (1984); Martin Wald, Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407 (1984).

96. See Ronald Reagan, Statement on Signing the Multinational Force in Lebanon Resolution, 2 PUB. PAPERS 1444–45 (Oct. 12, 1983) (Reagan complied with restrictions of the WPR, but also noted that the WPR “cannot cede any of the authority vested in me.”); Geoffrey Corn, *Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality*, 14 LEWIS & CLARK L. REV. 687, 688–89 (2010) (“Although no President has ever acknowledged the constitutionality of the law, all have endeavored to act ‘consistent with’ its notification and consultation requirements.”); Michael Benjamin Weiner, *A Paper Tiger with Bite: A Defense of the War Powers Resolution*, 40 VAND. J. TRANSNAT’L L. 861, 863 (2007).

97. Carter, *supra* note 95, at 101.

98. *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

99. Barron & Lederman, *supra* note 8, at 1071 n.529 (2008) (“[I]t is often asserted that every President since Nixon has agreed that section 5(b) of the WPR is unconstitutional,” but the “historical picture is much more complicated and equivocal.”).

Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.¹⁰⁰

Section 5(b) references section 4(a)(1), which specifies the conditions that require the Executive to terminate the use of force (which are also the conditions for which a report was presumably submitted 60 days earlier): “In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”¹⁰¹ Given the historical consensus on war powers sharing between the President and Congress under the Constitution, section 5(b) should not elicit too much dismay.¹⁰² The provision seeks to address military missions that Congress has not officially authorized, but has involved hostilities or is likely to involve combat. It merely reaffirms Congress’s authority to authorize or curtail hostilities, including conflict that may erupt but may not have been anticipated at the time the military was deployed.

There are examples of situations where WPR applicability is ambiguous, and force might be employed in a manner inconsistent with constitutional war powers and jurisprudence. Suppose a President reasonably perceives that no “imminent involvement in hostilities is clearly indicated by the circumstances”¹⁰³ and deploys soldiers outside U.S. borders. The WPR is not applicable. However, if unanticipated confrontation erupts or potential hostilities become apparent, the President must provide official notice of: “(A) the circumstances necessitating the introduction of United States Armed

100. WPR, *supra* note 9, at § 5(b).

101. *Id.* at § 4(a)(1).

102. *See supra* Parts II.A–B.

103. WPR, *supra* note 9, at § 2(a).

Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.”¹⁰⁴ From this perspective of an unexpected small-scale hostility, one might contend the WPR could open a limited exception for a President to unilaterally deploy force for short periods even if Congress would have disagreed with the circumstances under which the soldiers were originally deployed.

Suppose a President interprets the WPR time frame as granting discretion in war-making, or views a factual circumstance as endowing a residual authority to exercise a commander-in-chief mission short of “war.” Technically, when observing the original intent formulation recounted in Part II(A), the President only has the enumerated power of the Commander in Chief within the confines of Congress’s grant of authority for a specific mission, and as military caretaker during peacetime.¹⁰⁵ Nonetheless, if Congress has not authorized a military action, an Executive might construe the WPR to effectively smuggle in a tenebrous use of military force prior to Congress expressly prohibiting bombing, missile strikes, or skirmishes.¹⁰⁶ However, no clause in the WPR grants the Executive a unilateral right to use force. The Executive must have a declaration of war, an authorization from Congress, act in defense of the nation, or consult with Congress to attain an informal assent for deploying the military into potential hostilities prior to an official vote.¹⁰⁷ Further, the President is required to specify the authority for military actions under all of these possibilities.¹⁰⁸

Many scenarios could conceivably result in commencing a use of force without proper authorization, but the straightforward restriction is that Armed Forces cannot be used for longer than 60–90 days unless Congress proactively grants authority.¹⁰⁹ Also, the WPR does not prevent Congress from immediately demanding that U.S. soldiers be withdrawn, which is specified in section 5(c). The WPR does not provide any affirmative right to the Executive to keep soldiers in combat through the 60–90 day time frame, but instead is a built-in

104. *Id.* at §§ 2(a), 4(a)(3).

105. *See supra* Parts II.A–B.

106. *Youngstown*, 343 U.S. at 637. A unilateral action with potential WPR applicability might be analogized to Justice Jackson’s “Zone of Twilight” from *Youngstown*. *Id.* at 637 (Jackson, J., concurring).

107. WPR, *supra* note 9, at §§ 2(c), 3, 4(a).

108. *Id.*

109. *Id.* at § 5(b).

restriction that automatically mandates that military forces be withdrawn once the time frame runs.¹¹⁰ If Congress did nothing before the period expired, the President would lack authority in the military conflict in question.¹¹¹

Granted, the WPR could provide utility in responding to exigencies that require limited force for national security. What if there is unmistakable knowledge of a perilous weapon production facility in a foreign country and rapid action from a covert strike force on the ground is required? Hostilities may not clearly be anticipated if the mission remains clandestine. Congressional authorization would compromise the mission or be tardy to prevent a conceivably disastrous consequence. Alternatively, this mission might be authorized under WPR section 2(c) or, more likely, would be executed as a covert action outside of the WPR, which still requires notice to congressional leadership.¹¹² Advancing limited exceptions of presidential unilateralism amid alleged urgency creates three problems: it mandates layering contingencies; has potential to be unreasonably applied; and reeks of the same genre of arguments that were recently employed to countenance abusive interrogation methods to attain intelligence to defuse suppositious terror threats.

Second, suppose there is a possible humanitarian protection mission. Perhaps national security is not clearly invoked and justifications for U.S. intervention depend on the gravity of the situation, probability of potential harm to the vulnerable population, size of deployment, and dangerousness of the mission to the U.S. military. To what extent must there be congressional debate and approval? What if the President does not provide official, detailed notice, but engages in informal discussions with amenable select members of Congress; no humanitarian disaster erupted; and what was expected to be a deployment that could involve minor combat

110. *Id.* at § 5(b).

111. *Id.*

112. According to the National Security Act of 1947, the president can authorize a covert action when “such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States, which determination shall be set forth in a finding.” 50 U.S.C. § 413(b) (2010). If the president decides a “covert action” affecting “extraordinary circumstances affecting vital interests” of the U.S., a phrase never defined, he need only report to the “Gang of Eight,”—the chair and ranking members of the two congressional intelligence committees and the House and Senate majority and minority leaders. Alfred Cumming, *Statutory Procedures Under Which Congress Is To Be Informed of US Intelligence Activities, Including Covert Actions*, Cong. Res. Serv., 6–7, Jan. 18, 2006, available at <http://www.fas.org/sgp/crs/intel/m011806.pdf>.

turns into substantial hostilities? Congress has preempted the field for this contingency with the WPR and the President is without authority even if the President contends there were unexpected events after the initial deployment. The WPR put the President on notice before deployments were issued.

In short, since the WPR applies anytime armed forces are introduced into “hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,”¹¹³ the lack of conflict since the WPR was adopted, particularly of an intense and prolonged nature, may evince compliance with section 5(b). Also, the 1991 Gulf War, the 2001 invasion of Afghanistan, and the 2003 Iraq War were the first large-scale deployments of troops into hostilities since the Vietnam War and they were authorized by Congress.¹¹⁴ The fallout from the Vietnam War and the adoption of the WPR ostensibly impelled an abrupt reversal in presidential perceptions about unilateral action. Professors Barron and Lederman wrote:

In the wake of the Watergate revelations, Nixon’s impeachment, and the public outrage over President Ford’s pardon of the disgraced former president, President Carter took office in a context notably hostile toward claims of unchecked executive authority. Not surprisingly, the Carter Administration’s approach to preclusive war powers did not seek to capitalize on the ground that had been laid by the Truman, Nixon, and Ford Administrations. Instead, Carter appeared to push in the opposite direction.¹¹⁵

IV. MOMENTARY INTERVENTIONS

A. *Ronald Reagan and George H.W. Bush*

High-tech weaponry and military prowess, particularly when applied in confrontations involving drastic power disparity, produced new dimensions for U.S. armed conflict during the 1980s. But those operations were dissimilar from actions entailing express congressional approval. Operations involving nominal U.S. soldier

113. WPR, *supra* note 9, at § 2(a).

114. *See* Damrosch, *supra* note 21, at 1408.

115. Barron & Lederman, *supra* note 8, at 1077.

risk can be labeled “momentary interventions,” while Iraq and Afghanistan can be deemed “limited wars.”¹¹⁶ Iraq and Afghanistan did involve express congressional assent, while momentary interventions without clear congressional assent seem to implicitly rely on precedent instigated by actions such as the unauthorized bombing of Cambodia, and the unilaterally ordered involvement in the Korean War.¹¹⁷ Moreover, transitory interventions are delimited by perceptions of the time frame window in section 5(b) of the WPR. New operations that potentially lacked clear congressional approval under the terms of constitutional war powers include President Reagan’s troop dispatch to Grenada (1983) and air strikes against Libya (1986), President Bush’s invasion of Panama (1989), President Clinton’s bombing of Yugoslavia with NATO (1999),¹¹⁸ and President Obama’s bombing of Libya (2011).

While Presidents Reagan and Bush had a penchant for intensifying national security secrecy prerogatives—which can further restrict Congress’s access to information—both generally adhered to the WPR.¹¹⁹ Recognizing Congress’s war powers after dispatching troops to Lebanon, Reagan reported to Congress: “In accordance with my desire that the Congress be fully informed on this matter, and consistent with the War Powers Resolution, I am hereby providing a report on the deployment and mission of these members of the United States Armed Forces.”¹²⁰ Reagan updated Congress with later reports.¹²¹ In August 1983, after two Marines were killed and

116. Ackerman & Hathaway, *supra* note 75, at 448–49.

117. Bradley & Goldsmith, *supra* note 20, at 2050.

118. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTIONALITY AND FOREIGN AFFAIRS AFTER 9/11* 12, 143 (2005); Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 *GEO. WASH. L. REV.* 89, 121 (2008); Tung Yin, *Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 965, 969–71 (2007).

119. President George H.W. Bush commingled commander-in-chief authority with secrecy when he promoted the necessity “to ensure the secrecy of information whose disclosure would threaten our national security.” Barron & Lederman, *supra* note 8, at 1085 (citing George Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, *in* 2 *PUB. PAPERS* 1448, 1449 (Nov. 3, 1989)). Bush “also objected to various statutes requiring the executive branch to disclose to Congress information about military intelligence and operations.” *Id.* at 1086.

120. Letter from President Ronald Reagan to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of U.S. Forces in Beirut, Leb. (Aug. 24, 1982), <http://www.reagan.utexas.edu/archives/speeches/1982/82482e.htm>.

121. Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 *U. PA. L. REV.* 79, 93–95 (1984); Letter from President Ronald

fourteen were wounded in Lebanon, the Reagan Administration contended that the soldiers were not involved in activities that would fall within Congress's war power authorities.¹²² On October 23, 1983, a truck bomb blew up the Marine barracks at Beirut International Airport and killed 241 soldiers.¹²³ Reagan sought consent to maintain U.S. military forces in Lebanon, and Congress enacted legislation to end the U.S. presence in Lebanon.¹²⁴ In February 1984, with 264 American military deaths, Reagan was forced to withdraw approximately 1,000 remaining U.S. Marines from Lebanon.¹²⁵

On October 25, 1983, the Reagan Administration ordered the incursion of the tiny Pacific island of Grenada; several thousand U.S. soldiers quickly surmounted the light forces on the island.¹²⁶ Reagan held discussions with members of Congress prior to the attack,¹²⁷ which may not have been bona fide "consultation" as required under section 3 of the WPR.¹²⁸ Reagan filed a report two days after invading Grenada, stating that he was exercising his authority as Commander in Chief in a manner consistent with the WPR.¹²⁹ Many

Reagan to the Speaker of the House and the President Pro Tempore of the Senate Reporting on U.S. Participation in the Multinational Force in Lebanon (Sept. 29, 1982), <http://www.reagan.utexas.edu/archives/speeches/1982/92982e.htm>.

122. John H. Kelly, *Chapter 6: Lebanon: 1982-1984*, in U.S. AND RUSSIAN POLICYMAKING WITH RESPECT TO THE USE OF FORCE 85, 101 (Jeremy Azrael & Emil A. Payin eds., Rand Corp. 1996) available at http://www.rand.org/pubs/conf_proceedings/CF129/CF-129.chapter6.html.

123. *Id.*

124. *Id.* at 102; Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 2(b), 97 Stat. 805, 805 (1983); Vance, *supra* note 121, at 95.

125. Richard F. Grimmett, *Foreign Policy Roles of the President and Congress*, U.S. Dept. of State (June 1, 1999), <http://fpc.state.gov/fpc/6172.htm>; Stuart Taylor Jr., *Questions Raised Again on Reagan's Limits Under War Powers Act*, N.Y. TIMES Oct. 24, 1983, at A8, available at <http://www.nytimes.com/1983/10/24/world/questions-raised-again-on-reagan-s-limits-under-war-powers-act.html>; *1984: US troops withdraw from Beirut*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/february/26/newsid_4153000/4153013.stm (last visited Oct. 1, 2012).

126. NOAM CHOMSKY, HEGEMONY OR SURVIVAL 116 (2003); *Grenada: Collective Action by the Caribbean Peace Force*, 83 DEP'T ST. BULL. 67 (1983).

127. FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 258-59 (1986).

128. WPR, *supra* note 9, § 3.

129. 129 CONG. REC. 29, 832 (1983); President Ronald Reagan, *Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Forces in Grenada*, Oct. 25, 1983, <http://www.reagan.utexas.edu/archives/speeches/1983/102583e.htm>; Vance, *supra* note 121, at 89-90.

members of Congress dubbed the assault illegal and unapproved, and filed suit to deem the action unconstitutional.¹³⁰ However, before Congress was able to react with legislation and before the court could address the issue, the controversy ended and troops were removed.¹³¹

In justifying the invasion, the White House maintained that the island was inundated by political instability, a deterioration of law and order, and a propagating communist threat.¹³² Reagan also contended the invasion was necessary to rescue U.S. citizens attending St. George's School of Medicine, and approximately one thousand American residents and tourists.¹³³ Public approval of the action rose, perhaps partially due to medical students applauding the offensive and expressing gratitude for being "rescued."¹³⁴ Reagan addressed the nation on October 27, 1983, and merged the issues of the invasion of Grenada and U.S. Marines deployed in Lebanon as signals of an expanding Soviet threat.¹³⁵ The UN General Assembly condemned the U.S. intervention as illegal by a 108-9-27 vote.¹³⁶

In 1985, Reagan declared an emergency and alerted Congress that Nicaragua's Sandinista government was a state sponsor of terror, capable of launching hemispheric-wide communist revolutions, and an "unusual and extraordinary" security threat since Nicaragua was a

130. Richard F. Grimmett, *The War Powers Resolution: After Thirty-Six Years* 15, CRS REPORT FOR CONGRESS (Apr. 30, 2010), <http://www.fas.org/sfp/crs/natsec/R41199.pdf>.

131. *Id.*

132. IRONS, *supra* note 46, at 202 (apparently there were growing ideological ties to Cuba); David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 53 (2006) (When journalists were finally permitted access two days later and when conflict was over they were escorted to locations that gave the appearance of Soviet involvement in Grenada.); Gary Williams, *Prelude to an Intervention: Grenada*, 29 J. LATIN AM. STUD. 131, 131-32 (1983).

133. IRONS, *supra* note 46, at 202; WORMUTH & FIRMAGE, *supra* note 127, at 257-58; Mandel, *supra* note 50, at 797-98; President Ronald Reagan, Address to the Nation on Events in Lebanon and Grenada (Oct. 27, 1983), *available at* <http://www.reagan.utexas.edu/archives/speeches/1983/102783b.htm>.

134. Frank Newport, Jeffrey M. Jones & Lydia Saad, *Ronald Reagan From the People's Perspective: A Gallup Poll Review*, GALLUP (June 7, 2004), <http://www.gallup.com/poll/11887/Ronald-Reagan-From-Peoples-Perspective-Gallup-Poll-Review.aspx>; Robert McFadden, *From Rescued Students, Gratitude and Praise*, N.Y. TIMES, Oct. 28, 1983, at A1.

135. President Ronald Reagan, *supra* note 133.

136. G.A. Res. 38/7, ¶ 1, U.N. Doc. A/RES/38/7 (Nov. 2, 1983); Michael Byers & Simon Chesterman, "You, the People": *Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 271, 273 n.66 (Gregory H. Fox & Brad R. Roth eds., 2000).

two-day drive from the U.S. border.¹³⁷ The International Court of Justice (ICJ) ruled that Reagan's several-year covert CIA operations that organized, trained, financed, and supplied Contra insurgents to overthrow the democratically-elected Nicaraguan government was a violation of international law.¹³⁸ Consequently, Reagan withdrew the U.S. from the ICJ's contentious jurisdiction to avoid being mandatorily hailed before the court.¹³⁹

As for the domestic level repercussion, Professor Harold H. Koh called Iran-Contra "the tip of a much larger iceberg that crystallized during the Vietnam War . . . [and that] exposed systemic" problems in American foreign policy and deficiencies in legal frameworks recently enacted by Congress to oversee the Executive.¹⁴⁰ Investigations revealed that the Nicaraguan Contras were apparently involved in drug trafficking¹⁴¹ and severe suppression of civilian opposition.¹⁴² Colonel Oliver North testified about the Reagan Administration's covert support for the Contras, admitted that he "misled the Congress" about that assistance, and contended "I still to this day, counsel, don't see anything wrong with taking the Ayatollah's money and sending it to support the Nicaraguan freedom fighters."¹⁴³ President Reagan avoided serious backlash by "claiming

137. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 70 (June 27); CHOMSKY, *supra* note 126, at 96-99; Kevin M. Kearney, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 285-86 (1987); see generally Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT'L L.J. 15 (2001) (discussing chronology of events from the Nicaraguan legal team's perspective and criticizing Reagan administration).

138. Military and Paramilitary Activities, *supra* note 137, at 251-52 (Oda, J., dissenting).

139. Symposium, *A New Legal Frontier in the Fight Against Global Warming: Panel II*, 16 FORDHAM ENVTL. L. REV. 335, 346 (2005).

140. HAROLD HONJU KO, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 62 (1990).

141. 144 CONG. REC., H2954-56 (May 7, 1998); 144 CONG. REC., H5847-96 (July 17, 1998) ("CIA Admits Ties to Contra Drug Dealers"); GREG GRANDIN, EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM 115 (2006) (citing government investigations).

142. SAM DILLON, COMMANDOS: THE CIA AND NICARAGUA'S CONTRA REBELS 194-201 (1991); *Dems Ignore Negroponte's Death Squad Past, Look to Confirm Iraq Appointment*, DEMOCRACY NOW! (Apr. 28, 2004), http://www.democracynow.org/2004/4/28/dems_ignore_negropontes_death_squad_past.

143. *Iran-Contra Hearings; Day 2: The President's Knowledge and the Ayatollah's Money*, N.Y. TIMES, July 9, 1987, <http://www.nytimes.com/1987/07/09/world/iran-contra-hearings-day-2-the-president-s-knowledge-and-the-ayatollah-s-money.html?scp=1&sq=Iran-Contra+Hearings%3B+Day+2%3A+The+President%E2%80%99s+Knowledge+and+the+Ayatollah%E2%80%99s+Money%2C+N.Y.+TIMES%2C+July+9%2C+1987&st=cse&pagewante>

ignorance.”¹⁴⁴ Thus, although the Reagan Administration provided financial and military assistance to a long-term foreign hostility, it did not implicate the WPR because this assistance evidently did not entangle U.S. military soldiers in combat. However, the financial assistance did violate congressional appropriations restrictions, which triggered a criminal investigation.

President Bush sought authorization from Congress that was congruous with WPR requirements before taking action in the 1991 Gulf War, and before deploying troops to Somalia.¹⁴⁵ Bush notified congressional leaders prior to the invasion of Panama in 1989 even though Congress was not in session.¹⁴⁶ However, the action was assuredly unsurprising given the media coverage. Possible actions against President Noriega were front page news stories for months prior to the action, and included crazy episodes of officials leaking “covert” operations against Noriega to the press and newspapers choosing to publicize the operations prior to execution.¹⁴⁷ It also seems unusual to regard Panama as an invasion when the U.S. military had stationed between 10,000 and 60,000 troops at fourteen bases in Panama since World War II.¹⁴⁸ The House passed a resolution in support of the invasion with a 389-to-26 vote.¹⁴⁹

B. CNN Effect

Scholars contend that global news operations have impelled leaders to deploy force for momentary interventions. Policymakers react to television news and evolving populace perceptions influenced by media operations: “television coverage, primarily of horrific humanitarian disasters . . . forces policy makers to take actions they

d=all; Eric Lane, Frederick A.O. Schwarz, Jr., & Emily Berman, *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737, 766 (2010) (“Under the direction of Colonel Oliver North, this organization was committed—in direct violation of the Boland Amendments, laws barring U.S. government assistance to the rebel guerilla group known as the Contras in Nicaragua—to helping the Contras undermine the Nicaraguan government.”).

144. Lane, Schwarz & Berman, *supra* note 143, at 766.

145. Lori Fidler Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125, 130–31 (2000).

146. Grimmett, *supra* note 130, at 18–19.

147. Eytan Gilboa, *The Panama Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era*, 110 POL. SCI. Q. 539, 551 (1995) (citing WASH. POST, July 29, 1988).

148. Bejesky, *supra* note 49, at 56.

149. LOUIS FISHER, PRESIDENTIAL WAR POWER 166–67 (2d ed. 2004).

otherwise would not have taken, such as military intervention.”¹⁵⁰ Gow and Holbrooke stated that “the CNN effect . . . is believed to have directed the political agenda in Western Europe and North America toward peacekeeping operations in Iraq, Bosnia, Haiti, Rwanda, and Somalia.”¹⁵¹ In terms of whether the U.S. Congress formally authorizes action, if the media instills a cognitive impact on the populace that endorses an action and the President orders a military operation without congressional approval, perhaps it becomes more taxing for Congress to later convincingly object due to solid populace approval for the military involvement. Moreover, the circumstances generating military engagement were no secret to Congress because the foreign affair pervaded the news. While this process is certainly not a constitutional doctrine and exhorts apprehensions over whether the White House aroused the news coverage with agenda setting, or whether media outlets appropriately accentuate the events, one might construe that the network news effect could engender an informal populace sanction for a minor use of force. Nonetheless, these operations were limited and there was still often formal or informal Executive consultation with Congress.

The global community was concerned about Somalia. A Security Council Resolution called for humanitarian intervention.¹⁵² The news broadcasted poor people and suffering children in Somalia, which aroused public support of military involvement even without clear national security interests at stake.¹⁵³ Clinton met with both Republican and Democratic congressional leaders regarding the use of U.S. forces in Somalia.¹⁵⁴ The President and congressional leaders agreed that U.S. soldiers could only be used for limited combat and to

150. Eytan Gilboa, *Searching for a Theory of Public Diplomacy*, 616 ANNALS 55, 63 (2008) (the American press was instrumental in goading revolution against the British and forming the country); MICHAEL S. SWEENEY, *THE MILITARY AND THE PRESS: AN UNEASY TRUCE* 7–9 (2006).

151. Sophie Clavier & Laurent El Ghaoui, *Marketing War Policies: The Role of the Media in Constructing Legitimacy*, 19 KAN. J.L. & PUB. POL’Y 212, 225–26 (2010); *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (Justice Jackson may have eluded to such a possibility when he stated that the president’s power in the zone of twilight is “likely to depend on the imperatives of events.”). However, he was likely referring to more localized emergencies.

152. Lori Fisler Damrosch, *Agora: The 1994 U.S. Action in Haiti: The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT’L L. 58, 63–65 (1995).

153. PETER HUCHTHAUSEN, *AMERICA’S SPLENDID LITTLE WARS: A SHORT HISTORY OF U.S. ENGAGEMENTS FROM THE FALL OF SAIGON TO BAGHDAD* 167 (2003).

154. Mandel, *supra* note 50, at 800–01.

support UN peacekeepers, and that all forces would need to be withdrawn by March 1994.¹⁵⁵ U.S. soldiers were involved in minor melees with militias.¹⁵⁶

In September 1991, the Haitian military led a coup that deposed the civilian government, and Clinton deployed the Navy to enforce a Security Council-approved embargo.¹⁵⁷ To reinstall the civilian government in 1994, Clinton deployed over twenty thousand U.S. troops to Haiti for security and policing operations that would involve minimal combat.¹⁵⁸ The Senate and the House passed a resolution which stated that “the President should have sought and welcomed Congressional approval before deploying United States Armed Forces to Haiti . . . Congress supports a prompt and orderly withdrawal of all United States Armed Forces from Haiti as soon as possible.”¹⁵⁹ Assistant Attorney General Walter Dellinger believed that Clinton’s actions were Constitutional because the WPR permits unilateral deployments for national emergencies, and deployments to Haiti were not to a traditional “war.”¹⁶⁰

Gareth Evans, former Australian Foreign Minister, explained the preexisting humanitarian context to respond to Kosovo: “[W]e had the debacle of the intervention in Somalia in 1993, the pathetically inadequate response to the genocide in Rwanda in 1994, the lamentable failure to prevent murderous ethnic cleaning in the Balkans”¹⁶¹ There were reports of hundreds of thousands of human rights violations and ethnic cleansing in Bosnia and throughout the former Yugoslavia during the 1990s.¹⁶² For Kosovo,

155. *Id.*

156. HUCHTHAUSEN, *supra* note 153, at 167.

157. Mandel, *supra* note 50, at 803–04.

158. Larry Rohter, *Clinton, in Haiti, Marks the Withdrawal of G.I. 's*, N.Y. TIMES, Apr. 1, 1995, <http://www.nytimes.com/1995/04/01/world/clinton-in-haiti-marks-the-withdrawal-of-gi-s.html>.

159. Pub. L. No. 103-423, § 1(b)(e), Oct. 25, 1994, 108 Stat. 4358, <http://codes.lp.findlaw.com/uscode/50/33/1541/notes>.

160. Rachael Ward Saltzman, Note, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 457 (2010).

161. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 706 (2006).

162. Christopher C. Joyner, “*The Responsibility to Protect*”: *Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 695, 699 (2007). With Yugoslavia, the dangers of potential ethnic cleansing were reported all over the news. *See, e.g.*, Judith Miller, *Crisis in the Balkans: The Evidence; U.N. Finds Proof of 'Ethnic Cleansing' in Kosovo*, N.Y. TIMES, June 3, 1999, <http://www.nytimes.com/1999/06/03/world/crisis-in-the-balkans-the-evidence-un-finds-proof->

human rights abuses were on the international diplomatic agenda and news, and heightened public sensibility seemed to endorse action to prevent a possible humanitarian calamity.¹⁶³

In 1999, President Clinton initiated bombing operations on Yugoslavia, and provided an informational report, consistent with the WPR requirements, prior to the action and continued to impart congressional updates during seventy-nine days of bombing operations.¹⁶⁴ Clinton justified his immediate authority for action on NATO deliberations.¹⁶⁵ In *Campbell v. Clinton*, plaintiffs contended that the President's orders were unconstitutional, but the court held that the case was nonjusticiable because the plaintiffs lacked standing.¹⁶⁶ Members of Congress provided a barrage of diverse positions both on the bombing and on entry of troops,¹⁶⁷ but the Senate later approved the airstrikes via resolution,¹⁶⁸ and there was a 213-to-213 vote in the House of Representatives.¹⁶⁹

President Clinton asserted interpretive flexibility in deploying

of-ethnic-cleansing-in-kosovo.html?src=pm.

163. Amnesty Int'l, *Kosovo: A Decade of Unheeded Warnings*, (Vol. I & II), AI Index EUR 70/39/99 & AI Index EUR 70/40/99 (March 31, 1999); Press Release, Dr. Javier Solana, Sec'y Gen., NATO, Press Statement following the Commencement of Air Operations (Mar. 24, 1999), <http://www.nato.int/docu/pr/1999/p99-041e.htm>.; Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 55 (2009) (operations against Serbia were unlikely to be perceived also as international law violations due to the surrounding circumstances); CMDR Rob McLaughlin, *An Assessment of the Authority for Australia to Use Force Under United Nations Security Council Resolutions Concerning Iraq*, 51 NAVAL L. REV. 252, 252 (2005) ("Public debate on the rights and wrongs of the Kosovo operation tended to focus upon the humanitarian imperatives, rather than the explicitly legal dimensions of that conflict.").

164. *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000); *Campbell v. Clinton*, 52 F.Supp. 2d 34, 35, 38 (D.D.C. 1999).

165. Fisher, *supra* note 15, at 1211–12, 1227–28 (citing Remarks on the Decision of Certain Health Maintenance Organizations to Opt Out of Some Medicare Markets, 2 PUB. PAPERS 1765 (Oct. 8, 1998) (Clinton stated: "Yesterday, I decided that the United States would vote to give NATO the authority to carry out military strikes against Serbia if President Milosovic continues to defy the international community."). The U.S. bombed with the authorization of NATO, but not with Security Council assent. See Michael J. Kelly, *The President Does Not Need Congressional Approval for Libya No-Fly Zone (Yet)*, JURIST, Mar. 22, 2011, <http://jurist.org/forum/2011/03/the-president-does-not-need-congressional-approval-for-libya-no-fly-zone-yet.php>. Ironically, Clinton began bombing operations on the eve of House impeachment hearings involving the Monica Lewinsky and Jennifer Flowers affairs. See R.W. Apple, Jr., *On Two Fronts: The Overview; House to Debate Impeachment Today as U.S. Continues Air Assault on Iraq*, N.Y. TIMES, Dec. 18, 1998, at A1.

166. *Campbell*, 203 F.3d at 23–24.

167. Barron & Lederman, *supra* note 8, at 1090 n.619.

168. S. Con Res. 21, 106th Cong. (1999); Mandel, *supra* note 50, at 802–03.

169. *Campbell*, 203 F.3d at 20–23.

troops for potential emergencies and peacekeeping operations when congressional legislation, the WPR, and/or military spending measures interacted with presidential discretion, since hostilities were uncertain (as with Haiti and Rwanda).¹⁷⁰ However, it appears that Clinton was much more open with Congress than his predecessors.¹⁷¹ The “CNN Effect” seemed poignant during the Clinton Administration and one might also view that the CNN Effect has been influential during the Obama Administration. Global news operations televised vivid portrayals of government abuse on protesters in Libya and Syria, ostensibly influencing American populace sentiment in foreign policy.¹⁷² However, for both Clinton and Obama, questions remain over the WPR’s applicability to bombing operations.

V. CONCLUDING ANALYSIS AND CONTEXT TO CLARIFY SECTION 5(b)

Precedent indicates that the WPR normally functions effectively and has not been considerably abused.¹⁷³ The applicability and contextual constitutionality of section 5(b) of the WPR turns on two factors. First, prior Presidents have expressly or impliedly upheld section 5(b) by observing the time limitations,¹⁷⁴ and Presidents have habitually provided notice and updates accordant with section 3.¹⁷⁵ Nonetheless, there were some actions that may have violated the WPR in minor ways. Obama’s bombing operations on Libya were similar to Clinton’s bombing operations on Yugoslavia, but the questions remain over whether those operations are within the parameters of the WPR,¹⁷⁶ and whether unilateral bombing actions are consistent with war powers in the Constitution.

Delving more deeply into that query, the second factor to consider is whether the Framers of the Constitution intended “declare

170. Barron & Lederman, *supra* note 8, at 1093–94.

171. Damrosch, *supra* note 145, at 131–32.

172. *Analysis: After Libya, eyes turn to Syrian revolt*, REUTERS (Aug. 22, 2011), <http://www.reuters.com/article/2011/08/22/us-libya-syria-idUSTRE77L5QJ20110822>.

173. Corn, *supra* note 96, at 689 (“Congress has provided express statutory authorization for all but one military campaign since 1973 exceeding [the War Powers Resolution’s] time period, [but this] has perpetuated the uncertainty related to this prior authorization provision of the law.”).

174. See Barron & Lederman, *supra* note 8, at 1070 n.529; see generally Part IV.

175. Providing information is in opposition to President Nixon’s opinion that Congress does not have a right to know of bombing operations, which substantially led to the WPR. See IN THE NAME OF DEMOCRACY, *supra* note 78 at 194–95.

176. See generally *supra* Part I; see *supra* notes 165–170.

war” or the use of force to only address the political sphere and national interest of ordering soldiers into combat, or whether they intended to include the political and legal ramifications of using force when soldiers do not need to be deployed into combat. Obviously, the Framers did contemplate military operations involving distant melees from cannons and vessels, but assuredly they did not consider stealth bombing operations or offshore battleships firing missiles with satellite navigation and targeting operations.

The WPR does not differentiate between projectiles and soldier incursions. The WPR generally applies and section 5(b) is invoked by the “use of United States Armed Forces” into hostilities that occur “[in] the territory, airspace or waters of a foreign nation.”¹⁷⁷ Armed “soldiers” do not fight in airspace and no WPR provision refers to “soldiers,” “troops,” or any synonym. If high-altitude bombs or missiles are used, but the target cannot retaliate to place U.S. Armed Forces into a hostile situation, perhaps the WPR does not apply. However, WPR inapplicability does not mean unilateral bombing operations by default comport with an Originalist or Structuralist interpretation of the language of war powers in the Constitution.¹⁷⁸

It might be reasonable for Congress to adopt an amendment to or interpretation of the WPR that clarifies whether it only applies to U.S. soldiers in combat or to the use of force generally. Otherwise, debate is apt to fester on the question of what type of conflict implicates the WPR or starts the WPR 60-to-90 day clock. In addressing this question, it is important to recognize not only that military technology has assuredly advanced since the WPR was adopted in 1973, but also the historical context that induced Congress to adopt the WPR. Symmetry might bridge the gap between axiomatic war powers interpretations and the cult of inherent authority that swelled during the so-called war on terrorism.

The WPR was missioned with confining unreasonable and unconstitutional assertions of unilateralism. Difficulties began after President Truman introduced U.S. troops into the Korean War without Congressional authorization. However, the exigencies of the moment, uncertainty in U.S. obligations under the newly-constituted United Nations Charter, and McCarthy’s Un-American committees that thwarted domestic dissent, make this case problematic to enlist as

177. WPR, *supra* note 9, at §§ 2(a), 4(a)(2), 5(b).

178. Bejesky, *supra* note 12.

precedent to expand presidential war power authority. Prior to the Korean War, there was consensus—the Commander in Chief has domain to direct U.S. soldiers into battle, while the President’s authority is activated, parameterized, and delineated by Congress.¹⁷⁹ The Commander in Chief should not exceed that delegation of authority and is required to adhere to congressional mandates even after the military conflict begins.¹⁸⁰ This debate surfaced following the Civil War, which was arguably the most expansive exercise of unsanctioned commander-in-chief action prior to the Korean War.¹⁸¹ In 1862, and during Civil War debates, Senator Howard offered what was then the consensus about war powers and the prevailing position in the legislation at issue.¹⁸² Howard stated:

Should the President, as Commander-in-Chief, undertake an absurd and impracticable expedition against the enemy, one plainly destructive of the national interests and leading to irretrievable disaster . . . would the Senator rise in his seat here and insist that Congress has no power to interpose by legislation and prevent the folly and the crime? [Responding to Senators advocating executive discretion for confiscating enemy property and plenary authority over military direction] And yet his doctrines as here announced would impel him to exclaim, ‘the country is without remedy; Congress is powerless . . . It is the will of the Commander-in-Chief . . . Sir, this new heresy deserves rebuke.’¹⁸³

After the Korean War, Presidents asserted more war powers authority, but Congress also produced restrictive statutes, including those that regulated the conduct of ongoing campaigns.¹⁸⁴ Legislative measures corralled Executive war powers, and “the Supreme Court has never held that any statutory limitations on substantive executive war powers have constitutionally infringed the core prerogatives of

179. *Id.*

180. *Id.*

181. *The Prize Cases*, 67 U.S. 635, 669 (1862) (Congress provided no formal declaration of war, but it was a state of war that “all the world acknowledges to be the greatest civil war known in the history of the human race.”).

182. Cong. Globe, 37th Cong., 2d Sess. 3006 (1862) (only three Senators opposed the legislation).

183. Cong. Globe, 37th Cong., 2d Sess. 2969 (1862).

184. Barron & Lederman, *supra* note 8, at 1098–99.

the Commander in Chief.”¹⁸⁵ Alternatively, the Supreme Court has invalidated many presidential wartime acts “precisely because they lacked congressional authorization.”¹⁸⁶

Since the 1980s, high-tech weaponry and power disparity extended U.S. capability of employing force with lessened expectation of U.S. casualties; while during the 1990s global media operations broadcasted humanitarian catastrophes to stir populist sentiment to intervene in foreign humanitarian misfortune. Unless Congress is given an opportunity to exercise official war power authority prior to hostilities that may involve minor conflict or distant bombing operations, these instances could be viewed as compelled Congressional acquiescence.¹⁸⁷ Apparent transgressions may open new positions that are based more on rhetoric than fact,¹⁸⁸ but most examples seem to comport with the unofficial political practice between the Executive and Congress that permits the President to dispatch soldiers without congressional approval when there is no serious risk of hostility.¹⁸⁹

The precedent is limited since there have only been a handful of questionable cases since 1973, in which Congress did not grant authority before soldiers were dispatched and did eventually engage in hostilities. On the other hand, there are regularly occurring events around the world in which presidents might have wanted to dispatch U.S. troops but did not, which gives rise to arguments of selection bias compared against a broader pool of potential cases. Perhaps this is evidence that presidents implicitly understand that congressional assent is required before ordering the use of military force.

The greater danger of unreasonable and unsanctioned use of military force lies in the President offering spurious information to Congress, and Congress relying on falsities to activate war powers. This was the case with the Gulf of Tonkin Resolution for the Vietnam

185. *Id.* at 1106.

186. Bradley & Goldsmith, *supra* note 20, at 2051.

187. Corn, *supra* note 96, at 712.

188. Barron & Lederman, *supra* note 54, at 712 (The “likelihood that future Presidents will find such arguments attractive [for expansive or preclusive war powers] increases to the extent they are viewed as flowing from a longstanding legal tradition that accepts substantial and infeasible executive discretion in the conduct of war. After all, aggressive claims to executive power left unchallenged have a history of begetting future and more aggressive claims.”).

189. Barron & Lederman, *supra* note 8, at 1057.

War in 1964 and the Iraq War in 2003.¹⁹⁰ Authority in the September 2001 AUMF was also stretched beyond responding to abettors to 9/11 by the Executive's national security prerogatives and interpretation of classified information.¹⁹¹ The critical nature of Congress needing to be properly informed is codified in the WPR.¹⁹² Congress's ability to act as a voice for the American people and the U.S. military is dependent on possessing accurate data, and the existence of a mass media that will refresh memories over the language of particular war power authorizations.¹⁹³ If a President repeatedly urges wartime and security threat atmospheres, and the media broadcast allegations without effectively checking the Executive, the current political landscape may self-perpetuate and potentially permit unilateralism.¹⁹⁴

190. Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 811–82, 875–82 (2011); Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 327–40 (2011); see *supra* Part III.B.

191. Robert Bejesky, *Cognitive Foreign Policy: Linking Al Qaeda and Iraq*, 56 HOW. L.J. 1 (2012).

192. WPR, *supra* note 9, §§ 3, 5(a).

193. Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 357–63 (2012) (the media was rather lax in the period leading to the 2003 invasion of Iraq).

194. With regard to the Iraq War, Democrats took control of Congress in 2007, and there was a more rigorous check on presidential authority, but they were still unable to end the Iraq war due to war powers disagreements. See Robert Bejesky, *Political Penumbra of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. (forthcoming Fall 2012).

