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A Positive Theory of the War Powers Constitution

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Abstract

This Article explores the division of war-making authority between the President and Congress through the prism of positive political theory. For the most part, the scholarly treatment of the war-powers debate has been normative with various commentators offering various textual or functional accounts of what the proper allocation of war-making authority should be. This Article provides a positive account of the war-making powers by focusing on the domestic political constraints that the political branches face in the context of an imminent military build-up or troop deployment. This Article assumes that the President has the exclusive ability to influence the scope of an international crisis that precedes an actual armed conflict by making public threats against foreign states. Once such public threats reach a critical threshold, however, backing down by any domestic institutional actor becomes difficult due to the presence of significant domestic audience costs. In other words, since a domestic audience is likely to punish any domestic institutional actor that attempts to back down from an escalating international crisis, neither Congress nor the courts have much of an incentive to intervene once the President decides to initiate conflict. The President thus has a significant institutional advantage in framing the domestic audience costs for going to war. Given this apparent agenda-setting advantage, however, it is puzzling as to why the President would ever seek congressional authorization before initiating international conflicts. This Article argues that the presidential decision to seek congressional authorization is determined by a two-level strategic game of domestic and international interaction. At the domestic level, once the President decides to initiate conflict, he has an incentive to seek congressional authorization as a form of political insurance if he believes that the war is going to be fairly long or costly, or if he is uncertain about the prospects of victory. At the international level, the President also has an incentive to seek congressional authorization if he is uncertain

about the outcome of the conflict and wants to send a costly signal to the foreign enemy about the country's resolve to prosecute the conflict. In sum, the ex-ante beliefs of the President regarding the outcome of a conflict and the possibility of subsequent punishment by a domestic audience ultimately determine his decision to seek congressional authorization. Finally, this Article also argues that Congress has an incentive to constrain the President's war-making agenda in the shadow of a politically unpopular war. But while the President often shapes public opinion in his war powers role, Congress tends to react to public opinion when it constrains the President's war initiatives. This Article uses historical case studies, including the 2003 invasion of Iraq, to test these theoretical arguments.

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This Article explores the division of war-making authority between the President and Congress through the prism of positive political theory. For the most part, the scholarly treatment of the war-powers debate has been normative with various commentators offering various textual or functional accounts of what the proper allocation of war-making authority should be. This Article provides a positive account of the war-making powers by focusing on the domestic political constraints that the political branches face in the context of an imminent military build-up or troop deployment. This Article assumes that the President has the exclusive ability to influence the scope of an international crisis that precedes an actual armed conflict by making public threats against foreign states. Once such public threats reach a critical threshold, however, backing down by any domestic institutional actor becomes difficult due to the presence of significant domestic audience costs. In other words, since a domestic audience is likely to punish any domestic institutional actor that attempts to back down from an escalating international crisis, neither Congress nor the courts have much of an incentive to intervene once the President decides to initiate conflict. The President thus has a significant institutional advantage in framing the domestic audience costs for going to war. Given this apparent agenda-setting advantage, however, it is puzzling as to why the President would ever seek congressional authorization before initiating international conflicts. This Article argues that the presidential decision to seek congressional authorization is determined by a two-level strategic game of domestic and international interaction. At the domestic level, once the President decides to initiate conflict, he has an incentive to seek congressional authorization as a form of political insurance if he believes that the war is going to be fairly long or costly, or if he is uncertain about the prospects of victory. At the international level, the President also has an incentive to seek congressional authorization if he is uncertain about the outcome of the conflict and wants to send a costly signal to the foreign enemy about the country's resolve to prosecute the conflict. In sum, the ex-ante beliefs of the President regarding the outcome of a conflict and the possibility of subsequent punishment by a domestic audience ultimately determine his decision to seek congressional authorization. Finally, this Article also argues that Congress has an incentive to constrain the President's war-making agenda in the shadow of a politically unpopular war. But while the President often shapes public opinion in his war powers role, Congress tends to react to public opinion when it constrains the President's war initiatives. This Article uses historical case studies, including the 2003 invasion of Iraq, to test these theoretical arguments.

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INTRODUCTION

Contemporary media accounts of most extant American uses of force, including the ongoing Iraqi crisis, are often rife with speculation about when American military involvement will end.[1] But from an institutional perspective, there are many more interesting questions regarding the varying roles of Congress and the President in initiating and terminating wars. For instance, following the pattern set by previous administrations, President Bush, rather than Congress, took the lead in initiating the war in Iraq. But why was President Bush able to dominate the agenda at the initiation of

[1] *See, e.g.*, Frederick Barton, et al., *Should We Stay or Should We Go?*, NY TIMES, January 19, 2005 at A 19; David E. Sanger & Eric Schmitt, *Washington Memo; Hot Topic: How U.S. Might Disengage in Iraq*, NY TIMES, January 10, 2005, at A1.

military hostilities? Also, why do presidents sometimes seek congressional approval when they initiate certain wars but not others? What is the likelihood that the President will take the lead in ending the current American military involvement in Iraq? Are there specific circumstances that dictate when the President will take the lead in terminating a conflict and when the President will follow Congress's lead? As a practical matter, does the Constitution actually play a role in resolving any of these quandaries?

Interestingly, although there is a plethora of legal scholarship on war powers, hardly any of it focuses on the various questions raised above regarding the interaction of the political branches in use of force incidents. Rather, much of the scholarship tends to advance competing normative claims about the proper division of war powers. On one side of the debate, pro-President scholars stress the importance of strength and flexibility in an executive that is not fettered in his foreign policy goals by parochial legislators.[2] On the other side of the debate, pro-Congress scholars argue that a legislative check on the President's foreign policy actions encourages democratic accountability and effective scrutiny.[3] While the gulf between these two camps in the war powers debate is quite extensive, they both seem to be in agreement on one point: Congress is relatively impotent in war powers.[4]

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[2] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL L. REV. 167, 303-304 (1996) (citing Federalist arguments for vesting war-making powers in a single individual, the independent president, because he would represent the entire nation and be able to act swiftly and decisively); *see also* William Treanor, *Fame, Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696 (1997) (listing those scholars that advocate a pro-presidential view of war powers). More recently, debates have ensued as to whether the Vesting Clause of Article II gives the President broad residual powers in foreign affairs. *Cf.* Curtis Bradley & Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 560-85 (2004) (suggesting that textual language and early history do not support theory that Vesting Clause provides broad residual power in the President); Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 324-27 (2001) (arguing for an expansive view of presidential power under the Vesting Clause).

[3] *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 205-06 (1996)(arguing that separation of powers ensures that each branch can limit the powers of the others, thereby saving the people from autocracy); JOHN HART ELY, WAR AND RESPONSIBILITY 4-5 (1993) (citing both the slowing down of the war-making process and the democratic nature of the House as the Framers' primary rationales for including the House in the decision to go to war.); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS 72 (1981) (listing the purposes behind the Framers' division over war powers between Congress and the President). Pro-Congress scholars point to the extensive constitutional language that seems to give Congress a prominent role in foreign affairs. U.S. Const. art. I, §8, cl.11.; ELY, *supra* note __ at 3 (outlining the Constitutional Convention's debate and decision to vest in Congress the power to declare war); LOUIS FISHER, PRESIDENTIAL WAR POWER 1 (1995) (describing Framers' decision to vest the power to initiate war in Congress as a result of lessons learned from European nations).

[4] *See generally* Harold Koh, *Why the President(Almost) Always Wins in Foreign Affairs: Lessons of the Iran Contra Affair*, 97 YALE L. J. 1255 (1988); *see also* LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING (2000); *see also* REVELEY, *supra* note __ at 134 ("To date, however, the legislators have proved unable to reassert themselves once and for all by establishing enduring channels for a Congressional voice in decisions about war and peace"); ELY, *supra* note __at 48 ("Since 1950, [Congress] realized, it had been dodging its constitutional duty to make the decision whether to commit American troops to combat. Instead it had been laying back, neither disapproving presidential military ventures nor forthrightly approving them, instead letting the president use troops wherever and whenever he wanted and waiting to

What is lacking in these debates, however, is a coherent theoretical account of how the President and Congress actually interact on war powers issues. In other words, if Congress is so weak, why would the President ever seek congressional authorization to go to war? Conversely, if the President is so powerful, why is Congress able to constrain his national security choices in certain circumstances, such as in terminating a war?

This Article attempts to fill the gap in the war powers debate by presenting a theoretical framework that seeks to answer two related questions: (1) when, if ever, is the President likely to seek congressional approval before embarking on a use of force campaign?; and (2) when, if ever, is Congress likely to constrain the President's decision to use force?

Employing the tools and insights of positive political theory, this Article explores the division of war-making authority between the President and Congress by focusing on the domestic audience constraints that the political branches face in the context of an imminent military buildup or troop deployment. This Article assumes that at the conflict initiation stage, the President enjoys an agenda setting advantage over Congress because he has the power to influence the domestic audience costs for going to war. In other words, because the President has the exclusive ability to create and escalate an international crisis, he can effectively lock-in the other branches of government to his preferred course of military action knowing that any institutional actor that attempts to back out of the crisis will likely face punishment by a domestic audience. Thus, by precipitating "back out" costs and a "rally around the flag effect" among the domestic audience, the President can effectively "constrain" the scope of Congress's war-powers.

Given the President's apparent dominance over the crisis escalation agenda at the initiation of a conflict, however, why would the President ever seek Congress's approval before going to war? After all, the courts rarely ever intervene in separation of powers disputes regarding war-making authority and members of Congress who stand in the way of the President's war-making decisions face significant electoral risks.[5]

The answer is that the President's control over the war-making agenda is neither exclusive nor complete. Indeed, although the President may dominate the "rally around the flag" effect at the conflict initiation stage, he has less control over the course and outcome of any specific war, such as the monetary and psychological costs of the war, how

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see how the war in question played politically," which resulted in the passage of the War Powers Act); Yoo, *supra* note __, at 182 (pointing out that Congress has never sought to take available measures against presidents who refuse to comply with the War Powers Act); and KOH, *supra* note __ at 117 (Congress acquiesces to President in foreign affairs through "legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will").

[5] *See, e.g.*, Richard Stoll, *The Sound of Guns: Is there a Congressional Rally after U.S. Military Action*, 15 AMER. POL. Q. 223, 225 (1987); *see also* James Regens, Ronald Gaddie & Brad Lockerbie, *The Electoral Consequences of Voting to Declare War*, 39 J. CONFLICT RES. 168, 174-75 (1995) (showing that members of Congress who opposed the U.S. entry into WWI were less likely to be reelected than those who voted for entry but not finding statistically significant differences in Persian Gulf war and Mexican American war).

long the war will last, or whether failure or stalemate can be avoided. As the President's *ex-ante* beliefs of the risks of an unfavorable outcome increase, the President's calculus of the risks involved in going to war without congressional authorization also change.

This Article argues that this calculus is dependent on a two-level strategic interaction in which both levels of the interaction are interdependent. At the domestic level, this Article argues that the President is likely to seek congressional authorization as a form of political insurance if he believes that there is a significant enough risk that the war will go wrong. In other words, when there is a significant enough risk of military failure or stalemate, the President has an incentive to spread the costs of decision-making among other political actors in order to prevent those actors from subsequently exploiting the President's misfortunes. At the international level, the President also has an incentive to seek congressional authorization when the outcome of the war is uncertain in order to send a costly signal to the foreign adversary about the United States' resolve to prosecute the conflict. Both of these levels are interdependent because the perception that both political branches are not in accord in the prosecution of a conflict may embolden a foreign adversary, thereby increasing the chance of military failure or stalemate. In sum, because of the significant domestic audience costs associated with failure or stalemate in foreign military engagements (including costly but ultimately successful conflicts), the President will be less likely to initiate conflict without congressional authorization unless he is assured of relatively rapid military success.

Correspondingly, this theoretical model suggests that Congress also has an incentive to constrain the President's war-making authority in the shadow of an unpopular military undertaking. Indeed, presidents who embark on military adventures face an acute dilemma: while the use of military force is likely to generate a favorable public response in the short run, costly or failed military adventures are also likely to generate a subsequent backlash by the domestic audience. Thus, if the President is facing possible military failure or stalemate, members of Congress, especially those of the opposing party, are usually poised to take advantage of the President's misfortunes to mobilize opposition to the President's agenda. On those occasions, members of Congress are able to deploy a variety of mechanisms to constrain the President's war-making initiatives, including denial of funds for military engagements, use of procedural devices that restrict the scope of presidential decision-making, threats to derail the president's political agenda, and occasionally the threat of impeachment. The conventional wisdom often dismisses such legislative constraints, such as the War Powers Resolution, as being useless and purely symbolic. [6] This Article suggests that far from being useless as a constraint on the President's authority, the War Powers Resolution is actually an ingenious piece of legislation that allows members of Congress to intervene selectively

[6] *See* KOH, *supra* note __ at 39 ("[T]he resolution has… failed to prevent even the type of creeping escalation that it was expressly enacted to control"); ELY, *supra* note __ at 61 (describing the "bad aura" and general disrespect for the War Powers Resolution, which leads Courts to go out of their way to avoid enforcing it); BARBARA HINCKLEY, LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS 99 (1994) ("Decision making since the War Powers Act appears remarkably like the decision making before. . .").

and strategically in war-making decisions once there are clear political payoffs for doing so.

This Article also suggests that the role that public opinion plays in the separation of war powers between the President and Congress is strikingly different. While the President tries to frame and shape public opinion on use of force decisions, Congress tends to react to public opinion. Members of Congress, including those in the opposition, are aware that presidential popularity during an international crisis is often very relevant to their electoral fortunes. When the President's war initiatives are popular, members of Congress from both sides of the spectrum will often jump on the war bandwagon and support the President. When public opinion turns against the President, however, members of Congress, including those in the President's party, seem to be more willing to constrain the President's initiatives. The President, on the other hand, does not generally react to negative public opinion in his war-making initiatives. Indeed, the President is aware that withdrawal of troops in the face of negative public opinion is likely to be construed as an admission of failure and incompetence. Rather than follow the course of public opinion when the war is going badly, the President is more likely to entrench himself into a war and gamble that the course of the war (and public opinion) will change in his favor. Thus, a presidential decision to withdraw troops from an ongoing international crisis in the absence of military victory is more likely to be the result of congressional intervention than a response to negative public opinion.

While the theoretical thrust of this Article is decidedly positive, it has significant implications for the normative scholarship on war powers. Most of the normative critiques of presidential authority in war powers assume that government agencies or bureaucracies are empire builders that seek to maximize their institutional powers.[7] These commentators assume that the President has an imperialistic agenda in the national security sphere and that Congress will be more proactive in its war-powers role if it is provided with better institutional tools. The theoretical framework laid out in this Article suggests that as long as the President has control over the crisis escalation agenda, it is unlikely that more sophisticated institutional tools will significantly alter Congress's war powers role. After the President has escalated an international crisis and mobilized the domestic audience in favor of war, there is a strong tendency that Congress will follow suit and accede to the President's wishes. In other words, electoral payoff factors are more likely to influence the congressional role in war powers issues than empire building concerns. Correspondingly, this model also refutes the notion that Congress is impotent in foreign affairs because it does not have adequate institutional tools to assert itself against the President. In those instances where there is a discernible electoral payoff for constraining the President on war powers issues, Congress has been willing and able to do

[7] *See* Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 915-17 (2005) (alluding to prevalence of empire-building approaches in the analysis of separation of powers).

so.[8] Given the political incentives that members of Congress face on war powers issues, neither better institutional tools nor increased judicial intervention is likely to make much of a change to the current war powers landscape.

This Article proceeds as follows. Part I presents a positive political theory of the war powers constitution by exploring the domestic constraints Congress and the President face in the context of imminent military hostilities. This Part focuses on four key questions. First, how does the President get to exercise dominion over the crisis escalation agenda before a conflict is initiated? How does the President's ability to dominate the escalation agenda influence Congress's participation in the war powers debate? How does uncertainty about the outcome of a war influence the President's decision to seek congressional authorization? Finally, when is Congress likely to use devices, such as the War Powers Resolution, to constrain President's war-making activities? This Part shows that these four questions can be answered by a two-level game of domestic and international interaction in which both domestic audience costs and the President's desire to signal resolve to a foreign adversary influence the actual division of war powers. Part II tests this theory by focusing on four historical case studies of the modern use of force, including the 1982-1984 deployment in Lebanon, the 1983 intervention in Grenada, the 1992-1993 humanitarian intervention in Somalia, and the 2003 US-led military invasion of Iraq. The results of these case studies largely support the theoretical model. Lastly, Part III explores some of the implications of this theory for normative scholarship in war powers. More specifically, this Part argues that many of the debates about Congress's proper role in the War Powers Constitution may be misguided, since members of Congress do not act as empire builders when dealing with war powers issues, and may be averse to taking steps that increase their institutional power if taking such steps makes them electorally vulnerable. Moreover, this Part also suggests that efforts to have the courts police the war powers constitution may ultimately prove to be fruitless if members of Congress do not have much of an incentive to assert these war powers themselves.[9]

I. A THEORY OF WAR-MAKING AUTHORITY

This Part develops an argument that uses rational choice theory to explain the actual division of war-making authority between the President and Congress.[10] The core assumption underlying this theoretical approach is that the relevant institutional actors—

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[8] *See* James Lindsay, *Congress and Foreign Policy: Why The Hill Matters*, 107 POL. SC. Q. 607, 622-23 (1992).

[9] *See* KOH, *supra* note __ at 148.

[10] For a useful surveys of rational choice theory, *see* RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW (4th Ed. 1992); DANIEL FARBER & PHILLIP FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991). For an application of rational choice theory to political branch interpretation of foreign affairs powers see John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of the Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 203, 206-08 (1993)

individual members of Congress and the President—act rationally to advance war powers decisions that are consistent with their preferences. In other words, this approach assumes that all of these actors will pursue self-interested goals, that they will respond strategically to each other, and they will use institutional structures when necessary to advance their goals. The argument also assumes that the preferences of both the President and the individual members of Congress are very heavily influenced by electoral concerns, and thus both are very sensitive to the preferences of the domestic political audience. Finally, this argument assumes that the President is sensitive to the preferences of the domestic audience not just for electoral reasons, but because he believes a favorable domestic audience will help him advance his policy agenda.[11] The first section develops this theory by spelling out the presidential advantage in framing domestic audience costs before the initiation of a conflict. The second section suggests that uncertainty about the possible outcome of a conflict can influence the President's decision to seek congressional authorization before going to war.

A. *The Early Executive Advantage: Exclusive Domination over the Crisis Escalation Agenda*

In November 2001, almost 16 months before he ordered the invasion of Iraq, President Bush explicitly threatened Saddam Hussein to come clean on Iraq's alleged weapons of mass destruction program or else face the consequences.[12] When President Bush first uttered those words, he did not seem to be doing much more than sending a strong signal to Hussein that he should take the UN arms inspection program seriously. By fall 2002, however, the President's warnings against the Iraqi regime had escalated and it appeared that President Bush was staking his political reputation on forcefully removing Hussein from power.[13] When repeated UN inspections failed to disclose any new such weapons, and it appeared that the Iraqi authorities were not forthcoming in disclosing such weapons, President Bush followed through on his threat and ordered a full-scale invasion of Iraq in March 2003.[14]

When President Bush originally made his threats against Iraq in late 2001, he was not bound to follow through on them by either domestic or international law. Nonetheless, by September 2002, public opinion polls seemed to show that a majority of

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[11] *See* DAVID P. AUERSWALD, DISARMED DEMOCRACIES 27 (2000) (arguing that even when failure does not endanger tenure in office, an executive would prefer international success to failure).

[12] *See* Bob Deans, *Bush: Iraq may be Next*, ATLANTA J.-CONST., Nov. 27, 2001, at 1A (Bush demanded that Hussein comply with the United Nations or "face the consequences.")

[13] *See, e.g.*, George Bush, Weekly Compilation of Presidential Document, Vol. 38, at 1295 (2002) ("The policy of my government . . . is regime change—for a reason"); *We Have a Duty to Every Worker . . . in America to Punish the Guilty*, WASH. POST, September 9, 2002, at A14 ("It's a stated policy of this government to have a regime change. And it hasn't changed. And we'll use all tools at our disposal to do so. . . .").

[14] David E. Sanger and John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, NY TIMES, Mar. 20, 2003, at A1 (describing the first hours of the Iraq War.)

Americans believed military action against Iraq was inevitable.[15] Such public belief in a military response persisted even as key allies of the United States balked at supporting a UN Resolution that would authorize military action against Iraq.[16] Indeed, Congress subsequently granted President Bush the authorization to take action in Iraq even before he had publicly made up his mind about whether he wanted to go to war.[17]

Why did Bush's threats against Iraq, non-binding as they were, carry such political weight? One possible explanation relates to the expectations of the domestic audience during an international crisis. Political scientists have argued that political leaders in democracies suffer from domestic audience costs if they renege on their threats.[18] According to this argument, democracies have an advantage over autocratic regimes in signaling credible resolve in military engagements because democratic politicians suffer "audience costs" if they make threats that they subsequently fail to fulfill.[19] Thus, one way to interpret the public response in the build-up to the Iraqi conflict is that the public was aware that neither the President nor Congress could really back out of the crisis without suffering significant electoral consequences.

A much broader explanation of the President's actions is that when he threatens a foreign adversary he is engaging in a two-level signaling game. At the international level, as the political scientists have observed, when an elected executive issues such threats, he is essentially saying to the foreign adversary: "My resolve is high because as an elected official in a democracy the political costs of backing out of a publicly issued threat are high."[20] At the domestic level, however, President is also sending a distinct signal to the other branches of government: "I have committed this country to a course of action by initiating this international crisis, and anyone who tries to get us to back out of this course of action (including the executive branch itself) will suffer significant domestic audience costs."[21] In other words, the existence of domestic audience costs at the crisis

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[15] Richard Benedetto, *President Gains Support for Military Action*, USA TODAY, Sep. 18, 2002, at 6A (Gallup poll revealed that seven out of ten Americans believed war with Iraq was inevitable in the next year.); Adam Clymer & Janet Elder, Poll Finds Unease on Terror Fight and Concerns About War on Iraq, NY TIMES, Sep. 8, 2002, at 1.

[16] *See* James M. Lindsay and Caroline Smith, *Rally 'Round the Flag: Opinion in the United States before and after the Iraq War*, 21 BROOKINGS REVIEW 20, 22 (Summer 2003).

[17] Susan Milligan, *Congress Gives Bush OK to Act Alone Against Iraq; Senate Follows House in Voting Strong Support*, BOSTON GLOBE, Oct. 11, 2002, at A1.

[18] *See* James Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AMER. POL. SC. REV. 577, 580 (1994) (arguing that a leader who backs down after "engaging the national honor" is likely to be seen as suffering greater humiliation the more he had escalated the conflict); Alastair Smith, *International Crisis and Domestic Politics*, 92 AMER. POL. SC. REV. 623, 632 (1998) ("Democratic] leaders are able to send credible messages because they mortgage their domestic political survival on their ability to honor those commitments").

[19] *See* Fearon, *supra* note __ at 581-582.

[20] Fearon, *supra* note __ at 582; Bruce Bueno de Mesquita, James D. Morrow, Randolph M. Siverson & Alastair Smith, *An Institutional Explanation for the Democratic Peace*, 93 AMER. POL. SCI. REV. 791, 794 (1999).

[21] As some commentators have noted, members of Congress who vote against a war risks electoral defeat. *See e.g.*, Stoll, *supra note* __ at 225.

escalation stage provides the President with a credible tool to coerce the other branches of government, especially Congress, to his preferred course of military action.

Members of Congress, not only have to contend with possible "audience costs" if they try to resist the President's war agenda at the initiation of a conflict, there are also positive political benefits for supporting the President in an international crisis: the "rally around the flag" effect.[22] The rally around the flag effect suggests that in the context of an international crisis, the public will rally around the President and the flag.[23] Indeed, when there is an international event such as a war or terrorist attack, the initial patriotic impulse to rally around the flag gives the President a decisive boost in power and confidence.[24] As the President's public opinion polls soar, members of Congress often find it politically beneficial to piggyback on the President's political momentum and do as he wishes.[25] Thus, even before the first shot is fired, or the first aircraft carrier is dispatched, the President can act strategically and influence the political costs and benefits of intervention by the other branches of government.

To be sure, it is not all members of Congress that will subscribe to the rally round the flag factor and support the President's national security agenda. Some members of Congress may oppose the President's agenda for principled reasons regardless of the risks of subsequent punishment by a domestic audience.[26] Others may make a strategic calculation that the President's prosecution of the war is likely to go badly and hence try to put themselves in a position to exploit opportunistically the political spoils of the President's misfortunes.[27] But as demonstrated later in this Article, this latter kind of calculation is highly risky because ordinarily the President has better information of the

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[22] *See* JOHN MUELLER, WAR, PRESIDENTS, AND PUBLIC OPINION 48 (1973); *see also* John R. O'Neal & Anna Lillian Bryan, *The Rally Round The Flag Effect In U.S. Foreign Policy Crises, 1950-1985*, 17 POL. BEHAV. 379, 393-94 (1995) (finding that although the effect was far less than previously found when one analyzes only independently selected international crises, the rally 'round the flag is significantly affected by the media's coverage of the crisis); Brett Ashley Leeds & David R. Davis, *Domestic Political Vulnerability and International Disputes*, 41 J CONFLICT RES. 814, 816 (1997) ("The salient and potent danger of a foreign adversary quells domestic dissension and increases nationalist feelings and government support. The 'rally around the flag' effect, a tendency discovered in the United States for public approval of the president to increase following involvement in major international events").

[23] *See* Leeds & Davis, *supra* note __ at 814-15 ("Actions that serve to increase national pride and government support and provide the executive with an opportunity to demonstrate competence… might help a leader survive a period in which he or she may otherwise be vulnerable").

[24] See John Mueller, *Presidential Popularity from Truman to Johnston*, 1970 AM. POL. SC. REV. 18, 21.

[25] HINCKLEY, *supra* note __, at 79-80.

[26] See FISHER, *supra* note __ at 117 (Senator Wayne Morse (D-OR) opposed the Tonkin Gulf Resolution, stating that "if we follow a course of action that bogs down thousands of American boys in Asia, the administration responsible for it will be rejected and repudiated by the American people. It should be"); *Threats and Responses; Senator Deplores Attack on Iraq*, NY TIMES, March 20, 2003, at A20 (The senior member of the Senate, Robert Byrd of West Virginia, sets forth his opposition to the Iraq War).

[27] The tendency for legislators to exploit the political misfortunes of the President is discussed in detail in section ___

likely outcome of a conflict than members of Congress.[28] In the end, a majority of members of Congress regardless of party affiliation tend to follow the President's lead in the heat of an international crisis.

This Article does not make any assumptions about what actually motivates the presidential decision to use force, such as whether the President factors in electoral concerns in his decision-making process. What this Article assumes is that when he decides to use force for whatever reason, the President has a unique agenda setting advantage over Congress at the conflict initiation stage. Some political scientists have speculated that American presidents may have an incentive to create an international crisis in order to divert attention from domestic problems.[29] Other commentators who have studied the diversionary war hypothesis have found no clear evidence between electoral cycles and the presidential decision to use force.[30] This latter evidence makes sense if one assumes that the President is not able to easily transfer "rally around the flag" benefits to members of Congress from his own party.[31] What the empirical evidence has shown, however, is that there is a significant correlation between the President's popularity rating and the use of force.[32] This result suggests that a favorable domestic audience may be important to the President independent of electoral cycle concerns. As the political scientists Leeds & Davis argue, "Leaders who enjoy high public support are likely to find it easier to influence other political elites; they will have more success in implementing their programs as they meet with less resistance from actors within and outside the government."[33]

In any event, the question remains: what accounts for the unique advantage that the President enjoys in shaping domestic audience costs in the context of an international crisis? The rest of this section points to two possible explanations: (1) the President's constitutional role as the sole organ of communications in foreign affairs; and (2) the high public visibility and national significance of use of force issues.

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[28] *See infra* Section B.

[29] *See* Diana Richards et al., *Good Times, Bad Times, and the Diversionary Use of Force,* 37 J CONFLICT RES. 504 (1993); Patrick James and John O'Neal, *The Influence of Domestic and International Politics on the President's Use of Force*, 35 J. CONF RES. 307 (1991); Charles Ostrom & Brian Job, *The President and the Political Use of Force*, 80 AM. POL. SC. REV. 541 (1986).

[30] *See* Benjamin Fordham, *The Politics of Threat Perception: A Political Economy Model of US uses of force*, 42 INT'L STUD. Q 567, 570 (1998) ("Aside from Stoll (1984), most empirical studies have found no significant electoral cycle in the use of force.")

[31] *See* James Campbell & Joe Sumners, *Presidential Coattails in Senate Elections*, 80 AM. POL. SC. REV. 513 (1990); *see also* Paul Gronke, Jeffrey Koch & Matthew Wilson, *Follow the Leader? Presidential Approval, Presidential Support, and Representatives' Electoral Fortunes*, 65 J. POL. 785, 793 (2003).

[32] Lian Bradley & John Oneal, *Presidents, the Use of Military Force, and Public Opinion,* 37 J CONFLICT RES. 277, 378-30 (1993); *see also* John Mueller, *Presidential Popularity from Truman to Johnston*, 64 AM. POL. SC. REV. 18 (1970).

[33] Brett Leeds & David Davis, *Domestic Political Vulnerability and International Disputes*, 41 J CONF RES. 814, 817 (1997).

1. *The Sole Organ of Communications in Foreign Affairs*

The notion that the President is the sole organ of communication in foreign affairs is so uncontroversial that it has almost become a truism of American constitutional law.[34] The textual basis for this authority is not explicit, but courts and commentators have assumed that it is derived from the President's power to appoint and receive ambassadors.[35] Nonetheless, in the same breadth that courts and commentators often mention the "sole organ" role, they are quick to point out that the President does not have the exclusive authority to conduct foreign policy.[36] There is not much analysis, however, as to how the President's organ of foreign communications role influences his ability to shape the national security agenda.

One can view the President's role in an international crisis as that of an agent reacting to events that have been thrust upon him.[37] Interestingly, however, his role as the nation's spokesman actually puts the President in a position to create or escalate an international crisis. By issuing threats against a foreign adversary, the President is able to create an international crisis that might eventually require a military response.[38] Because foreign states frequently rely on the President's statements as representing the United States' position on an issue, a presidential threat also carries extra weight in creating or amplifying an international crisis. In addition, the domestic audience also takes its cue as to the existence and nature of an international crisis from the President's statements.

The President's agenda setting power gives him the unique ability to shape domestic audience preferences for the use of force abroad. In periods of international crisis such as when the nation faces a foreign threat, the public tends to rally behind a singular authority who symbolizes national unity.[39] As commander in chief, the President serves as a "focal point of action" and embodies a united front against what the public perceives is a common menace. The public turns to him for reassurance and protection

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[34] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 42 (1996) ("That the President is the sole organ of official communication by and to the United States has not been questioned and has not been a source of significant controversy. Issues begin to burgeon when the President claims authority, as 'sole organ', to be more than an organ of communication and to determine also the content of the communication..."); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1151 n.431 (2000) ("Congress has not seriously doubted that the President is the sole organ of communication with foreign governments.").

[35] *See* HENKIN *supra* note __at 41-42.

[36] *See* HENKIN *supra* note __at 42-43 ("[I]ssues begin to burgeon when the President claims the authority, as sole organ, to be more than an organ of communication and also to determine the content of the communication"); *see also* Goldwater v. Carter, 481 F. Supp. 949, 961 (D.D.C. 1979), rev'd, Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), vacated by 444 U.S. 996 (1979) ("While the President may be the sole organ of communication with foreign governments, he is clearly not the sole maker of foreign policy.").

[37] *See* discussion at *supra* notes __

[38] *See* Fearon, *supra* note ___at 577.

[39] *See* Michael Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidence May not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 844 (1996) ("[T]he president can establish a "focal point" around preferred public policies").

and they expect—indeed, they demand—that he respond by taking appropriate and decisive action against the perceived threat. In these times, the public expects Congress to give the President the free reign to tackle the foreign menace as he sees fit.[40]

The President also has the ability frame the crisis in a manner that is most likely to mobilize popular support for the use of force. For instance, polls usually indicate that Americans are more reluctant to support the use of force if the sole military objective is to impose political change on another country.[41] In such circumstances, the risk of significant division of public opinion on the wisdom of the war increases, and so does the chance of having a protracted and expensive conflict with a significant loss of lives.[42] However, foreign policy goals that involve curbing foreign aggression or a perceived external threat enjoy significant popular support.[43] Through his sole organ of foreign communications role, the President is in the unique position to frame a potential use of force in a manner that is most likely to galvanize public support. Because the public perceives the President as having access to superior information as to the nature of an international crisis, they are more likely to buy the President's position at the conflict initiation stage that a particular use of force is necessary to contain foreign aggression, even if subsequent developments call that motive into question.[44]

In their actions of voters, citizens are also sensitive to United States' position in the international community as a global superpower with superior military capabilities.[45] They expect that in a crisis the President should be able to deploy force decisively and vindicate America's international security commitments. The American public may be even more willing than citizens in other democracies to punish domestic institutional actors that are not willing to use effective military force to protect the country's image

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[40] *See* MARC E. SMYRL, CONFLICT OR CODETERMINATION?: CONGRESS, THE PRESIDENT, AND THE POWER TO MAKE WAR 133 (1988) ("Experience suggests that presidential military initiatives will be initially well received by the American public . . . Expressing strong opposition to such initiatives in their early stages, thus, is likely to be politically unrewarding for members of Congress.").

[41] *See* Bruce Jentleson, *The Pretty Prudent Public: Post Post-Vietnam American Opinion on the Use of Military Force*, 36 INT'L STUD. Q. 49, 49-54 (1992).

[42] *See id.*

[43] *See id.*

[44] See John Mueller, *Presidential Popularity from Truman to Johnston*, 64 AM. POL. SC. REV. 18, 21 (1970) ("Invariably, the popular response to a President during international crisis is favorable, regardless of the policies he pursues.") (*quoting* NELSON POLSBY, CONGRESS AND THE PRESIDENCY 25 (1964)); *see also* CECIL V. CRABB & PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY18 (1980) ("[O]nce a President has made a decision in foreign affairs that becomes known to the public, he automatically receives the support of at least 50 percent of the American people, irrespective of the nature of the decision").

[45] *See* James Meernik, *Presidential Decision Making and the Political Use of Military Force*, 38 INT'L STUD. Q. 121, 129-30 (1994) ("Just as presidents believe that is in their interest to maintain credibility internationally, they appear also to believe that their domestic political reputation is dependent in part on their willingness to use force . . . The American public appears to expect presidents to take strong action when the nation's interests or its citizens are threatened to preserve U.S. power and prestige. Given the enormous and formidable American military arsenal, the public has generally assumed that an effective application of force is readily available and easily utilized option in times of crisis.").

abroad.[46] Thus, when the President takes the initiative to assert America's military prerogative in a crisis, members of Congress may even feel more constrained than their legislative counterparts abroad in acting as a counterweight to the President's authority.

The United States' unique stature as a global superpower also suggests that the initial impulse of the American public to support the President at the beginning of an international crisis is somewhat rational. The public understands that when a President initiates an international crisis by issuing threats against a foreign adversary, he not only stakes his political reputation but also that of the United States in the particular military endeavor.[47] But this high stakes gambit has significant implications for the domestic audience: if the President subsequently admits error in his judgment and backs out from a rapidly escalating international crisis, he not only signals incompetence by his administration but also incompetence and the lack of credibility by the United States.

2. *The High Public Visibility of Use of Force Issues*

In the eyes of the members of Congress, not all policies or issues are of equal political relevance. Unlike the President, members of Congress are more apt to be politically sensitive to those issues that are most salient to their local constituencies and pay less attention to those of national significance.[48] Beyond the explicitly parochial incentives that attract them to local issues, members of Congress also face acute collective action problems in attempting to address issues of national importance.[49] Because the potential political benefits of addressing issues of national concerns are likely to accrue to the institution of Congress as a whole, no one member may have an incentive to invest the resources to understand and claim responsibility for a national policy issue. Consequently, members of Congress are likely to be unwilling to expend their resources and time on national issues, especially those issues that do not have a clear electoral payoff. Moreover, members of Congress are particularly susceptible to issues that have rent-seeking opportunities—issues were the costs to the public are dispersed but the benefits to interest groups are concentrated.[50]

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[46] This might explain why the United States is more routinely an initiator rather than target of the use of force. Dan Reiter & Allan C. Stam, III, *Democracy, War Initiation, and Victory*, 92 AM. POL. SC. REV. 377, 379 (1998) ("States with a greater objective chance of victory will select themselves into the population of war participants by launching wars, whereas states with a lower objective probability of victory are selected into the population of targets of attack").

[47] *See* Fearon, *supra* note __at 578.

[48] See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 144-45 (1999) (observing that constituent commitments often prevent members of Congress from acting collectively to advance their institutional interests).

[49] *See id.; see also* Steve Calabresi, *Some Normative Arguments for the Unitary* Executive, 48 ARK. L. REV. 23, 35 (1994) (arguing that Congress's collective action problems support the argument for a unitary executive).

[50] *See* WILLIAM HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 109-110 (2003). The latter phenomenon, which social scientists dub "rational ignorance," is most prevalent when the payoff to the general public from investing the resources necessary to understand an issue is not worth the costs. John McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's*

Unlike many rent-seeking issues, however, issues like war and foreign terrorist threats are not usually plagued by the problem of rational ignorance and interest group politics. Indeed, the perceived costs and benefits of engaging in war or combating foreign terrorist threats are widely distributed. Correspondingly, information dissemination about war and foreign terrorist threats in the national media is significantly high. For instance, during both the 2003 and 1991 invasions of Iraq, almost all media outlets dedicated a significantly high amount of airtime to the conflicts, often providing live round the clock coverage of developments in the battlefield.[51] Of course, there is no guarantee that the quality of information that the public receives about an international crisis is particularly reliable, but the relevant consideration is not necessarily the quality of the information but the level of public engagement with the issue.

The high public visibility of war as an issue has significant implications for congressional willingness to assert its authority on national security issues. It is not that such highly visible political issues do not provide significant electoral payoffs to members of Congress; they do, but the direction of the payoff is most closely related to the sway of public opinion. But the President is most often in the driver's seat when it comes to mobilizing public opinion in favor of initiating a war. Thus, he is usually able to dictate the direction of the electoral payoff for members of Congress in an international crisis.[52] The widespread availability of war and other security issues on regular news and entertainment-oriented programs also tends to amplify the "rally around the flag" effect, mobilizing support for presidential decisions to use force.[53]

Jurisprudence of Social Discovery, 90 CAL. L. REV. 485, 503 (1995) ("[P]ublic choice theory has shown that cohesive groups, called special interests, may be able to exercise political power out of proportion to their numbers to obtain resources and status for themselves . . . In contrast, since the diffuse citizenry has little leverage on centralized democracy, it is rationally ignorant of much government policy"); *see also* OLSON, RISE AND DECLINE, *supra* note __, at 25-26 (discussing how typical voters are "rationally ignorant"). Discussing the typical voter, Olson notes:

> The gain to such a voter from studying issues and candidates until it is clear what vote is truly in his or her interest is given by the difference in the value to the individual of the "right" election outcome as compared with the "wrong" outcome, multiplied by the probability a change in the individual's vote will alter the outcome of the election. Since the probability that a typical voter will change the outcome of the election is vanishingly small, the typical citizen is usually "rationally ignorant" about public affairs.
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> *Id.*

[51] For an account of how pervasive media coverage of war events has become see MATTHEW BAUM, SOFT NEWS GOES TO WAR: PUBLIC OPINION AND AMERICAN FOREIGN POLICY IN THE NEW MEDIA AGE (2003).

[52] As some commentators have noted, one of the most unique features of the modern plebiscitary president is his ability to mobilize public opinion in favor of nationally-oriented policy issues. *See* Moe & Howell, *supra* note __at 145-46; Fitts, *supra* note __ at 890 ("[O]ne of the most important devices of a modern president is his ability to mobilize support through the bully pulpit -- to take advantage of his unitary and visible position as a 'focal point.'")

[53] *See generally* MATTHEW BAUM, SOFT NEWS GOES TO WAR: PUBLIC OPINION AND AMERICAN FOREIGN POLICY IN THE NEW MEDIA AGE xii (2003).

B. *Uncertainty About the Use of Force Outcomes and the Scope of the Two-Level Interaction*

Although the President enjoys significant informational and framing advantages at the conflict initiation stage, the extent of that advantage starts to dissipate during the course of an actual conflict. The President, like any war leader, usually has less than perfect information about the variables that affect the outcome of a conflict, such as the foreign adversary's level of resolve and the expected costs of the conflict.[54] Once a conflict begins in earnest, however, the President, Congress, the foreign adversary, and the American public can now evaluate better both the costs and objectives of the military engagement. This new information by Congress and the domestic audience can alter significantly the President's dominance of the crisis escalation agenda.

Assume, for instance, that the American public and Congress get new information about the actual costs and objectives of a conflict that differs significantly from the original estimates given to them by the President; it is likely that their initial enthusiasm for the use of force will wane. This learning process is the source of the President's dilemma: although he might be able to create easily a short-term rally in public support at the initiation of a conflict, he is unlikely to sustain that rally if there is military failure or stalemate. Thus, a President who is thinking of initiating an international crisis needs to consider not only the positive domestic audience reaction at the early stages of a conflict but also the likelihood of a domestic backlash if the war goes wrong. In many respects, this uncertainty about the outcome of foreign military engagements has many ramifications for the President's decision as to whether to seek congressional authorization before going to war.

First, a point of clarification: as used here, military failure does not necessarily entail the outright defeat of the United States by a foreign adversary. Indeed, given the significant military and resource advantage that the United States has over almost every other country, the risk of outright defeat of the United States in a foreign military engagement is relatively trivial. Rather the notion of military failure or success as used here depends on three factors: costs (both in human lives and resources), time, and the nature of the military objectives. All else equal, the American public will likely perceive a military campaign as a failure if: (1) the conflict is protracted and results in high human casualties; and (2) the primary objective of the war does not involve curbing foreign aggression.[55] Thus, if one were to develop a typology of United States military outcomes, at one end of the spectrum representing classic military success would be a swift and relatively costless effort to restrain foreign aggression. At the other end of the spectrum representing classic military failure would be a protracted and costly effort to impose

[54] *See* Fearon, *supra* note __ at 583.

[55] In the latter case, the empirical evidence shows that the American public is generally more supportive of using force to restrain a country from aggression than using force to impose political change in another country. *See* Bruce Jentleson, *The Pretty Prudent Public: Post Post-Vietnam American Opinion on the Use of Force*, 36 INT'L STUD. Q 49 (1992).

political change on a foreign country. In the middle (ranging from success to failure) would be a swift and non-costly effort in a mixed-motives war (both curbing foreign aggression and internal political change), a protracted and costly effort to curb foreign aggression, a swift and quick effort to achieve internal political change only, and a protracted and costly mixed-motives war.

TABLE 1
A Spectrum of Possible Outcomes in American Foreign Military Engagements

Success	Failure
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Swift and non-costly war curbing foreign aggression > Swift and non-costly war involving mixed motives (both curbing foreign aggression and imposing political change) > Protracted and costly war curbing foreign aggression > Swift and non-costly war imposing internal political change only > Protracted and costly war involving mixed motives (both curbing foreign aggression and imposing political change) > Protracted and costly war imposing internal political change only.	

Where the outcome of a military conflict is likely to fit within the spectrum makes a difference as to whether the President will decide to seek congressional authorization. As explained in the next two sections, the President's *ex ante* belief that a conflict is likely to fit towards the failure end of the spectrum increases the likelihood that he will seek congressional authorization before going to war. Moreover, the proximity of time between a previous failed military engagement and a presidential decision to use force also affects Congress's willingness to constrain the President's national security agenda. In this context, the President's and Congress's calculus depends on a two level game of domestic and international interaction. Both levels of this interaction are interdependent because a perceived disagreement between the President and Congress over the use of force may bolster the resolve of a foreign adversary, thereby increasing the chance of military failure.

1. *The Domestic Level: Buying Political Insurance in Wars with Uncertain Outcomes*

Introducing a certain degree of uncertainty about the outcome of a military engagement can radically change the separation of powers landscape. Since neither Congress nor the President is likely to know with complete certainty the outcome of any war in advance, they are likely to position themselves to exploit any political opportunities that become available as they gain more information about the probable outcome of the war. Just as presidents may find it useful to exploit their institutional advantage at the conflict initiation stage to mobilize political support for their agenda,

there are also opposition politicians in Congress who are willing to exploit the President's military failure to mobilize political opposition to his agenda.[56] When the war goes well, these opposition figures in Congress may be content to bask in the President's glory, but when things wrong they are likely to sing a different tune.

Because of the downside political risks associated with military failure, the President often has to factor in his ex-ante beliefs about the likely outcome of a conflict in deciding whether to seek congressional authorization. Although he may be able to initiate conflict on his own without much opposition from Congress, the incentives of members of Congress (especially those in the opposition) are likely to change as the war progresses and casualties mount. This consideration leads to our first hypothesis:

> *Hypothesis 1*: In circumstances where the President is uncertain about the prospects of rapid military success, he is likely to resort to congressional authorization in order to spread the political costs of decision-making among other domestic political actors.

In this hypothesis, the proxy for whether the President is uncertain about the prospects of immediate military success involves the scale and the announced period of the deployment. All else equal, if the President announces a significant military deployment (let us say over 20,000 troops) for a significant period of time (longer than 3 months), he is likely signaling a "high risk" military engagement.

The President's decision to seek congressional authorization as a form of political insurance is in large part driven by two considerations regarding the potential political costs of a failed military engagement. First, when a President mobilizes the domestic audience in an international crisis, he not only "locks in" Congress to a specific military response, he also "locks in" himself.[57] Therefore, the President usually does not have much political flexibility in backing out of a military engagement after he has initiated it even if he subsequently revises his beliefs about the likely outcome. Second, the domestic audience costs for a failed military engagement without congressional authorization may be subject to a cascading effect. In other words, the more unpopular

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[56] *See* Todd Allee & Paul Huth, *Domestic Political Accountability and the Escalation and Settlement of International Disputes*, 46 JOURNAL OF CONFLICT RES. 754, 758 (2002) ("The strategic behavior of political opposition: In all political systems, there are political elites who seek to remove the current leadership and assume positions of political power themselves. ….. Furthermore, although the threat or use of military force is likely to generate short term domestic support, costly or failed attempts at military coercion will also mobilize domestic opposition.")

[57] See James Fearon, *Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs*, 41 J. CONFLICT RES. 68, 70 (1997) ("Tying hands signals typically works by creating audience costs that the leadership would suffer due to the reaction of domestic political audiences to a perceived failure in the management of foreign policy"); see also Kenneth Schultz, *Do Democratic Institutions Constraint or Inform? Contrasting Two Institutional Perspectives on Democracy and War*, 53 INT. ORG. 233, 236-37 (1999) ("When a threat generates large audience costs, there is a strong possibility that the government intends to---indeed, has to—carry through on that threat").

the prosecution of a failed military engagement, the greater the chance of increased congressional resistance, and in turn the greater the likelihood that the President will lack the political momentum to withstand such congressional resistance. Moreover, opposition members of Congress will be poised not only to blame the President for military failure, but also for embarking on a military campaign in the first place without congressional authorization.

At first blush, the President's calculus of whether to go alone seems rather straightforward: If the war goes well, he gains considerable political momentum for his political agenda without having to share the political spoils of victory; if it goes bad, he provides easy and potentially devastating ammunition to his political opponents. Therefore, absent the seemingly vain impulse of a president who desires to take exclusive credit for military victories, we would ordinarily expect the President to seek congressional approval for all uses of force. But the President's decision-making process is not likely to be that simple. A president who seeks legislative consent before going to war may face other significant risks such as the legislative imposition of burdensome substantive and procedural restraints on how the actual war is conducted, premature disclosure of secret or confidential military plans by members of Congress, and the possibility of outright rejection of his request by Congress.[58] Indeed, members of Congress, aware of the potential political spoils that may be available in a military engagement, may have an incentive to impose seemingly onerous reporting, spending, and consultation requirements on the President as a condition for providing congressional approval.

The President's dilemma is not as bad as it seems, however. Although the President and Congress may both face uncertainty about the likely outcome of a military engagement, the level of uncertainty is hardly symmetrical. In other words, the President is almost always likely to possess better information about the likely outcome of a military engagement than members of Congress.[59] Given this informational asymmetry, the President can at the outset present evidence about the factors that affect the outcome of the war, such as motive and costs, in a manner that is most likely to win congressional support. The President may thus often get the kind of congressional authorization he wants for military engagements without too many strings attached.

Of course, in selling the war, the President may have an incentive to exaggerate (or understate) his beliefs about the expected costs and objectives of the war. As the war progresses and members of Congress learn about the true costs or objectives of the conflict, however, they can revise their judgments about the political benefits/costs of supporting the President and try to position themselves accordingly. Indeed, risk-averse

[58] *See* James Lindsay & Randall Ripley, *How Congress Influences Foreign and Defense Policy*, in CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 17-35(Ripley & Lindsay, Ed. 2004); Louis Fisher, *Congressional Checks on Military Initiatives*, 109 POL. SC. Q. 739, 757 (1994).

[59] Terry Moe & William Howell, *The Presidential Power of Unilateral Action*, *supra* note __ at 132; *see also* HOWELL, POWER WITHOUT PERSUASION, *supra* note __ at 102-03.

members of Congress may actually prefer that the President go solo without consulting them because it gives them the flexibility to jump on the rally around the flag bandwagon if things go well, or to sharpen their swords and distance themselves politically from the President if things go badly.

In other contexts, members of Congress may try to use the informational asymmetry to their advantage: "I did support the war initially given the information I originally received about the objectives and costs of the war being x, but if I had known then what I know now—that the real objectives and costs of the war were really y—I would not have supported it."[60] Indeed, efforts by members of Congress to disclaim prior support for wars that subsequently became unpopular are very common, but in such circumstances the members of Congress often have an incentive to overstate the extent of their prior ignorance.[61]

In any event, notwithstanding the President's informational advantages, his decision to seek congressional authority before going to war is not costless. Indeed, in many circumstances, he may seek to obtain the reassurance that congressional approval is clearly forthcoming before he formally seeks congressional consent.[62] In other circumstances, he may believe that the chance of military success is high enough that he does not need the kind of political insurance that congressional authorization affords. This consideration leads to the second hypothesis:

> *Hypothesis 2*: The President is likely to go to war without congressional authorization when the expected costs of a war are low and the likelihood of victory is high.

This second hypothesis is obviously the corollary to the first one discussed above. Congressional authorization provides a form of political insurance for the President in which he alone does not get to bear the possible downside costs of military failure. In situations where the President is fairly sure of rapid military success, however, such as when the foreign adversary is known to lack either the resources or resolve to prosecute a war against the United States, he will not need the protection of political insurance. In such circumstances, the President is likely to prefer complete agenda control over the prosecution of the war, knowing that when the war is terminated on his terms he is surely going to reap the benefit of a positive domestic audience reaction. From the President's perspective, congressional input in such "little wars" can be counterproductive because it is likely to decrease the likelihood of immediate victory. In other words, without the

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[60] *See* ELY, *supra* note __, at 47 (describing Congress' "backhanded" authorization of the Vietnam war, done so ambiguously that if anything went wrong, it could pin responsibility for the war on the President.)

[61] *See id*. at 19-21.

[62] *See* John Zaller, *Strategic Politicians, Public Opinion, and the Gulf* Crisis, in TAKEN BY STORM: THE MEDIA, PUBLIC OPINION, AND U.S. FOREIGN POLICY IN THE GULF WAR 266(Lance Bennett & David Paletz, Eds. 1994) ("Bush made the request [for congressional approval only after . . . he was almost certain to receive Congressional endorsement").

element of surprise that unilateral action affords, the President will be constrained in his ability to develop a military strategy that minimizes the loss of casualties in little wars.

If the downside risks of possible military failure or stalemate are significant enough even with the element of surprise, however, the President will likely forego the benefit that unilateral action provides. Indeed, the element of surprise may actually be counterproductive in high stakes military engagements because the domestic audience may not necessarily be prepared for the significant casualties or loss of lives that such engagements entail. In such high stakes conflicts, the President will likely choose to escalate the crisis gradually in order to condition the American public and Congress to the possibility of significant war casualties and financial commitments. Moreover, a gradual escalation strategy gives the President the opportunity to observe and measure the level of public support for war before he crosses a critical threshold where backing out of the use of force is not a politically feasible option.

While the foregoing discussion focuses primarily on the President's incentives to seek congressional authorization, the factors involved in a high stakes military engagement also affect congressional willingness to constrain the President. At the conflict initiation stage, the President usually has the ability to influence the domestic audience costs in a manner that makes congressional approval of his war agenda likely. However, if the President is already involved in a costly military engagement, or has recently just concluded a failed military engagement, the public appetite for the use of force is likely to diminish. In such situations, members of Congress have an incentive to capitalize on the shift in public opinion and oppose the President's agenda. This consideration leads to the third hypothesis:

> *Hypothesis 3*: Congress will most likely act to constrain the President's war-making agenda in the shadow of a recent politically unpopular use of force.

In this context, the shadow of recent uses of force refers not only to recently concluded wars but also the escalation of ongoing wars. All else equal, the domestic audience will generally disfavor involvement in foreign military engagements in the period following a war with significant casualties.[63] In these situations, members of Congress, especially those in opposition, will likely take advantage of the unpopularity of the war to constrain the presidential use of force.[64] Of course, members of Congress may

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[63] *See* Charles Ostrom & Brian Job, *The President and the Political Use of Force*, 80 AM. POL. SC. REV. 541, 548 (1986) ("The greater involvement in a 'shooting war, the longer will be the period following the war in which the public will resist any further or additional involvement that might lead to U.S. casualties. It would be unwise for the president to consider undertakings with the risk of additional casualties, because of the lingering resistance to foreign involvement that follows such outbreaks of war."); Patrick James & John O'Neal, *The Influence of Domestic and International Politics on the President's Use of Force*, 35 J. CONFLICT RES. 307, 313 (1991) ("[I]n periods following U.S. involvement in a war, public sentiment will reduce the president's propensity to use force.").

[64] *See* MARC SMRYL, CONFLICT OR CODETERMINATION 137 (1988) (When U.S. involvement ….. continues, the likelihood of Congressional action can increase if public opposition to military action

not have the ability to curb directly the presidential deployment of troops, but they can make the presidential exercise of the use of force much more costly by cutting off funds, by invoking statutory consulting and reporting requirements, or by threatening the President with impeachment.[65]

The most obvious institutional device at Congress's disposal for constraining the presidential use of force is the War Powers Resolution ("WPR").[66] Passed in 1973 over President Nixon's veto, the WPR provides certain procedures that the President has to comply with before he introduces forces into foreign hostilities. Ever since its passage, legal commentators of various stripes have dismissed the WPR as a toothless piece of legislation.[67] These critics focus on what seems to be a severe loophole in the reporting requirements of section 4.[68] More specifically, they usually point out that since only section 4(a)(1) triggers the time limit in section 5(b), which requires the termination of hostilities after sixty to ninety days,[69] the termination requirements of section 5(b) can be easily evaded.[70] In other words, a president who wants to evade section 5(b)'s time limits can simply report that a deployment falls under sections 4(a)(2) or 4(a)(3), which do not have automatic termination requirements, rather than section 4(a)(1). Indeed, of the over 110 uses of force that have been reported under section 4 since the WPR was enacted, only once has section 4(a)(1) been cited—by President Ford in the 1975 seizure of the SS Mayaguez.[71] Thus, as a practical matter, Congress may often have to build a veto-proof majority to force the President to terminate a use of force. The critics of the

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develops"); James Meernik, *Congress, the President, and the Commitment of the U.S. Military*, 20 LEGIS. STUD. Q 377, 383 (1995) ("When public support for a major use of military force is not forthcoming, Congress will likely smell blood and attempt to place constraints on the executive's ability to further commit the nation").

[65] *See generally* James Lindsay & Randall Ripley, *How Congress Influences Foreign and Defense Policy*, in CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 17-35(Ripley & Lindsay, Ed. 2004).

[66] 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548).

[67] HINCKLEY, *supra* note __ at 99-100; KOH, *supra* note __ at 39-40; 128; LOUIS FISHER, PRESIDENTIAL WAR POWER 132 (1995); MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 103-07 (1990).

[68] Section 4 requires the President to submit a report to Congress within forty-eight hours after any troops are deployed: (1) "into hostilities or into situations where imminent involvement in hostilities is clearly indicated," 50 U.S.C. § 1543(a)(1); (2) "into the territory, airspaces, or waters of a foreign nation," *id.* § 1543 (a)(2); or (3) "in numbers which substantially enlarge" American troops that have already been deployed, *id*. § 1543 (a)(3). Section 3 requires that the President consult with Congress "in every possible instance" before he introduces United States troops into foreign hostilities. *Id.* § 1542.

[69] Section 5(b) requires that any use of force under section 4(a)(1) be terminated within sixty to ninety days unless Congress authorizes such use or extends the termination deadline. 50 U.S.C. § 1544(b). Finally, section 5(c) requires the President to remove troops at any time if Congress orders him do so by concurrent resolution. *Id*. § 1544(c). The constitutional validity of this latter provision is questionable in light of the Supreme Court's ruling in *INS v. Chadha*, 462 U.S. 919 (1983). *See* Phillip Trimble, *The War Powers Twenty Five Years Later*, 3 U.C. DAVIS J. INT'L L. & POL'Y 183, 187 (1997) (discussing the constitutionality of section 5(c) under *Chadha*).

[70] *See* KOH, *supra* note ___at 126-127; ELY, *supra* note ___ at 49 (describing "pattern of presidential evasion").

[71] *See* HINCKLEY, *supra* note ___ at 86.

WPR argue that this loophole transforms the WPR into a symbolic statute that does little to enhance Congress's war powers authority.[72]

Contrary to the received wisdom, this Article argues that the WPR is actually an ingenious statutory instrument that enables members of Congress to monitor the political pulse of a war and intervene strategically. While the critics are probably correct that the WPR has not proven to be a very effective instrument for enhancing Congress's overall institutional prerogative, it has proven much more effective in giving members of Congress the opportunity to harness the political benefits of the use of force without bearing much of the downside costs. More specifically, the WPR allows members of Congress to remain agnostic and not invoke its provisions if the public momentum seems to favor the presidential use of force, but then invoke it selectively otherwise. Thus, the WPR can act conveniently as a sword when a war turns ugly and there are political benefits for constraining presidential authority, and act as a shield at other times when intervention might seem politically imprudent.

Furthermore, the ability of Congress to invoke the WPR selectively increases the President's political insurance costs. In other words, if the President refuses to seek congressional approval for a use of force that subsequently becomes unpopular, members of Congress can capitalize on the President's misfortunes by pointing out that he deliberately ignored a statutory scheme that was already in place. Thus, all else equal, the President has a greater incentive to seek congressional authorization for the use of force given the existence of the WPR than he would otherwise.

From an electoral perspective, the WPR's reporting, consulting, and constraining provisions serve a variety of important purposes. Section 4's reporting requirements compel the President to disclose any information about all uses of force, which includes uses of force that might otherwise be conducted surreptitiously.[73] By making such actions public, Congress has an opportunity to gauge the public response to the use of force and decide whether congressional intervention would be politically desirable. Moreover, the termination requirements under section 5(c) also give Congress a ready-made statutory framework to repudiate the President's use of force decision when it becomes politically desirable to do so. Although Congress could in theory repudiate the President's use of force without such a provision, such as by threatening to cut-off funds, the very existence of section 5(c) is likely to influence the President's calculus of whether to ignore or accommodate congressional preferences in the first instance. As one commentator has noted, "even if the [WPR] clock does not tick on the sixty to ninety day deadline, executive officials behave as though it does."[74] In other words, although presidents tend

[72] *See* KOH, *supra* note __at 126-127; ELY, *supra* note __ at 49 (concluding that the War Powers Resolution "has not worked" due to loopholes and Congress' unwillingness to close them).

[73] *See* David Auerswald & Peter Cowhey, *Ballotbox Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505, 509 (1997).

[74] LOUIS FISHER, PRESIDENTIAL WAR POWER 133 (1995).

to routinely disclaim the applicability of the WPR, they nonetheless seem to be wary of ignoring its provisions.

Finally, the critics are correct that the loophole in section 4(a)(1) of the WPR will often allow the President to evade the automatic termination requirements of section 5(b).[75] But it is not clear that a mandatory termination requirement would be in the electoral interests of members of Congress. Such a requirement is likely to shift many of the electoral risks associated with the use of force from the President to Congress. For instance, if there were an automatic termination requirement and for some reason Congress refuses to extend the period after the time limit expires under section 5(b) and the war goes wrong, the public is likely to blame the individual members of Congress who declined to vote for an extension rather than the President.[76] If, on the other hand, Congress does grant an extension and the war goes wrong, some of the blame that will be leveled at the President will also be leveled at those members of Congress who voted for an extension. Many commentators may argue that this form of political burden-sharing is desirable from the perspective of the American public,[77] but it is far from obvious as to whether it would be desirable for members of Congress subject to electoral constraints.

In any event, during a costly and unpopular war, or in the shadow of a recent unpopular use of force, Congress has shown both its ability and willingness to intervene in use of force decisions. Indeed, as the case studies in Part II reveal, members of Congress have often used the WPR selectively in constraining the presidential use of force in various politically unpopular conflicts.

One significant caveat: in deciding whether to constrain the presidential use of force, different members of Congress face varying incentives. Members of the President's party may have an incentive to support the Presidential use of force even in the face of waning public support since the President's electoral fortunes may be closely tied to their own. Opposition members of Congress, on the other hand, have an incentive to support the President only when there are "rally around the flag" benefits associated with the use of force.[78] Given these varying incentives, we might expect congressional resistance to the President's agenda to increase when the opposition is the majority party in Congress. Some political scientists have actually documented a relationship between the partisan

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[75] *See, e.g.,* KOH, *supra* note __at 126-127.

[76] *See* James Meernik, *Congress, the President and the Commitment of the U.S. Military*, 20 LEGIS. STUD. Q at 379 ("[I]f Congress places limitations on the President, it may prevent the nation form taking a correct, aggressive, course and thus it may be blamed by the public for interfering with the commander-in-chief").

[77] *See e.g.,* ELY supra note __ at 47 ("[T]he prerogatives of congressmen aren't what's at stake here. What is at stake—and was so understood by the framers—is the judgment that no single individual should be able to take the nation into war and thereby risk the lives of all of us, especially our young people.").

[78] *See* Kenneth Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SC. REV. 829, 831 (1998) (pointing to empirical evidence that suggests that it will be costly for opposition parties to oppose wars that voters consider successful).

composition of Congress and legislative resistance to the use of force.[79] These findings support the thesis in this Article that congressional resistance to the use of force is likely to increase if there are clear electoral payoffs for doing so. The focus of this paper, however, is not on the political motivations that drive individual members of Congress, but the factors that affect the institutional capacity of Congress to constrain the President. Thus, while this Article does not factor in the partisan composition of Congress in its analysis, it acknowledges that during a politically unpopular war the opposition members may have a greater incentive to constrain the President's political agenda.

> *Hypothesis 4:* While the President is more likely to be shaping public opinion in his commander-in-chief role, Congress is more likely to be responding to public opinion when it constrains the President's national security agenda.

As some scholars of the institutional presidency have noted, the President has the unique ability to make the first move on a policy issue and then wait for the other branches of government to respond.[80] In the war powers context, the President's first move advantage is most clearly demonstrated when he uses his role as the commander-in-chief to create or escalate an international crisis without having to first convince the other institutional actors of the wisdom of his action. While Congress and the courts may occasionally respond to the President's use of force decisions, it is rare that any of these other branches of government actually take a proactive stance in national security issues.[81]

Of course, when the President makes the first move on a policy decision such as the use of force, he is not necessarily waiting for a reaction from Congress. It is more appropriate to describe the President's first move advantage in national security issues as his ability to shape favorable public opinion for his preferred military course of action.[82] Correspondingly, it is more appropriate to consider a congressional response to the President's decision as a response to the public's perception of that decision. Thus, in many circumstances preceding the actual initiation of a conflict, the President will be able to mobilize public opinion in his favor and on those occasions Congress will usually rubberstamp the President's decision.[83] In other circumstances, such as when casualties

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[79] *See* Meernik, *Congress, the President, and the Commitment of the U.S. Military, supra* note __ at 384.

[80] *See* HOWELL, POWER WITHOUT PERSUASION, *supra* note __ at 14.

[81] Koh, *supra* note at__ .

[82] *See* Robert Shapiro & Lawrence Jacobs, *Lyndon Johnson, Vietnam, and Public Opinion: Rethinking Realist Theory of Leadership*, 29 PRES. STUD. Q 592 (1999) (observing the President Johnson led and directed public opinion on the Vietnam war).

[83] HINCKLEY, *supra* note __ at 80.

and the costs of the war become fairly significant, the public is likely to turn against the President and members of Congress are likely to follow suit.[84]

The ability to frame and influence public opinion on use of force issues thus distinguishes presidential action from congressional intervention. In other words, from the perspective of the domestic audience, the President is proactive and Congress is reactive on national security issues.

Concluding that Congress follows public opinion on national security issues does not resolve the question of causality, however. If, for instance, the President withdraws from a politically unpopular use of force decision, how would we know whether he is reacting to congressional intervention or to the negative reaction of a domestic audience? Or put differently, if the President is simply reacting to negative public opinion, how can one claim that Congress is actively constraining the President's national security agenda?

The answer is that President has very little incentive to react directly to a negative domestic audience in use of force decisions. Indeed, it will often be to the President's disadvantage to withdraw or pull out of a military engagement in the midst of declining public support because he will look incompetent if he does so.[85] In other words, instead of rewarding the President for withdrawing from a politically unpopular use of force, the domestic audience is more likely to punish him for initiating a military engagement he could not win.[86] In this sense, the same sort of domestic audience factors that make it difficult for the President to back out of an escalating international crisis are also likely going to make it difficult for him to back out of a politically unpopular conflict. Thus, rather than withdraw as a military campaign becomes unpopular, the President has an incentive to escalate the conflict and hope for strategic victories in the battlefield that will change the wind of public opinion.[87]

Of course, the President's preference may not necessarily be to entrench the troops in a war at all costs; he may on occasion prefer to pull out of an intractable military engagement if he concludes that the war is unwinnable and that he is likely to face some punishment by a domestic audience regardless of the eventual outcome of the military

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[84] *See* Timothy Cotton, *War and American Democracy: Electoral Costs of the Last Five Wars,* 30 J CONFLICT RES. 616, 619-20 (1986).

[85] *See* Fearon, *Domestic Political Audience*, *supra* note __ at 581 ("Backing down after making a show of force is often most immediately costly for a leader because it gives domestic political opponents an opportunity to deplore the international loss of credibility, face or honor").

[86] *See* Huth & Allee, *Domestic Political Accountability*, *supra* note __ at 759 ("Opposition elites and mass publics . . . do not generally hold more dovish diplomatic and military preferences than incumbent leaders. Instead, they simply seek to punish leaders who adopt controversial or failed policies.").

[87] As former Secretary of State George Ball aptly put it: "Once we suffer large casualties, we will have started a well-nigh irreversible process. Our involvement will be so great that we cannot—without national humiliation---stop short of achieving our goals." (quoted in George Downs & David Rocke, *Conflict, Agency, and Gambling for Resurrection: The Principal Agent Problem Goes to War,* 38 Am. J. Pol. Sc. 362, 375 (1994). Downs and Rocke characterize the practice as "gambling for resurrection." *Id.* at 374-77.

engagement.[88] Under such circumstances, the President may choose to terminate the military engagement but will likely try to do so in a manner that minimizes the political fallout from pulling out. For instance, he may insist on settlement terms that suggest that the United States fulfilled some of its military objectives. Alternatively, he may revise his military objectives and present the withdrawal as a victory to the domestic audience by arguing that some of the "revised" military objectives had been met and that further engagement with the foreign adversary would either be unnecessary or counterproductive. In all these circumstances, however, the President is likely to consider withdrawal only as a last resort because it is likely to result in some form of domestic audience costs.[89] Thus, the President's initial preference will be to gamble that the course of the war will change in a favorable direction rather than admit defeat at the first signs of a negative domestic reaction.

Unlike the President, members of Congress, especially those in the opposition, do not necessarily have an incentive to support the President's use of force decision once public support for the war declines significantly. On the contrary, whenever opposition members in Congress perceive that public opinion has turned against the war they have an incentive to mobilize immediately against the President's national security agenda.

These varying incentives between the President and members of Congress on the question of the termination of war are rooted in the asymmetric political payoffs they face in use of force issues. In other words, the President faces a different political payoff than members of Congress when he decides to engage in a war even if the war has been approved by Congress.[90] When there is a rally around the flag effect, the President is likely to benefit from the rally effect more than members of Congress. Correspondingly, if there is domestic backlash against the use of force, the President is more likely to be blamed than members of Congress.[91] Since the President bears a disproportionate burden of the costs of military failure, the opposition members of Congress might prefer to

[88] Indeed, in certain circumstances, the President may conclude that domestic audience costs are likely to increase in the absence of an immediate withdrawal. *See* HEIN GOEMANS, WAR AND PUNISHMENT 39-40 (2003).

[89] Political scientists who have studied democratic regimes and war have observed that democratic leaders are usually reluctant to initiate international crisis unless they are assured of winning. *See* Bruce Bueno de Mesquita et al., *An Institutional Explanation of the Democratic Peace*, 93 Amer. Pol. Sc. Rev. 791, 802 (1999). As Shapiro and Jacobs observe, Lyndon Johnson's decision to withdraw from the presidential race in 1968 occurred only after he concluded that the United States' military objectives were unattainable. Shapiro & Jacobs, *Lyndon Johnson, Vietnam, and Public Opinion: Rethinking Realist Theory of Leadership*, *supra* note __ at 594.

[90] *See* Fitts, *The Paradox of Power*, *supra* note __ at 888 (observing that the public is more likely to hold the President than Congress responsible for national events because of public perceptions that Congress faces a collective action problem).

[91] *See id.*

terminate a conflict early even if they suffer some domestic audience costs since they know the President is likely to suffer even higher costs. [92]

2. *The International Level: Sending Costly Signals to Foreign Adversaries*

In some circumstances, the presidential choice to seek congressional approval for the use of force may be a strategic signal to the foreign adversary about the United States' willingness to prosecute a conflict. Costly signals play a very important role in use of force situations especially when both states are mutually uncertain about each other's cost tolerance for prosecuting the conflict.[93] By under-taking the costly effort to seek authorization from Congress—an institution that includes members who have an incentive to oppose the President's policy—the President sends a more credible signal of United States' resolve to prosecute the conflict.[94]

Costly signals to a foreign adversary are especially important for democratic regimes. Assume, for instance, that the foreign adversary is uncertain about the United States' cost tolerance for escalating a specific conflict. The foreign adversary may nonetheless conclude that because the United States is a democratic regime, there is likely to be an opposition party that competes with the President for political power. Absent the support of such an opposition, the foreign adversary may reckon that the cost tolerance of the United States for military casualties is likely to be low because the opposition stands to reap political benefits from military failure by the President.[95] On the other hand, support by the domestic political opposition for the president's use of force decision sends a credible signal to the foreign adversary because "while the government [in power] may have incentives to bluff (about the United States' resolve), the opposition has no incentive to collude in the bluff."[96]

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[92] *See* ELY, *supra* note __at 53 ("[D]espite the Tonkin Gulf Resolution most members of Congress felt no compunction whatever about disclaiming responsibility for the war and blaming it entirely on the President.")

[93] *See* Fearon, *Domestic Political Audiences, supra* note __ at 582 (observing that institutions that improve domestic accountability of political leaders increases the chance that the leaders will be able to send credible signals of resolve).

[94] Some commentators have noted that the President will seeks legislative ratification of treaties as a costly signal to foreign treaty partners of the United States' commitment to its treaty obligations. *See, e.g.*, John Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 5 (2002).

[95] Indeed, leaders that face a strong domestic opposition are more credible when they issue threats precisely because there are domestic opponents who stand to benefit politically if the leaders backs out of an international crisis. *See* Paul Huth & Todd Allee, *Domestic Political Accountability, supra* note __ at 759.

[96] Kenneth Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AMER. POL. SC. REV. 829, 838 (1998). In 1986, Caspar Weinberger, then Secretary of Defense wrote that legislative participation and public support were crucial in signaling United States resolve:

> Before the United States commits combat forces abroad, the U.S. government should have some reasonable assurance of the American people and their elected representatives in Congress. . . . The public elects the President as a leader, not a follower. He takes an oath to protect and defend the Constitution. The people also expect a Congress sworn to the same

Sending a costly signal to the foreign adversary may only be important to the President when he believes that the foreign adversary has significant military capabilities or a high level of resolve. In other words, the more the President believes that an immediate victory is likely with a non-costly show of force, the less the value of the costly signal. As mentioned earlier, a President who seeks congressional authorization for the use of force risks the possibility of outright rejection of his national security agenda.[97] Thus, in the context of "little wars" where the prospects of immediate victory are high, the President is more likely to dispense with the role of congressional authorization as a costly signal.[98] This last consideration leads up to our final hypothesis:

> *Hypothesis 5:* Where the President is uncertain about the military capabilities and the level of resolve of a foreign adversary, he is likely to resort to congressional authorization to send a costly signal to the foreign adversary of United States' resolve to prosecute the conflict.

The problem with the hypothesis above is that it involves a variable—the value of costly signaling—which is interdependent with the political insurance variable discussed in the first hypothesis. Often, the presidential decision to seek domestic political insurance through congressional authorization will also implicate the presidential need to send a costly signal to the foreign adversary. For instance, when the President seeks congressional approval as a form of political insurance because he is worried about the prospects of military failure, he may also conclude that the lack of congressional authorization is likely to increase the chance for military failure. Thus, the President's desire to signal resolve to the foreign enemy is likely to overlap with his desire to seek political insurance through congressional authorization.

Because the President is likely to anticipate congressional reaction when he decides whether he wants to send a signal to the foreign adversary, it will often be very difficult to isolate the causal variables in any particular presidential decision to seek congressional authorization. Although the historical evidence in some of the case studies suggest that both variables are at play, the issue of falsifiability looms large. Therefore, for the skeptic, is may be difficult to test the theoretical framework espoused here against the alternatives. Even with these limitations, however, the following case studies probably provide the best method for evaluating the strength of the theoretical model. Through the various speeches, floor amendments, newspaper reports and executive edicts referred to in these case studies, we are given a window into some of the thought processes of the institutional actors that drive the use of force decisions.

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principles and duties. To that end, the president and leadership of the Congress must build the public consensus necessary to protect our vital interests.

Caspar Weinberger, *U.S. Defense Strategy*, 65 Foreign Affairs 675, 686 (1986).

[97] *See* discussion at *supra* notes __
[98] *See* discussion at *supra* notes __

II. THE CASE STUDIES OF PRESIDENTIAL-CONGRESSIONAL INTERACTION ON WAR-POWERS

This Part of the Article examines 4 different modern case studies of presidential-executive interaction on the use of force: (1) President Reagan's 1982-1983 deployment of Marines in Lebanon; (2) President Reagan's 1983 invasion of the Caribbean island of Grenada; (3) President Clinton's 1993 effort to provide humanitarian relief after a state-breakdown in Somalia ("Operation Restore Hope"); and (4) President Bush's 2003 invasion of Iraq.[99]

These case studies reveal that presidents are more likely to seek congressional authorization in use of force situations that require extensive troop deployments over a long period of time. Such extended troop deployments are effective proxies for the president's belief that the war is likely to involve a significant risk of casualties or military stalemate. Moreover, Congress is more likely to intervene in two separate circumstances: (1) in protracted wars where there is declining public support; (2) in the shadow of a recent unpopular use of force. For instance, the protracted deployment of U.S. Marines in Lebanon came under a lot of congressional fire after the October 1983 barracks bombing that killed 239 servicemen.[100]

Moreover, these case studies also illustrate certain consistent patterns in congressional and presidential reaction to negative public opinion polls of the use of force. For instance, in the midst of declining public support for a foreign military engagement, presidents are more likely to try gamble on reviving public support by mounting a public relations campaign or escalating the conflict with the hope of achieving politically strategic victories. In such circumstances, presidents usually argue that the withdrawal of troops in the face of negative opinion polls is inappropriate because it will send a wrong signal to foreign adversaries of the United States' resolve to protect its interests. On the other hand, members of Congress seem more willing to pursue a withdrawal strategy once public opinion turns against the use of force.

Beyond the case studies examined in detail below, presidents have shown in other circumstances that they are willing to commit United States Forces to military engagements without congressional authorization when the immediate prospects of victory are high. For instance, in December 1989, while Congress was on recess, President Bush announced that he had ordered the invasion of Panama, citing threats to the significant American military and civilian presence in that country by the military

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[99] For the methodological approach I used to generate the public opinion polls and graphs in these case studies, I simply gathered public opinion data from the Roper Center for Public Opinion Research over the relevant periods for the wars used in the case studies. This data is available on Roper's website at http://www.ropercenter.uconn.edu/. To determine whether opinion polls changed over time, I recalculated the poll responses to eliminate don't know, not sure, and no opinion responses. *See* Benjamin Page & ROBERT SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES 44-53 (1992) (adopting similar conventions to test change of American public opinion over time).

[100] *See* discussion *infra* notes __

regime of General Manuel Noriega.[101] President Bush did not even bother to consult formally with Congress and by the time Congress came back from the winter recess in January 1990 the invasion was over.[102] Given the relatively rapid and decisive victory in Panama and the subsequent capture of General Noriega, President Bush's invasion proved to be fairly popular with the domestic audience.[103] In his decision to invade, President Bush understandably chose to dispense with congressional approval because Panama was too weak to be much of a political risk and the likelihood of a swift military victory was fairly high. In the end, congressional response to the President's unilateral action was overwhelmingly positive even though the President had effectively left Congress completely out of the decision-making process. [104]

Interestingly, there are other such instances of unilateral use of force by the President in low-risk conflicts in the post-Vietnam era: the 1975 rescue mission on the U.S. merchant ship *Mayaguez*, the 1980 Iran rescue mission, the 1986 air strikes against Libya, the 1987 escort operations in the Persian Gulf, the 1993 air strikes against Iraq for attempting to assassinate President Bush, the 1993 air strikes in Bosnia, the 1998 air strikes against terrorist sites in Sudan and Afghanistan; and the 1999 air strikes against Bosnia.

Although the focus of these cases studies is on post-Vietnam uses of force, the Vietnam conflict itself is also a very good illustration how presidential interaction with the domestic audience can shape the division of war-powers authority. For instance, the beginning of the conflict, which culminated in Congress granting the President broad authority under the Tonkin-Gulf Resolution, is a veritable example of how the presidential management of a crisis constrains Congress's decision-making space. In the tense and uncertain atmosphere following the Tonkin Gulf incidents, President Johnson was able to frame the issue as an act of foreign aggression that required an immediate and decisive military response.[105] Moreover, President Johnson's strategy of escalating the conflict whenever there was a sustained dip in the public opinion polls also supports the gamble for revival hypothesis.[106] In other words, instead of following negative public opinion polls when the war was going badly, President Johnson tried to change the course of public opinion by escalating the war with the hope of achieving strategic battlefield

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[101] See Presidents Bush's Address of Dec. 20, 1989, reprinted in 1989 CONG. Q. 3534.

[102] *See* Rosenthal, *U.S. Forces Gain Wide Control in Panama*, NY TIMES, Dec. 21, 1989, at A1.

[103] Richard Morin, *Poll Shows Rising Support for Bush, Republicans; After Panama Invasion, President's 79 Percent Approval Rating Exceeds Reagan's Peak*, WASH. POST, Jan. 18, 1990, at A09.

[104] Pat Towell & John Felton, *Invasion, Noriega Ouster Win Support on Capitol Hill*, 1989 CONG. Q. 3532, 3532.

[105] *See* ELY, *supra* note __ at 20-21 (suggesting that the Johnson administration misled Congress in reporting the Tonkin Gulf incidents).

[106] As Jacobs and Shapiro demonstrate, President Johnson's administration focused its efforts on shaping public opinion for the war and not following it. *See* Robert Shapiro & Lawrence Jacobs, *Lyndon Johnson, Vietnam, and Public Opinion: Rethinking Realist Theory of Leadership*, 29 PRES. STUDIES Q. 592, 594 (1999). More interestingly, their empirical analysis reveals that during the period when public opinion polls supporting the withdrawal of troops actually increased, President Johnson's "militaristic statements and decisions to increase bombing and troops levels also continued to increase." *Id.* at 607.

victories. Finally, the conflict also supports the hypothesis that Congress will act to constrain the President's war-making initiative when there is a sustained loss of public support for the use of force. Indeed, it was the congressional action to cut-off funds that eventually led to the final withdrawal of troops from Southeast Asia under Nixon's presidency.[107]

A. *The 1982-1984 Intervention in Lebanon and the 1983 Intervention in Grenada*

In many ways, the interventions in Lebanon in 1982-1984 and the intervention in Grenada in 1983 are inextricably linked from the perspective of domestic audience costs. The Grenada invasion was commenced two days after the most tragic moment of the Lebanon intervention: the October 23, 1983 terrorist bombing of the U.S. Marine barracks in Beirut that left over 269 Marines dead and dozens injured.[108] The eventual success of the Grenada invasion managed to divert public attention from the tragedy unfolding in Beirut. More importantly, the significant public support for the relatively rapid Grenada invasion most likely muted growing public distaste for the American military role in Lebanon. When the euphoria of the Grenada invasion wore off, however, public dissatisfaction with the Lebanese intervention increased and Congress continued to mount resistance to the President's Middle-East policies. As discussed in more detail below, such congressional resistance proved to be crucial in the President's decision to order the withdrawal of the Marines from Lebanon in March 31, 1984. In any event, given the complex relationship between the public reactions to the Grenada and Lebanon interventions, it is hard to analyze these two conflicts in isolation from one another. Thus, the following two case studies will often discuss both conflicts when necessary to understand the context of the domestic audience's reactions to these conflicts.

1. *Lebanon.* In 1982 Lebanon was a country wracked by civil war with over six warring factions occupying different parts of the country. The United States intervention in that country in 1982 would consist of two separate deployments. The first deployment, which lasted less than a month, occurred in August 1982 and involved overseeing the withdrawal of PLO forces from Lebanon.[109] The second deployment, which occurred in late September that year, involved a multinational effort to restore order after Christian Phalangist militiamen massacred 460 people in two Palestinian refugee camps ostensibly in retaliation for the assassination of Lebanese President Amin Gemayal.[110] Initially, President Reagan did not seek congressional authorization for either

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[107] *See* Continuing Appropriations Act for Fiscal Year 1974, Pub.L.No.93-52, 93rd Cong. 2nd Sess. (July 1, 1973), § 108 (providing that "on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia."); *see also* MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 289 (1990) (describing how public opinion led Congress to cut off funds for the Vietnam conflict).

[108] Steven Strasser, *The Marine Massacre*, NEWSWEEK, 31 Oct. 1983.

[109] Richard Whittle, *Report on Marines Skirts War Powers Issues*, 1982 Cong. Q. 2157, 2158

[110] Richard Whittle, *Congress Uncertain about Aid to Isreal*, 1982 Cong. Q. 2357, 2357/

of these deployments.[111] In both instances, the number of troops initially deployed was relatively small—less than 1,200 troops and the administration insisted the troops would be out by the end of the year. By late that year, however, the situation in Lebanon had worsened and the Christian-led government of Amin Gemayal had asked the countries contributing to the multinational force to increase their presence.[112] When President Reagan announced in December 1982 that he would seriously consider the Lebanese government's request to double the Marine presence in Lebanon, some members of Congress started requesting formal reassurances from the administration regarding the scope of the U.S. military role in Lebanon.[113]

Although there were occasional congressional requests to President Reagan regarding the role of the Marines in Lebanon, Congress did not play any formal role in the Lebanese intervention until mid-year 1983. The congressional intervention was triggered in part by a bomb that exploded at the U.S. embassy in Beirut on April 18, 1983 that killed 61 people.[114] The day after the bombing the Senate Foreign Relations Committee passed a bill that approved $250 million for military and economic aid to Lebanon but the bill was contingent on the President seeking congressional approval for any expansion of the U.S. military role in Lebanon.[115] Eventually, President Reagan signed the resulting legislation--the Lebanese Emergency Assistance Act of 1983 (the "LEAA").[116] Although the LEAA explicitly required that the President seek congressional authority for any future expansion of the mission in Lebanese, it did not in any way suggest that the WPR was triggered by the events in Lebanon or that the duration of the deployment was contingent on congressional authorization.

By late August, events in Lebanon started to look bleak. On August 29, Druse militia forces attacked a contingent of U.S. military forces in West Beirut and killed two Marines.[117] The President reported these casualties to certain congressional leaders but disclaimed that the Marines were facing any imminent hostilities within the meaning of section 4(a)(1) of the WPR.[118] The President also quickly escalated the conflict and ordered the additional deployment of 2,000 Marines in ships off the coast of Lebanon.[119] By September, Marines and naval units were actively shelling Muslim militia positions in villages near Beirut. At this stage, it was becoming increasingly difficult for the

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[111] John Felton, *Some in Congress Uneasy About New Role for Marines in Lebanon Peace Force*, 1982 Cong. Q. 2469

[112] *Id.*

[113] *Id*. at 2469.

[114] DANIEL P. BOLGER, SAVAGE PEACE 172 (1995).

[115] The Lebanon Aid Bill--H.R. 2532 in its House incarnation and S. 639 in the Senate--had been introduced in the Senate on March 1, 1983 and in the House on April 13. *See* 129 Cong. Rec. 3295 & 8452 (1983).

[116] *See* 129 Cong. Rec. 14,349-50 (1983)

[117] Steven R. Weisman, *From Santa Barbara, Shock, Grief and Blame*, N.Y. Times, August 30, 1983 at A9.

[118] BOLGER, *supra* note __, at 179.

[119] William E. Farrel, *U.S. Positioning 2000 Marines Off Beirut Coast*, NY TIMES, September 2, 1983 at A1.

administration to deny that the U.S. forces were not engaged in hostilities in Lebanon. Moreover, more members of Congress were becoming more assertive about their concerns in the ongoing crisis.[120] Congressional leaders, including Senator Robert Byrd of West Virginia, were insisting that the WPR was operative and that the sixty-day time clock under section 4(a)(1) was triggered once the Marines were killed in action on August 29, 1983.[121] The President was also somewhat vulnerable from a political standpoint because the first national political poll on the deployment in almost a year suggested that only 40 % of Americans were satisfied with how the President was handling the Lebanese intervention.[122]

In this delicate political environment, the Congress and the President began to negotiate the proper contours of a congressional role in the Lebanese intervention. The President warned that any signs of congressional opposition to the deployment were likely to send the wrong signal to the foreign adversary and terrorists.[123] The President and Congress eventually reached a compromise position with legislation that expressly declared that hostilities in Lebanon started on August 29, 1983, but then authorized the deployment of the Marines for an additional eighteen months from the date of enactment.[124] This new legislation—the Multinational Force in Lebanon Resolution(MFLR)—expressly disclaimed any intention to supersede the WPR even though it effectively rescinded the sixty-day triggering mechanism under section 4(a)(1) of the WPR. Certain provisions were consistent with the spirit of the WPR: section 7 gave Congress the authority to terminate the conflict at any time before the 18 month time limit by passing a joint Resolution; and section 4 required that the President seek congressional approval before expanding the mission of the Marine deployment.[125] In signing the legislation, President Reagan praised the cooperative spirit of Congress but also expressly made it clear that he believed that his constitutional authority as the commander-in-chief was in no way constrained by the provisions of the WPR.[126]

The political cooperation that gave birth to the MFLR was short-lived. On October 23, 1983, a bomb exploded outside the Marine barracks in Beirut and killed 269 Marines.[127] The mainstream media quickly attacked the President's Middle-East policies and suggested that the public was growing frustrated with the role of U.S. forces in

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[120] *Id*.

[121] Hedrick Smith, *Reagan Upgrading Lebanon Presence*, NY TIMES, September. 13, 1983 at A1.

[122] *See* opinion polls data in Table 2 *infra*.

[123] *See* Steven R. Weisman, *White House Warns A War Powers Fight Hurts U.S. Interests*, NY TIMES, September 17, 1983, Section 1 (senior administration officials say that requiring defined time period will send wrong signal to foreign adversaries); *Id*. at 4 ("It's also important that, particularly in sending a signal to the Syrians, that we not have a plan that promises that the troops are going to be out of Lebanon on a given day").

[124] Felton, *Domestic Debate Follows Lebanese Violence*, 1983 Cong. Q. 1912, 1912.

[125] *See* 129 Cong. Rec. 25,747 (1983) (text of S.J. Res. 159).

[126] Ronald Reagan, statement upon signing PL 98-119 (Oct. 12, 1983), reprinted in 1983 Cong. Q. 2142, 2142.

[127] *See* Strasser, *supra* note __ at 1.

Lebanon.[128] Various members of Congress reacted predictably with outrage. Barely two days after the bombing several congressional democrats threatened to break ranks with the party leadership and craft a proposal that would cut off all funding for the Marines in Lebanon and force the President to withdraw the troops.[129] Even members of Congress who supported the President acknowledged that the mood of Congress had changed significantly and that a reevaluation of the Marine deployment would be necessary.[130]

On October 26, barely three days after the bombing in Beirut, the President ordered the invasion of the Caribbean island-nation of Grenada.[131] The reasons given for the invasion were to quell the growing communist threat posed by political instability on that island and to rescue American citizens living on the island who were endangered by the ensuing political turmoil.[132] The invasion ostensibly diverted the attention of the public and Congress from the events in Lebanon. In the midst of these two ongoing crises, President Reagan went on national television to defend his actions.

President Reagan's television address to the nation on October 27, 1983 was a classic example of an attempt by the President to create a "rally round the flag" effect in the midst of an international crisis. First, President Reagan announced that the objectives of both the Grenada and Lebanon invasions were similar and couched them in terms of defending American interests from a growing double threat of Soviet and Cuban communism.[133] In Lebanon, the growing communist threat stemmed ostensibly from the alignment of Syrian and Soviet interests. President Reagan insisted that only the United States and the other members of the multinational force could prevent the Syrians from toppling the government of President Amin Gemayal.[134] In effect, the President framed the objectives of both engagements as an effort to protect the nation from a foreign threat—an objective that would be more amenable to the "rally around the flag effect" than intervention in the internal political affairs of another country.[135] Second, the President tried to reassure the country that the enemy was dangerous and had committed provocative acts that required decisive action. In the Grenada context, for instance, President Reagan explained that that the only remnant of governmental authority involved the imposition of "a 24 hour curfew with orders to shoot on sight anyone found moving in those 24 hours."[136] He concluded that American citizens were under great danger and were seeking to escape from the political chaos.[137]

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[128] Robert McFadden, *Americans React to Attack with Frustration and Doubt*, NY TIMES, 24 October 1983, at A.9.

[129] Steven Roberts, *Some Democrats Want Marines Out*, NY TIMES, October 25, 1983 at A16.

[130] *Id.*

[131] *Wednesday, October 26, 1983 Invasion of Grenada*, NY TIMES, October 26, 1983 at B1.

[132] Drew Middelton, *U.S. Forces: Need Arising for More Troops, Ships and Planes*, NY TIMES, October 26, 1983, at A 16.

[133] *Quotation of the Day*, NY TIMES, October 28, 1983, at B1.

[134] *Transcript of Address by President on Lebanon and Grenada*, NY TIMES, October 28, 1983, at A10.

[135] *See* discussion in text at *supra* notes __

[136] *See* Denise Bostdorf, *The Presidency and Promoted Crisis: Reagan, Grenada, and Issue Management*, 21 PRES. STUD. Q, 737, 742 (1991).

[137] *Id.*

In the end, both the impact of the Grenada invasion and President Reagan's October 27 speech proved to be very effective at shaping public perception of the U.S. military role in Lebanon—at least in the short term. A CBS/New York Times poll taken after the speech showed that 57.3 percent of Americans approved of the American government sending Marines to Lebanon—up from 40% from a similar poll in September and up from 53.8% from a poll the night before the speech.[138] Among those who actually heard the President's speech, however, the change was even more dramatic – 66.8 percent actually approved of the Marine presence in Lebanon.[139] In sum, the President's speech on the Lebanese crisis in the wake of the Grenada invasion was an apt demonstration of an executive branch effort to gamble on the resurrection of public support in the midst of a significant foreign policy setback (the Beirut barracks tragedy).

The public euphoria surrounding the Grenada invasion fizzled out by late November, however. By December 1983, the public mood towards the deployment in Lebanon had changed significantly and so had the stance of major congressional leaders. Earlier that month, 8 American servicemen were killed in a raid against Syrian antiaircraft positions in East Beirut.[140] In a Gallup poll in mid-December, about 52 percent of the respondents said they thought it was a mistake for the United States to send the Marines to Lebanon.[141] Democratic members of Congress in the House and Senate were busy introducing a variety of bills that would ostensibly cut-off funding for the Marine deployment in Lebanon.[142] But it was not only Democratic members of Congress who were growing increasingly skeptical of the Lebanon deployment. By late December, Congressman Robert Michel, the House Minority Leader, was urging President Reagan to pull out the Marines in Lebanon as soon as possible.[143] Earlier, Senator Charles Mathias of Maryland, another prominent Republican legislator, announced that he would support a Resolution that would reduce the 18 month withdrawal timeframe under the MFLR to 6 months.[144]

In the face of mounting public criticism of the Lebanese deployment and legislative threats to force a withdrawal of the troops, President Reagan mounted a public relations counter-offensive. In his weekly radio address on December 10, 1983 President Reagan vowed in the face of growing casualties that American troops would remain in Lebanon until "internal stability is established."[145] Later on at a news conference in

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[138] *See* opinion polls data in Table 2 *infra*.

[139] *See* Alan J Rosenblatt, *Aggressive Foreign Policy Marketing: Public Response to Reagan's 1983 Address on Lebanon and Grenada*, 20 POL. BEHAVIOR 225, 236 (1998).

[140] Thomas Friedman, *U.S. Ships Attack Syrian Positions in Beirut Region*, NY TIMES, Dec. 14, 1983, at A1.

[141] Gallup Poll, Dec 9-12, 1983 in Table 2 *infra*.

[142] *See* 129 Cong. Rec. 28, 863 (1983).

[143] Philip Taubman, *O'Neil Considers Backing a Change in Marine Mission*, NY TIMES, December 30, 1983, at A1.

[144] *See* John Felton, *Senate Democrats Push Lebanon Policy Review*, 1983 Cong. Q. 2359.

[145] Francis Clines, *Reagan Defends Policy in Lebanon*, NY TIMES, December 17, 1983, Section 1 at 17.

December 14, President Reagan announced that the United States would not withdraw its troops until the government of Lebanon had control of its territory or until the complete collapse of order in that country.[146] But the heat for pulling out was on and by late December, Walter Mondale—the Democratic frontrunner for the 1984 presidential election argued that the Marines should be pulled out of Lebanon immediately.[147] A further blow to the President came later that month: on December 28, 1983 a Department of Defense committee chaired by retired Admiral Robert Long released a devastating report that criticized the Marine presence in Lebanon and suggested that the Marine barracks tragedy was a result of failures in the chain of command.[148]

Notwithstanding the critical tone of the Long Report, the Reagan administration continued to campaign actively for legislative and public support for a sustained Marine presence in Lebanon.[149] But given the growing decline in public opinion polls in support of the deployment,[150] the President's public relations campaign was clearly faltering. For instance, a Gallup poll of January 13-16, 1984 showed that about 70% disapproved of the way the President was handling the situation in Lebanon.[151] In early January, both Democratic and Republican leaders in the House issued a statement saying that a reassessment of the U.S. policy in Lebanon was necessary.[152] The Senate and House Democratic Caucus eventually endorsed a proposed bill that called for the immediate withdrawal of U.S. troops from Lebanon.[153]

Initially, the President was adamant and strongly opposed the proposed Democratic Resolution on the grounds that the Resolution would clearly make matters worse for the troops in Lebanon.[154] In addition, the President seemed to react to the news by escalating the conflict and increasing the strikes on enemy positions in Lebanon.[155] Indeed, as the situation in Lebanon got worse, President Reagan's level of resolve seemed

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[146] Steven Weisman, *Reagan Predicts Role Till Beirut Stands or Falls*, NY TIMES December 15, 1983 at A1.

[147] *See* James Carity, *Mondale says U.S. Must Get Marines Out of Beirut Now*, NY TIMES, December 31, 2003 at A1.

[148] *See* Report of the Long Commission, 1984 Cong. Q. 31 (Released Dec. 28, 1983).

[149] Michael Glennon, *Lebanon Policy Is Questioned As Support Waivers on the Hill*, 1984 Cong. Q. 3, 3.

[150] *See* Gallup Poll, Jan. 13-16, 1984 in Table 2 *infra*

[151] *See Id.*

[152] *See* Martin Tolchin, *House Leaders Urge New Study of Beirut Policy*, NY TIMES, Jan. 2, 1984 at A1; *see also* Steven Roberts, *Support Waning for Beirut Role*, NY TIMES, Jan 4, 1984 at A10

[153] See John Felton, *Democrats Step Up Pressure for Beirut Pullout*, 1984 Cong. Q. 227, 227-28; *House Democrats Draft Resolution on Beirut Pullout*, NY TIMES, February 1, 1984, at A1; *see also* Martin Tolchin, *O'Neill Predicts House Will Back Resolution on Lebanon Pullout*, NY TIMES, January 27, 1984, at A8.

[154] See Francis Clines, *White House Says Democrats Play Politics on Beirut*, NY TIMES, February 2, 1984 at A1 (arguing that the resolution "'aids and abets' those opposed to peace in the Middle East.")

[155] *See* Richard Halloran, *U.S. Warships and Jets Pound Lebanon Targets*, NY TIMES February 7, 1984, at A 17; *see also* Martin Tolchin, *O'Neill Says U.S. Shelling Violates War Resolution*, NY TIMES, February 9, 1984, at A1.

to increase.[156] But by early February, however, the President caved into congressional pressure and started drafting plans for the withdrawal of troops.[157] By February 21, the Marines were deployed to ships offshore and by March 30, 1984 the United Stated formally ended its participation in the multinational forces deployed in Lebanon.[158]

In announcing the withdrawal of U.S. troops, President Reagan insisted that the United States was not abandoning its mission in Lebanon but had instead decided to change tactics.[159] Less than 2 weeks after President Reagan ordered the withdrawal of the troops and thanked Congress for its role, he went on the attack and blamed the congressional leadership for the failures in Lebanon. The President claimed that although Congress had approved an 18 month deployment under the MFLR, "the subsequent second-guessing about whether to keep our men there severely undermined our policy."[160] Various members of Congress countered this attack and argued that the failure of the Lebanese deployment was exclusively the President's fault.[161]

The President's effort to place blame on Congress for the Lebanese debacle is consistent with what the theoretical model would predict. Since Congress played such an active role by approving the Lebanon deployment and by pressuring the President to withdraw, the President wanted to make sure that Congress got its fair share of the blame for the failure of the deployment.[162] On the other hand, members of Congress, particularly those in opposition, were poised to exploit the President's misfortunes in Lebanon. Indeed, many of the Democratic Presidential candidates tried to make the Lebanese deployment a key issue in the election. The Democratic Speaker of the House, who had been initially very supportive of the deployment called the President's Lebanese

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[156] *See* Leslie Gelb, *The U.S. Commitment Continues to Deepen*, NY TIMES, February 7, 1984, at A 16.

[157]In this speech, the President announced that he "had asked Secretary of Defense Weinberger to present to me a plan for redeployment of the Marines from Beirut airport to their ships offshore." *See Text of President's Statement on Redeployment of Marines*, NY TIMES, Feb. 8, 1984, at A16.

[158] *See Text of President's Letter on Multinational Force*, NY TIMES, March 31, 1984 at 3; *U.S. Withdrawing Its Military Force on Lebanon Coast*, NY TIMES, March 31, 1984 at A1; Irvin Molotsky, *Lawmakers Welcome Pullout from Lebanon*, NY TIMES, April 1, 1984, Section 1 at 12.

[159] The President also made it clear that he was not ordering the Marines to "cut and run" in Lebanon, but was merely "redeploying the troops." Francis Clines, *White House Denies it Cuts and Runs*, NY TIMES, February 9, 1984, at A12.

[160] *Excerpts from President Reagan's Speech on Foreign Policy and Congress*, NY TIMES, April 7, 1984 at 6; *see also* Francis Climes, *Reagan Attacks Congress's Role on Many Fronts*, NY TIMES, April 4, 1984 at A1; *see also Shutlz Says Pullout Harmed U.S.*, NY TIMES, April 2, 1984 at A3.

[161] *See* Martin Tolchin, *O'Neill Asserts Deaths in Beirut 'Lie on' Reagan*, NY TIMES, April 5, 1984 at A12.

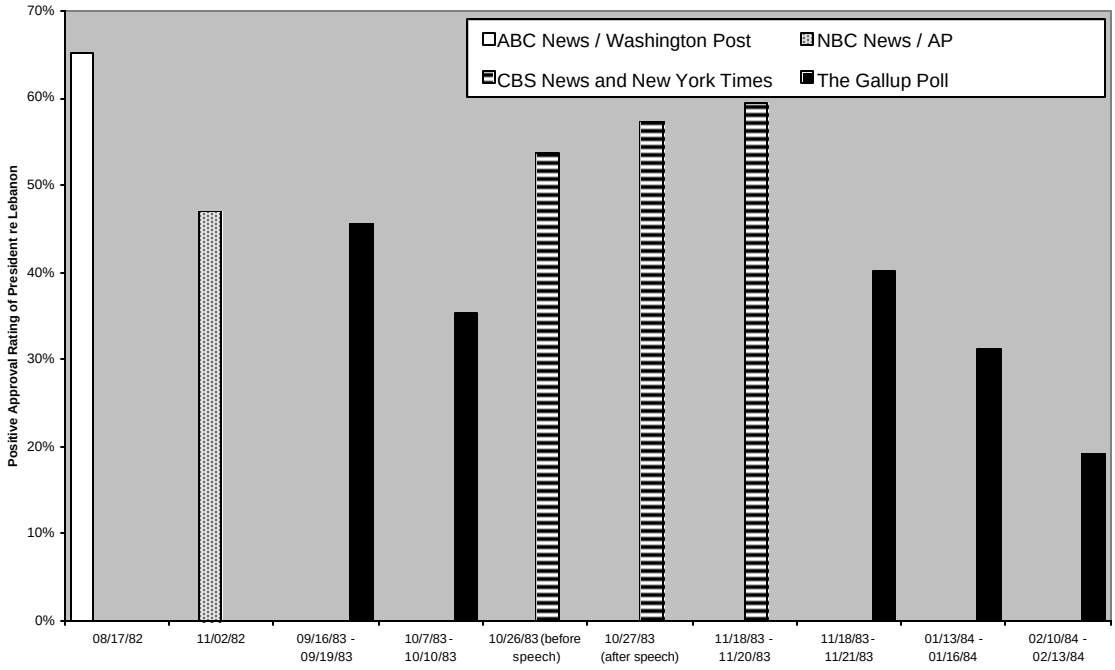
[162]The administration subsequently acknowledged that seeking congressional approval of the deployment served a strategic purpose for the White House: it would mean that Congress would get to share the blame for any potential failure in the Lebanese intervention. For instance, Deputy Secretary of State Eagleburger later stated that Congress has a share of responsibility because f its enactment of Multinational force in Lebanon Resolution. *See* Felton, *Democrats Step up Pressure for Beirut Pullout*, 1984 Cong. Q. 227, 227-28

policy "'the biggest blunder, the biggest mistake' he had made in the White House."[163] Predictably, members of Congress who initially supported the Resolution authorizing the deployment claimed they were deceived because the President misrepresented the prospects for peace in the region.[164]

The varying reactions of the President and Congress to public opinion surveys on the Lebanese deployment were also very informative. As public opinion polls turned against the Lebanese deployment, congressional leaders (especially those on the opposition) turned up the heat and urged immediate withdrawal from Lebanon. Interestingly, however, when public opinion polls in the aftermath of President Reagan's appeal to the nation on October 27, 1983 showed that a slight majority of Americans favored a sustained Lebanese deployment, leading members of Congress changed their tone during that period and resigned themselves to a long term U.S. troop deployment.[165]

TABLE 2

Public Opinion Polls on the United States Intervention in Lebanon, 1982-1984 (in percentages)



Questions: **(1) ABC News / Washington Post:** Do you approve or disapprove of the US sending American troops to Lebanon to participate in the evacuation plan? (08/17/82) **(2) NBC News / AP:** Do you approve or disapprove of President Reagan sending American military troops to Lebanon? (11/02/82) **(3) CBS / NY Times:** US Marines went to Lebanon as part of an international peacekeeping force to try to prevent fighting there. Do you approve or disapprove of the government sending troops to Lebanon for that purpose? (10/26/83; 10/27/83; 11/18/83 - 11/20/83) **(4) Gallup Poll:** Do you think we should keep the marines in Lebanon, or not? (9/16/1983 - 9/19/1983) Do you approve or disapprove of the way President Reagan is handling the situation in Lebanon? (10/7/1983 - 10/10/1983; 11/18/1983 - 11/21/1983; 1/13/1984 - 1/16/1984) Do you think the US should withdraw its troops from Lebanon at the present time, or not? (02/10/84 - 02/13/84)

Note: Percentages were recalculated to eliminate "don't know," "not sure," and "no answer" responses.

[163] Martin Tolchin, *O'Neill Asserts Deaths in Beirut 'Lie on' Reagan*, NY TIMES, April 5, 1984 at A12.

[164] *Id.*

[165] Steven Roberts, *Pullout in Beirut Rejected in* House, NY TIMES, Nov. 3, 1983, at A15.

The President's response to the public opinion polls was remarkably different. Rather than capitulate and withdraw the Marines when public opinion polls turned against the deployment in December 1983 and January 1984, the President repeatedly went on a public relations offensive and attempted to explain why withdrawal would be a victory for terrorists and Syrian (and by extension Soviet) interests in the Middle East.[166] At various points in early 1984, President Reagan suggested that the enemy in the Middle East was being emboldened by Congress's lack of resolve on Lebanon and that a firm policy to stay the course would defeat the Syrians' determination.[167] The White House also tried to influence public opinion by emphasizing some of the military successes in that region. Indeed, the White House's positive spin on the deployment was so pervasive that Speaker of the House O'Neill reportedly accused the President of turning a blind eye to reality: "Every time I talk to you, you say things are going well, but there's nothing but deterioration going on over there." [168] In sum, rather than concede to public opinion polls and admit that the Lebanon deployment was a failure, President Reagan actually tried to resurrect public support by arguing that the situation in Lebanon was better than how the media portrayed it and that steadfastness would bring about victory in the end. Predictably, President Reagan also escalated the crisis by bombing selective enemy targets even as congressional and public support was declining rapidly.

Finally, Congress's response in the Lebanese crisis is consistent with what the model would predict. After two consecutive months of declining public approval of the war, Congress moved decisively to constrain the President's Lebanon military agenda.[169] In asserting its war powers role, Congress wielded the statutory tools that it had at its disposal, such as the WPR and the MFLR, to force the President to withdraw the troops.[170] Had the President not agreed to a withdrawal in the early months of 1984, a congressional resolution under the WPR that would have forced such a withdrawal seemed all but inevitable. In the end, President Reagan made it clear that in ordering the withdrawal from Lebanon he was not following his preferred military strategy but one foisted upon him by congressional leaders. Moreover, the White House's harsh public attack on the WPR and Congress's role in the withdrawal from Lebanon is testament to the President's belief that his national security options were constrained. In sum, Congress's effective use of the WPR in the Lebanon deployment is largely inconsistent

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[166] *See* Hedrick Smith, *Reagan Plan: Share Blame*, NY TIMES, January 26, 1984 at B7 ("With public opinion survey showing a majority of American public favoring withdrawal . . ., Mr. Reagan tonight stressed an emerging Administration justification for keeping them there. 'We must not be driven from our objectives for peace in Lebanon by state-sponsored terrorism.'").

[167] *Excerpts from U.S. Aide's Statement on Reagan's View of Marine Pullout*, NY TIMES, February 3, 1984 ("Syrian officials commented that the United States seemed 'short of breadth.' In short, when we showed steadiness of purpose, progress was being made. When we wavered, progress stopped. When we show that steadiness again, progress will resume.").

[168] Steven Weisman, *Aides Say President Started Pullback Process Weeks Ago*, NY TIMES, February 9, 1984 at A 12.

[169] *See* CQ Congress Collection, Foreign Policy, 1981-1984 Legislative Overview

[170] *See Id.*

with the conventional wisdom that the WPR is a useless statutory device that has only symbolic value.

2. *Grenada.* On 25 October 1983, President Reagan announced that forces from the United States and some other Caribbean nations had begun landing on the Caribbean Island of Grenada.[171] President Reagan announced he had ordered this intervention for three reasons: to protect American citizens—many of them students at St George's School of Medicine; to prevent further breakdown in the political situation on the Island; and to restore law and order.[172] The intervention occurred approximately 2 weeks after a coup deposed the leftist regime of Prime Minister Maurice Bishop.[173] Subsequently, the coup plotters executed Bishop and declared a dusk to dawn curfew with instructions to shoot on sight any violators. [174]

The Grenadian military intervention occurred in the shadow of the bombing of the Marine Barracks in Lebanon; indeed, it occurred just 2 days after the Beirut tragedy. In many ways the events unfolding in Lebanon played a very key role in the military intervention in Grenada. *First*, the 1,900 troops that were diverted to conduct the invasion of Grenada were actually bound for off-shore duty in Lebanon. [175] *Second*, the administration explicitly acknowledged that the decision to invade Grenada was in part prompted by the Barracks bombing in Lebanon because President Reagan was concerned that Grenada could become "another Beirut." [176] *Third*, the shadow of the Barracks bombing framed the political landscape against which Congress reacted to the Grenada invasion.

Like the initial deployments in Lebanon, Congress seemed to be left in the dark on the decision to invade Grenada. In other words, the President did not formally consult with Congress before the invasion as required under section 3 of the WPR. The President did invite a bipartisan group of congressional leaders to the White House on Monday, 24 October 1983, but he apparently only confided in them details about a decision to invade he had already made three hours ago.[177] The President did deliver a report, however, on the afternoon of October 27, which he mentioned that he was filing pursuant to his authority of the commander-in-chief of the United States armed forces and consistent with the WPR.[178] The House moved quickly to invoke the triggering requirements of section 4(a)(1) of the WPR by passing the relevant legislation and the house version of

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[171] President's Remarks, 25 October 1983, Department of State Bulletin, vol. 83 (Dec. 1983), p. 67.

[172] Gary Williams, *Prelude to an Intervention: Grenada*, 29 J. Lat. Amer. Stud., 131-169 (1983).

[173] *Id.* at 133.

[174] *Id.*

[175] *Id.*

[176] *See* Bernard Gwertzman, *An Invasion Prompted by Previous Debacles*, NY TIMES, October 26, 1983, at A1.

[177] *See* President Reagan's Letter to Senator Thurmond, (October 25, 1983), in 129 Cong. Rec. 29,832 (1983); *see also* Hedrick Smith, *1,900 U.S. Troops, with Caribbean Allies, Invade Grenada and Fight*, NY TIMES, October 25, 1983, at A1.

[178] *See* 129 Cong. Rec. 29,997 (1983).

the bill—H.J. Res. 402—passed on November 2, 1983.[179] The Senate version of the bill was introduced as an amendment to a bill increasing the national debt ceiling, which was ultimately defeated on October 31, 1984.[180] Congress eventually adjourned without ever successfully passing a two-chamber bill that formally invoked the WPR in the Grenadian invasion.[181] In any event, the invasion was over in about a week and any further congressional action would have proven irrelevant by that time.

Although the President did not seek a congressional role in the Grenada invasion, leading members of Congress were not indifferent about the invasion. Since it occurred in the shadow of the Beirut Barracks bombing—an unpopular use of force incident, many members of Congress, especially those in the opposition, had an incentive to oppose the President's move and they did so. For instance, Senator Patrick Moynihan condemned the invasion as "an act of war" and added: "I don't know that you restore democracy at the point of a bayonet."[182] Aside from leading members of the opposition, significant Republican members also expressed misgivings about the invasion. Republican Representative Olympia Snowe, who served on the Foreign Affairs Committee, summarized the odd political posture of the invasion: "I'm dismayed we're involved in Grenada, especially on the heels of Beirut . . . The two events raise a lot of concerns about exactly what we're doing."[183] Senator Weiker, a Republican from Connecticut, also accused Reagan of "flouting the law" by invading Grenada.[184] Although House Speaker O'Neill was initially supportive of the invasion, he subsequently turned against the President and described the invasion as "gunboat diplomacy" with "frightening" policy implications.[185] Other members of Congress, from both sides of the aisle, also complained that the invasion was illegal because President did not comply with the consulting requirements of the WPR .[186] In addition to skeptical members of Congress, most of the

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[179] *See* 1983 Cong. Q. 2326.

[180] *See* 129 Cong. Rec. 29,835 (1983)

[181] *Id*.; s*ee also* Hedrick Smith, *O'Neill Now Calls Grenada Invasion 'Justified' Action,* NY TIMES, Nov. 9, 1983, at A1.

[182] *See* Steven Roberts, *Capitol is Sharply Divided Over the Wisdom on Invading Grenada*, NY TIMES, October 25, 1983 at A22. Senator Cranston of California described Reagan as a "trigger happy president . . . who has recklessly landed the United States in two civil wars." Steven Roberts, *Democrats Move on War Powers Act*, NY TIMES, October 27, 1983 at A 18. Senator Eagleton of Missouri attacked the purported objectives of the invasion: "The notion that American nationals were endangered is flimsy, illusory, and hypothetical." Steven Roberts, *Democrats Move on War Powers Act*, NY TIMES, October 27, 1983 at A 18.

[183] *See Responses are Wide-Ranging*, NY TIMES, October 27, 1983 at A21.

[184] *See* Steve Roberts, *O'Neill Criticizes President; War Powers is Invoked,* NY TIMES, October 29, 1983, at 4.

[185] *Id*. at 4.

[186] Congressman Torricelli lamented that "[The WPR] does not say in all cases except Grenada. It does not say in all cases except when the Cubans are involved. It says the President shall consult with the Congress in all cases." U.S. Congress, House Committee on Foreign Affairs, Grenada War Powers, Markup on H. J. Res. 402, October 27, 1983, 98th Cong., 1st Sess, 1983, 12; *see also* Steven Roberts, *Capitol is Sharply Divided Over the Wisdom on Invading Grenada*, NY TIMES, October 25, 1983 at A22; *see also* Steven Roberts, *Democrats Move on War Powers Act*, NY TIMES, October 27, 1983 at A 18

United State's traditional allies—including Great Britain, Italy and France—also strongly condemned the invasion.[187]

Given the recent experience in Lebanon and the President's political vulnerability, the congressional critics of the President's Grenada policy probably believed that the invasion would prove to be a political miscalculation.[188] In any event, they did not obviously expect the overwhelming military success of the invasion and the resulting wave of patriotic euphoria that followed.[189] As medical students arriving from St. George expressed gratitude and praise to the President for rescuing them,[190] opinion polls in favor of the invasion soared.[191] Invariably, the positive public opinion polls of the invasion were due in part to the President's well-managed public relations campaign. As the polls picked up, most of the President's critics retreated. By early November—which was a critical time in the opinion polls—the invasion was over and mainstream media had largely described it as a success.[192] In an astonishing concession, Senator Moynihan retreated from his previous critical stance of less than two weeks ago and declared: "The move is popular and therefore there's no disposition in the Senate to be opposed to it."[193] Speaker of the House O'Neil also did an about-face and subsequently announced that the invasion was "justified" because American citizens on the island were in jeopardy.[194] As demonstrated in the graph below, the change in the congressional response to the invasion in early November seemed to mirror the increase in public opinion polls in favor of the invasion.

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[187] See Bernard Gwertzman, *Allies Criticism of U.S. Raises Wider Questions*, NY TIMES, October 27, 1983 at A21.

[188] See Steven Roberts, *Democrats Move on War Powers Act*, NY TIMES, October 27, 1983 at A 18 (observing that with Grenada invasion there was "a growing belief among Democrats that they might be able to paint President Reagan as 'trigger happy' President in next year's election campaign.").

[189] Draymond Ayres, *U.S. Says Grenada Invasion is Succeeding; 600 Cubans Seized After Heavy Resistance*, NY TIMES, Oct. 27, 1983, at A1.

[190] Robert McFadden, *From Rescued Students, Gratitude and Praise*, NY TIMES, October 28, 1983 at A1; *First Evacuees Arrive in U.S. From Grenada*, NY TIMES, October 27, 1983 at A1.

[191] *See* CBS News/NY TIMES Poll, Nov. 18-20, 1983 in Table 3 *infra*.

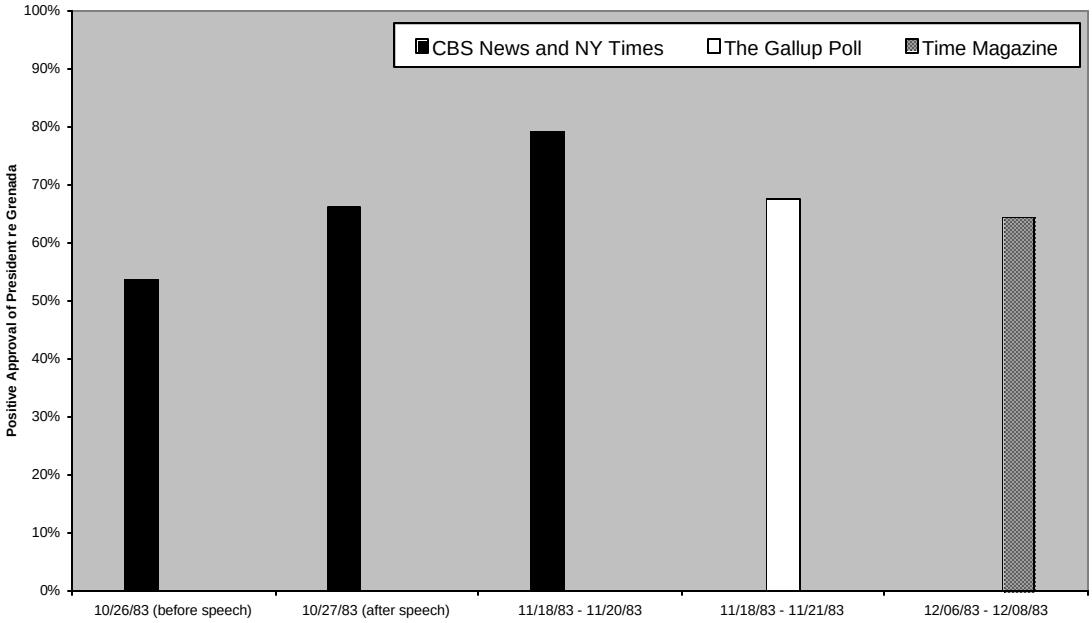
[192] *See* Robert McFadden, *From Rescued Students, Gratitude and Praise*, NY TIMES, October 28, 1983 at A1; *First Evacuees Arrive in U.S. From Grenada*, NY TIMES, October 27, 1983 at A1; Bernard Gwertzman, *Reagan Gains by Grenada, But Mostly on His Own Turf*, Ny Times, Nov. 6, 1983, at 41.

[193] See Hendrick Smith, *Capitol Hill Outcry Softens as Public's Support Swells*, NY TIMES, November 4, 1983, at A18.

[194] See Hedrick Smith, *O'Neill Now Calls Grenada Invasion 'Justified' Action*, NY TIMES, November 9, 1983, at A1. The invasion even won some adherents among European politicians who only a week ago seemed uniformly critical about the invasion. John Vinocurs, *Invasion of Grenada Wins Some Allied Supporters*, NY TIMES, November 3, 1983, at A 23.

TABLE 3

Public Opinion Polls on the United States Invasion of Grenada, 1983 (in percentages)



Questions: **(1) CBS / NY Times:** Do you approve or disapprove of sending the troops to Grenada? (10/26/1983; 10/27/1983; 11/18/1983 - 11/20/1983) **(2) Gallup Poll:** Do you approve or disapprove of the way President Reagan is handling Grenada? (11/18/1983 - 11/21/1983) **(3) Time Magazine:** In general, do you feel that military activities of the US such as those in Grenada and Central America are in the best interests of the nation or not? (12/06/1983 - 12/08/1983)

Note: Percentages were recalculated to eliminate "don't know," "not sure," and "no answer" responses.

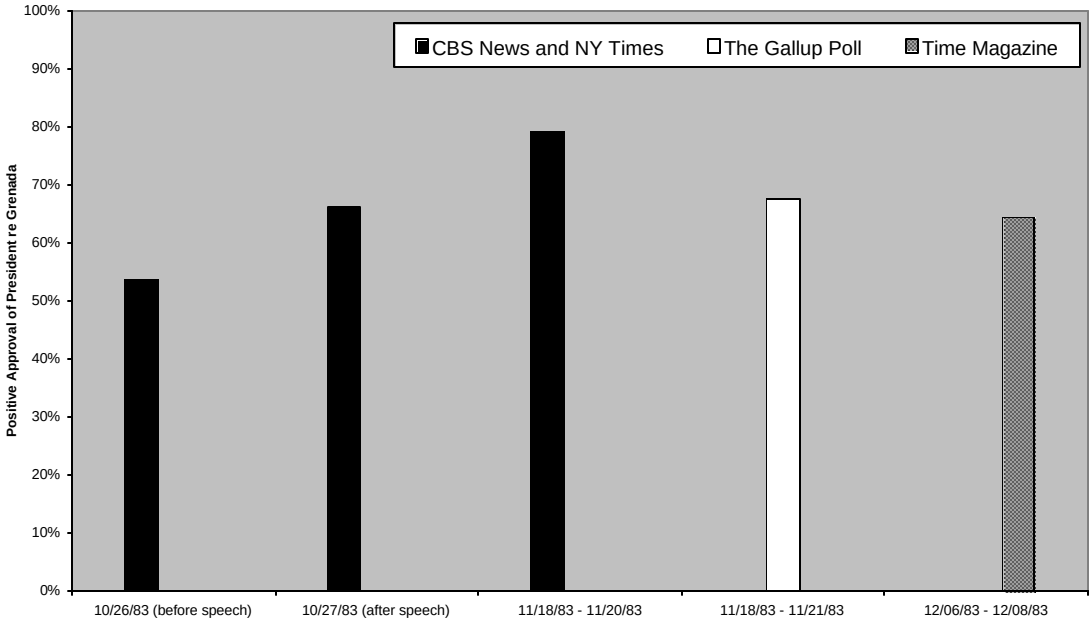
On November 3, 1983, President Reagan, obviously basking in the glory of the successful invasion, announced that the objectives of the Grenada mission had been accomplished and that the troops would be home soon.[195] In that same speech, he claimed that the military intervention was not an invasion after all—even though he had described as an invasion a week before—but a rescue mission.[196] The White House's focus on the rescue rationale of the Grenada invasion at the expense of other reasons that were put forth for the invasion was a strategic public relations success. The rescue mission rationale resonated really well with the American public and members of Congress. In the end, when the military personnel involved in the Grenada invasion returned back to the United States in mid-November they were greeted with a heroes' welcome. As illustrated in the graph below, the success of the Grenada invasion also seemed to increase the overall public perception of the President's ability to handle foreign policy. More specifically, the public approval of the President's ability to handle foreign policy increased during the months of October and November 1983.

[195] *See Transcript of the President's News Conference on Rumsfeld and Grenada*, NY TIMES, Nov. 4, 1983, at A16.

[196] Francis Clines, *It was a Rescue Mission, Reagan* Says, NY TIMES, Nov. 4, 1983, at A16.

TABLE 4

Public Opinion Polls on President Reagan's Handling of Foreign Policy, 1983-1984 (in percentages)



Questions: **(1) CBS / NY Times:** Do you approve or disapprove of sending the troops to Grenada? (10/26/1983; 10/27/1983; 11/18/1983 - 11/20/1983) **(2) Gallup Poll:** Do you approve or disapprove of the way President Reagan is handling Grenada? (11/18/1983 - 11/21/1983) **(3) Time Magazine:** In general, do you feel that military activities of the US such as those in Grenada and Central America are in the best interests of the nation or not? (12/06/1983 - 12/08/1983)

Note: Percentages were recalculated to eliminate "don't know," "not sure," and "no answer" responses.

The Grenada invasion exhibited all the classic hallmarks of a successful military engagement: it was fairly rapid, it ostensibly involved the protection of American lives, and there were very few casualties. The political risks to the President for not initially seeking congressional approval for the invasion were also very low. Given that Grenada was a weak and small Caribbean island with an almost non-existent military force, the chances of military failure or stalemate were negligible. Therefore, the President had very little need for the political insurance that prior congressional approval provides. On the other hand, there were significant risks that seeking a congressional role would imperil the President's chances for a quick and decisive military victory. Given that the President was operating in the shadow of a relatively unpopular military undertaking in Lebanon which had recently taken a decisive turn for the worse, he was politically vulnerable. Indeed, the Grenada invasion actually took place in the immediate wake of the Marine barracks bombing in Beirut and at the time many members of Congress were actively clamoring for an immediate withdrawal from Lebanon. In that political climate, it is unlikely that President Reagan would have had the opportunity to secure the quick congressional approval that would be necessary for a rapid and decisive military victory in Grenada.

In the context of political branch reaction to public opinion polls, the Grenada invasion also illustrated patterns that were consistent with what the theoretical model developed in this Article would predict. In the immediate shadow of the unpopular Beirut barracks bombing and the Grenada invasion, various members of Congress were very critical of the Reagan administration and sought to invoke the provisions of the WPR immediately. Once the invasion succeeded and the spectacle of obviously happy and grateful rescued medical students returning home filled the television screens, many of the same members of Congress who were initially critical of the invasion changed their tune and embraced the President's agenda. In all, members of Congress were simply reacting to public opinion polls and some of them, including Senator Moynihan of New York, were honest enough to admit it. Also, the reaction of these members of Congress made it clear that they considered congressional deliberation over the merits of the invasion or its legality unnecessary provided that a majority of the public had already shown its support for the President's decision to use force.

B. *The 1992-1993 intervention in Somalia*

Like Lebanon in 1982, Somalia in 1992 was a country that was deeply entrenched in a long and seemingly interminable civil war. In January of that year the military regime of Siad Barre collapsed and the country descended into a chaotic civil war fuelled by the battle for territory by rival clans and warlords. A famine ensued and by late 1992 amidst horrifying television images of widespread suffering and starvation, President Bush decided to intervene as part of a UN humanitarian mission ("UNOSOM I").[197] In December 1992 President Bush sent about 28,000 U.S. troops to the region to aid in the distribution of food and relief supplies.[198] President Bush dubbed this relief operation "Operation Restore Hope" and it was one of the last major policy decisions he made before leaving office in early 1993.[199]

President Bush did not seek congressional approval for the December 1992 deployment even though the deployment involved a significant number of troops. Public opinion polls at the time reveal, however, that support for the intervention was overwhelmingly high with upwards of 70% of those polled supporting the operation.[200] In this political climate, Congress was understandably deferential to the President and there was no visible congressional opposition to the deployment. Admittedly, President Bush also reassured certain congressional leaders that there was no risk of imminent hostilities and that the troops were in Somalia for purely humanitarian purposes.[201]

In early 1993 President Clinton took office and decided to continue the deployment. On February 4, the United States Senate passed a Resolution in support of

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[197] Michael Wines, *Mission to Somalia; Bush Declares Goal in Somalia to 'Save Thousands*,' NY TIMES, Dec. 4, 1992, at Section 1.

[198] *Senate Gives Belated Blessing to Somalia Intervention*, 1993 Cong. Q. 277, 277.

[199] *See id*; *Bush Sends U.S. Troops to Somalia*, 1992 Cong. Q. 535, 535.

[200] *See* ABC News Poll, Dec. 11-14, 1992 in Table 5 *infra*.

[201] *See* Carroll J. Doherty, *The Reluctant Warriors*, 1993 Cong. Q. 323, 323.

Operation Restore Hope—S.J. Res. 45—and declared that the Resolution was consistent with the WPR.[202] The Resolution also requested the transfer of the humanitarian mission to the UN at the earliest possible date.[203] The House passed its own version of the Resolution on May 25 and the House version invoked the WPR more explicitly.[204] The Senate and House versions were never reconciled, however, so the Resolution never really became law.

The situation in Somalia want smoothly for the first half of 1993 and the United States started to transfer control over the mission to the UN (UNOSOM II) in May 1993. UNOSOM II was the result of a new UN Resolution—strongly supported by the Clinton administration—that expanded the UN mission in Somalia to include economic rehabilitation and political reconciliation.[205] By the time the transfer was completed only about 4,000 United States troops remained in Somalia.[206] There were no American casualties during that period and the relief effort seemed to be largely successful. Public opinion polls taken in early 1993 continued to show significant public support for the operation.[207]

By mid-year 1993, the events in Somalia took a decisive turn for the worse. With the significant reduction of the United States military presence after the transfer of control to the UN, factional fighting increased in the capital city of Mogadishu and the outlying areas. On June 5, a faction led by Muhammad Farah Aidid ambushed and killed 23 Pakistani peacekeepers.[208] The UN Security Council denounced the incident and ordered the arrest and punishment of all those responsible.[209] The United States troops—who were originally deployed for a disaster relief mission—were ordered to get involved in a mission to find and arrest Aidid and his accomplices.[210] But President Clinton never sought congressional authorization for this expansion of the role of the U.S. troops.

With the expansion of the UN mission to include tracking down warlords, the clashes with Aidid's forces escalated. On August, 4 U.S. troops were killed in a bomb explosion.[211] Then in early September, a U.S. helicopter operation resulted in the death of almost 200 Somali citizens, including women and children.[212] Moreover, in that same period 7 Nigerian peacekeepers were killed.[213] In the later part of September a U.S. army

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[202] *Senate Gives Belated Blessing to Somalia* Intervention, 1993 Cong. Q. 277, 277.
[203] *Id*.
[204] 139 Cong. Rec. H2764 (May 25, 1993).
[205] S.C. Res. 814, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/814 (1993).
[206] *U.S. General Hands Over Relief Operation in Somalia to U.N*., NY TIMES, May 5, 1993, at A5.
[207] *See* Time/CNN Poll, Jan. 13-14, 1993 in Table 5 *infra*.
[208] Jennifer S. Thomas, *A Somalia Chronology*, 1993 Cong. Q. 2826, 2826.
[209] *Id*.
[210] *See* Bolger, supra note __, at 300-01.
[211] Karen De Witt, *Four U.S. Soldiers are Killed by Mine in Somali Capital*, NY TIMES, August 9, 1993 at A1.
[212] Clifford Kraus, *Civilian Casualties; Anxiety Over Somalia: Shots Fired in Mogadishu Are Heard in the Senate*, NY TIMES, September 12, 1993, Section 4 at 2.
[213] *7 Nigerian Troops Die in Somalia*, NY TIMES, September 6, 1993, Section 1 at 2.

Blackhawk helicopter was shot down resulting in the death of 3 U.S. soldiers.[214] By late September the public opinion polls in support of the operation had dipped to around 40 percent.[215]

As the public opinion in support of the U.S. role in Somalia declined leading members of Congress started to demand withdrawal of United States troops. On September 8, 1994, Senator Byrd introduced a bill that would automatically terminate funding for the Somalia mission in thirty days unless Congress authorized a continuation of the deployment.[216] On September 9, the Senate passed a watered down version of Senator Byrd's bill which required the President to notify Congress of the objectives of the deployment by October 15, and to seek congressional authorization for a continued deployment by November 15. [217] In approving an identical version of the Senate bill on September 28, the House purportedly decided to "put the White House on notice that Congress is losing patience with a mission that has gone from feeding the starving to hunting down a faction leader."[218]

In October 1993, the situation in Somalia reached its nadir. On October 3, 18 U.S. soldiers were killed and over 70 wounded in a firefight with Aidid's forces in Mogadishu.[219] As the television cameras focused on the body of a dead American soldier dragged through the streets of Mogadishu, public opinion in support of the operation eroded dramatically. In a poll taken on October 7, public support had dropped to 35 percent from a January high of over 80 percent.[220] As public opinion in support of the operation declined, congressional pressure for an immediate withdrawal increased. In mid-October the Senate passed a bill that called for the automatic termination of all funding for U.S. operations in Somalia by March 31, 1994.[221] Later in October Congressman Gilman introduced a bill in the House that called for cutting of funding for the operation and the withdrawal of all American troops by January 31, 1994.[222] Under congressional pressure, President Clinton agreed to the March 31, 1994 withdrawal date proposed in the Senate bill.[223]

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[214] 3 Killed as U.S. Chopper is Shot Down in Somalia, NY TIMES, September 25, 1993, Section 1 at 2.

[215] *See* Gallup Poll, Sept. 9-12, 1993 in Table 5 *infra*.

[216] *See* 139 Cong. Rec. 11123, 11124 (Sept. 8, 1993).

[217] *See* 139 Cong. Rec. 11123, 11124, 11272-77 (Sept. 9, 1993).

[218] Clifford Krauss, *House Vote Urges Clinton to Limit American Role in Somali Conflict*, NY TIMES, Sept. 29, 1993, at A1, A6.

[219] JOHN. L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING 127-129 (1995).

[220] *See* ABC News Poll, Oct. 7, 1993 in Table 5 *infra*.

[221] Amend. No. 1-42, to the 1994 Defense Appropriations Act, reprinted in 139 Cong. Rec. S13, 516 (daily ed. Oct. 14, 1993)

[222] 139 Cong. Rec. E 2451 (daily ed. Oct. 15, 1993).

[223] Carroll J. Doherty, Clinton Calms Rebellion On Hill By Retooling Somalia Mission, 1993 Cong. Q. 2750, 2750.

As the model would predict, Congress and the President took radically different approaches to the negative turn in public opinion polls after the October incident in Mogadishu. As voices on Capital hill and elsewhere clamored for an immediate withdrawal, President Clinton warned that the United States should not cut and run. "Our leadership in world affairs would be undermined," the President insisted, "and all around the world, aggressors, thugs and terrorists will conclude that the best way to get us to change our policies is to kill our people."[224] In the same early October speech President Clinton announced that he was going to increase the troop levels from 4,700 to about 20,000 troops.[225] The President acknowledged that in response to the increased military capacity of the warlords in Somalia, increased troop levels were needed to prevent Somalia from descending into anarchy.[226] He acknowledged, however, that he would pull out the troops by March 31 but insisted that he would "leave on our terms."[227] He also tried to distance the American military role from the UN and clarified that the troops would be under U.S. and not UN command.[228]

The decline in public opinion in support of the war was also consistent with the hypothesis that the American public support for the use of force tends to be at its lowest ebb when the military engagement involves significant casualties and the primary objective of the engagement involves the imposition of internal political change. Initially, when the military objective in Somalia just involved the delivery of humanitarian relief, the public support for the operation was significantly high. When the military objective devolved into a manhunt for Aidid, however, the public began to view the U.S. military as being drawn into a messy civil war that had no clear U.S. security implications. The President was also hard-pressed to come up with any plausible argument that would suggest that the Somali factions involved in this civil war imposed any threat to American security. As depicted in the graph below, public opinion in support of the Somali operation was fairly high in the late 1992 and early 1993, but declined significantly in September in the wake of the first U.S. casualties and the killing of about 200 Somali citizens by U.S. helicopter crews. It then dropped precipitously after the October firefight that killed 18 U.S. soldiers.

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[224] *Clinton's Words on Somalia: The Responsibilities of American Leadership*, NY TIMES, October 8, 1993, at A15. Secretary of Defense Les Aspin also echoed the President's sentiments:

> If after we got a dozen guys killed on Sunday, we pull out it tells people wherever we go—the Golan Heights, Bosnia, Syria, Haiti, wherever—that all they have to do is give us double-digit casualties and they can get rid of us.

R.W. Apple, *The Somalia Mission: An Old War Refrain*, NY TIMES, October 7, 1983 at A1 (quoting Secretary of Defense Aspin's speech.).

[225] Douglas Jehl, *The Somalia Mission: Clinton Doubling U.S. Forces in Somalia, Vowing Troops Will Come Home in 6 Months*, NY TIMES, October 8, 1993, at A1.

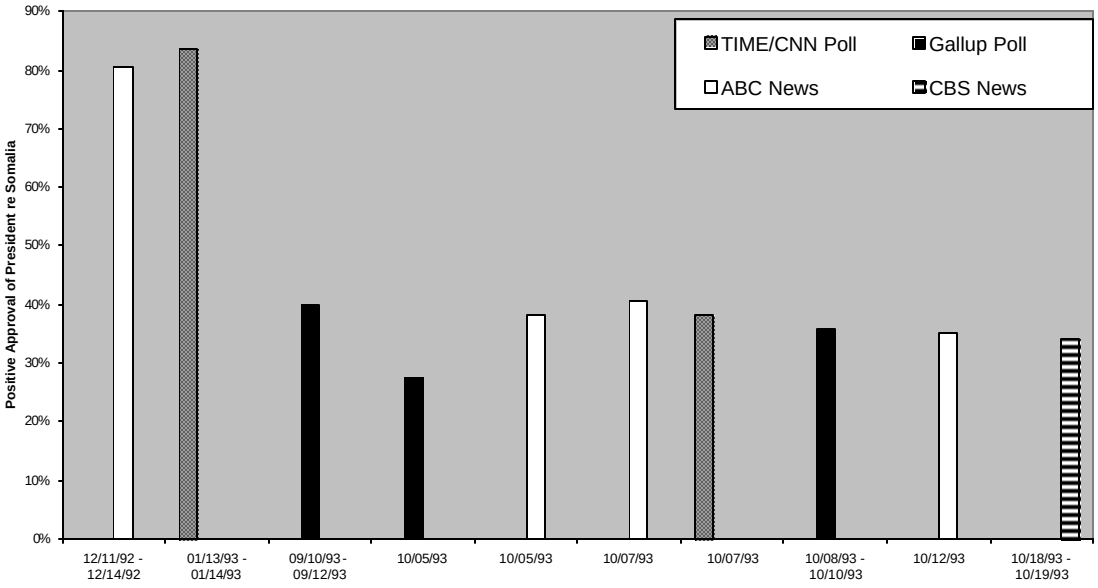
[226] *Id.*

[227] *Clintons Words on Somalia: The Responsibilities of American Leadership*, NY TIMES, October 8, 1993, at A15.

[228] *Id.*

TABLE 5

Public Opinion Polls on the United States Intervention in Somalia, 1992-1993 (in percentages)



Questions: **(1) Time/CNN Poll:** Do you approve or disapprove of the presence of US troops in Somalia? (01/13/1993 - 01/14/1993) **(2) Gallup Poll:** Do you think the US should continue its role of active military involvement in Somalia, or should it stop? (09/10/1993 - 09/12/1993) Has the operation in Somalia been successful, or unsuccessful? (10/05/1993) Do you approve or disapprove of the way Bill Clinton is handling the situation in Somalia? (10/08/1993 - 10/10/1993) **(3) ABC News:** Do you approve or disapprove of Bush's decision to send US troops Somalia? (12/11/92 - 12/14/92) Do you approve or disapprove of the way Bill Clinton is handling the situation in Somalia? (10/05/1993; 10/07/1993; 10/12/1993) **(4) CBS News:** Do you think the US should be sending US troops to Somalia to try and make sure shipments of food get through to the people there, or should US troops stay out? (12/06/92) Do you approve or disapprove of the way Bill Clinton is handling the situation in Somalia? (10/18/1993 - 10/19/1993)

Note: Percentages were recalculated to eliminate "don't know," "not sure," and "no answer" responses.

Finally, congressional reaction to the dip in public opinion polls in fall 1993 was also consistent with what the model would predict. Indeed, in the wake of the October 3 incident, Senator Dole, the Republican leader announced: "If there were a vote today, we'd be out today." [229] Lawmakers also demanded immediate plans for a Somali exit from leading White House officials like Defense Secretary Les Aspin and Secretary of State Warren Christopher.[230] Formal congressional action to cut off funds for the operation subsequently followed.[231] In the end, congressional pressure on the White House seemed to work. However, this congressional victory is subject to qualification. Given that Somalia seemed to pose no clear risk to U.S. security, White House officials did not seem overly concerned that a forced withdrawal would hurt the President's credibility.[232] In other words, since the American public and foreign governments would likely appreciate the lack of any significant U.S. interests in Somalia, the White House presumably

[229] Thomas Friedman, *Somalia Mission; Clinton Reviews Policy in Somalia as Unease Grows*, NY TIMES, October 6, 1993, at A1.

[230] *Id.*

[231] *Id.*

[232] *See id.* (observing that notion that a quick pullout would discredit the President is dismissed by top Presidential advisers).

concluded that the political risks of a withdrawal under congressional pressure would not be that significant.[233]

C. *The 2003 Invasion of Iraq*

In many ways, the 2003 invasion of Iraq is a classic demonstration of the President's unique ability to frame public opinion by escalating an international crisis. Indeed, from summer 2002 through mid-2003, Iraq overshadowed most other issues in the popular media. However, the presidential saber-rattling that foisted Iraq into the headlines in the fall of 2002 started much earlier; as early as October 2001 presidential aides had suggested expanding the war against the Taliban to Iraq.[234] President Bush subsequently hinted at a link between al-Quada and Iraq in his January 2002 state of the union address in which he famously described Iraq as a member of the "axis of evil."[235] Then in an address to graduating cadets at West Point in early June 2002, the President publicly announced the outlines of his new doctrine for preventive action in which he urged that it would be necessary for the United States to "take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge."[236] Later that month the Washington Post released a report about a new national security strategy in which the President "signed an intelligence order directing the CIA to undertake a comprehensive, covert program to topple Saddam Hussein, including authority to use lethal force to capture the Iraqi president." [237]

Although Iraq was already beginning to dominate the headlines by late July 2002, the President did not take his case for war to the public until later that fall. Indeed, in mid-August the President was still urging a more cautious approach and mentioned he was going to "look at all options" available to him before making a decision.[238] By later that month, however, the administration had changed its tone and was suggesting that Iraq's threat to peace in the region through its potential nuclear programs made the removal of Saddam Hussein necessary.[239] Like what the model would predict, the administration couched the objectives of the war largely in terms of a response to foreign aggression: the President insisted that a preemptive strike was necessary because Iraq had weapons of mass destruction that it could likely use against the United States and that there was a clear link between Iraqi regime and the al-Qaeda terrorists who launched the

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[233] *See id.*

[234] Elaine Sciolino & Patrick Tylera, *Nation Challenged: Saddam Hussein; Some Pentagon Officials and Advisers Seek to Oust Iraq's Leader in War's Next Phase*, NY TIMES, Oct. 12, 2001, at B6.

[235] *George W. Bush's Moment*, NY TIMES, Jan. 30, 2002, at A26.

[236] Elisabeth Bumiller, *U.S. Must Act First to Battle Terror, Bush Tells Cadets*, NY TIMES, June 2, 2002, at Section 1.

[237] *President Broadens Anti-Hussein Order*, WASH. POST, June 16, 2002, at A1.

[238] Weekly Compilation of Presidential Documents, 38: 1393 (August 21, 2002).

[239] Elizabeth Bumiller & James Dao, *Cheney Says Peril of a Nuclear Iraq Justifies Attack*, NY TIMES, August 27, 2002, at A1.

September 11, 2001 attacks.[240] Moreover, the President made clear that waiting for Iraq to act first was not an option: "The danger is clear: using chemical, biological, or one day, nuclear weapons provided by Iraq, the terrorists could one day kill thousands of people in our country or any other."[241]

While it is not clear why the White House decided to shift tactics from exploring non-use of force options in mid-August, the proximity of a mid-term congressional election probably factored heavily in its calculations. By late August 2002, however, it was still unclear whether the President would actually seek congressional authorization for the use of force. Like his predecessors, including Reagan, Clinton, and his father, President Bush initially disclaimed any constitutional role for Congress and argued that he could embark on the use of force solely on the authority of his role as commander-in-chief.[242] The political background in which presidents usually make such pronouncements suggest that it is a tactical move: the President initially declines to concede Congress's constitutional authority to approve the use of force in order to avoid establishing legal or political precedent for President acquiescence, but then subsequently seeks congressional approval ostensibly on political grounds. In other words, presidents seem to prefer to seek congressional approval for the use of force in a context in which it does not look like they are bound by a constitutional requirement. In any event, by early September the President requested congressional authorization to go to war in Iraq but insisted that such authorization take place immediately. Furthermore, polls conducted around that time revealed that a majority of Americans did not want the President to go to war without congressional authorization.[243]

With the mid-term elections around the corner, President Bush's decision to seek immediate congressional authorization for the Iraqi invasion in September 2002 turned out to be a good tactical move. In the weeks before he requested congressional authorization, the White House aggressively mobilized public opinion by making public pronouncements that an invasion of Iraq was imminent.[244] At the time there were deep divisions regarding the propriety of unilateral action against Iraq in prominent circles, including among leading Republic foreign policy experts.[245] Given these divisions, it was important for the President to get a vote on the war before the election when members of Congress were most politically vulnerable, otherwise a protracted congressional debate

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[240] *See* Mike Allen, *Bush Asserts That Al-Qaeda Has Links to Iraq's Hussein,* Washington Post, September 26, 2002, at A1; Eric Schmitt, *Rumsfield Says U.S. Has "Bulletproof Evidence" of Iraq's Links to Al Qaeda*, NY TIMES, September 28, 2002.

[241] George W. Bush, *President's Remarks at the United Nations General Assembly*, September 12, 2002, http://www.whitehouse.gov/news /releases/2002/09/20020912-1.html.

[242] Mike Allen & Juliet Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote*, Wash. Post, August 26, 2002, at A1.

[243] Adam Clymer & Janet Elder, *Threats and Responses: Poll Finds Unease on Terror Fight and Concerns About War on Iraq*, NY TIMES, September 8, 2002, at A1.

[244] Dan Balz & Dana Milbank, *Iraq Policy Shift Follows Pattern*, Wash. Post, September 6, 2002, at __

[245] Elisabeth Bumiller, *President Notes Dissent on Iraq, Vowing to Listen*, NY TIMES, August 17, 2002, at ___.

about the merits of the war would likely ensue in January. Although the public opinion polls at the time did not necessarily endorse unilateral action by the United States, members of Congress were probably aware that an extensive debate about the merits of the war would not play in their favor in the mid-term election. Indeed, members of Congress, especially those in the opposition, likely thought it would be in their electoral interests to quickly approve the President's request because they did not want to appear hesitant and weak on national security issues—especially in the aftermath of September 11.[246] For those democratic members of Congress who had presidential political aspirations, support for the use of force against Iraq came early and it was largely unequivocal.[247]

On October 7, 2002, days just before Congress voted on the Iraq Resolution, President Bush once again went public to make his case for war and declared in a thirty-minute speech that "confronting the threat posed by Iraq is crucial to winning the war on terror." [248] A few days later a significant majority in the House—296-133—approved the Resolution and it passed by an even more significant margin in the Senate—77-23.[249] Although there were some Democratic critics against the Resolution, such as Senator Robert Byrd of West Virginia, a majority of Democratic members of Congress voted with their Republican colleagues. Byrd had been an early and vocal opponent of the use of force since February 2002,[250] but his position did not seem to resonate strongly among his colleagues. In many respects, Senator Byrd has been somewhat of an institutional iconoclast on the use of force—having openly opposed presidential war-powers initiatives since the Vietnam conflict. But most members of Congress do not enjoy Senator Byrd's inscrutable stature as a politician; and since these other elected officials are likely to be more electorally vulnerable than Senator Byrd they probably decided it unwise to stand in the way of the President's national security agenda. Rather than insist on their institutional war-powers prerogative, these politically cautious members of Congress probably calculated that it was more prudent to focus their attention on domestic issues like the economy and health care—issues that would presumably be more relevant to their political fortunes in the November elections.[251]

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[246] See Allison Mitchell, *Democrats, Wary of War in Iraq, Also Worry About Battling Bush*, NYTIMES, September 14, 2002 ("Some party moderates … warn that the last thing the Democrats can risk after the September 11 attacks is to revive image of themselves as 1960s war protesters.").

[247] *See id.* (observing early support for the war effort by future presidential candidates like Joseph Lieberman, John Edwards, Richard Gephardt). John Kerry urged President Bush to get UN support or build an international coalition against Hussein but suggested that he would vote for a resolution of force without such a coalition. *See id.* ; *see also* Dan Balz & Jim VandeHei, *Democratic Hopefuls Back Bush on Iraq,* WASH. POST, Sep. 14, 2002.

[248] David Sanger, *Threats and Responses: The President's Speech; Bush Sees 'Urgent Duty' to Pre-empt Attack by Iraq*, NY TIMES, Oct. 8, 2002, at A1.

[249] *See* Alison Mitchell & Carl Hulse, *Threats and Responses: The Vote; Congress Authorizes Bush to Use Force Against Iraq, Creating a Broad Mandate*, NY TIMES, October 11, 2002, at A1.

[250] *See* 148 Cong Rec § 700; *see also* Robert Byrd, *Congress Must Resist the Rush to War*, NY TIMES, Oct. 10, 2002.

[251] *See* John Huber, *Sleepwalking Democrats and American Public Support for Bush's Attack on Iraq*, 10 Constellations 392, 402 (2003) ("The most obvious explanation for the sleepwalking democrats . . . [i]s that

The President's reaction to the public opinion polls in favor of the war was consistent with what the model would predict. Initially, the President's selling of the war to the American public was not easy. Despite initial tepid support for an Iraqi invasion, the President waged an aggressive public relations campaign that focused on the imminence of the danger imposed by Saddam Hussein and his historical belligerence in the face of multilateral sanctions. Although the polls showed support for the President's handling of the situation in Iraq during much of the fall of 2002 through March 2003, a majority also thought that that the United States should only go to war against Iraq with UN support.[252] Nonetheless, despite reservations in the polls about the United States proceeding unilaterally, by early September a significant majority of Americans indicated that they thought that a war against Iraq was inevitable.[253] By late February, as diplomatic efforts seemed to fail, more Americans seemed resigned to the prospect that a UN-approved intervention was no longer possible and public support in favor of a US-led intervention increased.[254] Once the war actually started on March 19, support for the war hit the 70 percent mark and stayed there for the course of the war.[255] On March 20, the U.S. Senate voted 99-0 in support of the President's invasion of Iraq. [256]

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the elected party leaders calculated that their future electoral success would be greatest if they 'changed the subject' diverting attention away from security and Iraq and toward other issues like the economy").

[252] *See* CBS/NY TIMES Poll, October 20-21, 2002 (63 percent preferred to wait).

[253] *See* Adam Clymer & Janet Elder, *Threats and Responses: Poll Finds Unease on Terror Fight and Concerns About War on Iraq*, NY TIMES, September 8, 2002, at __

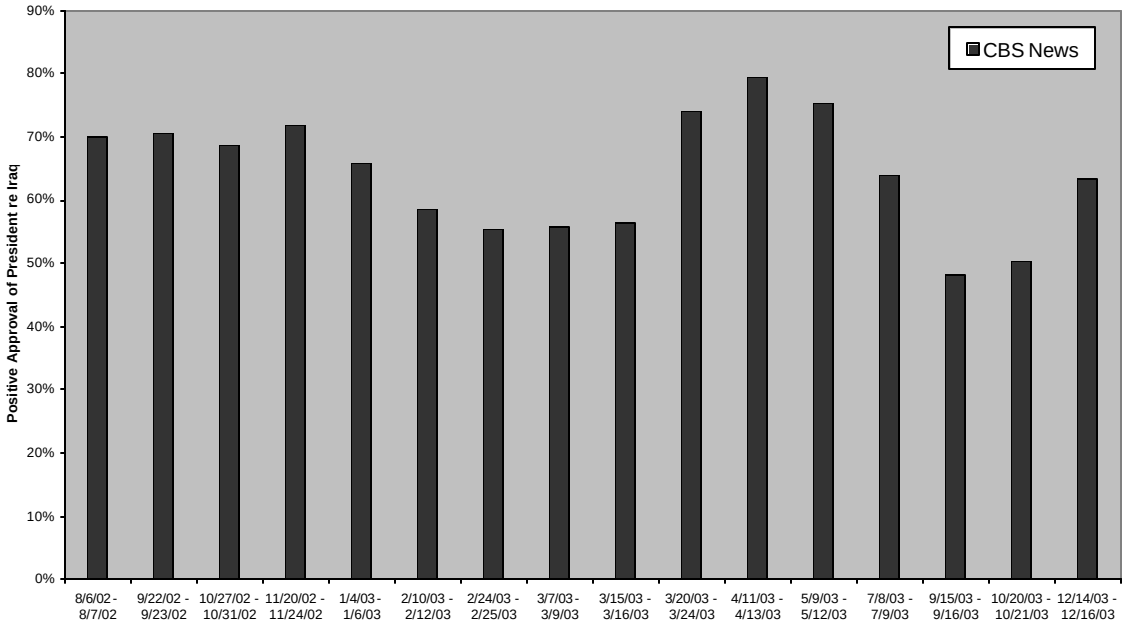
[254] *See* Tom Zeller, The Nation: Reading the Polls, New York Times, February 23, 2003, at 5.

[255] *See* CBS/NY TIMES Polls, March 20-21, April 11-13 & May 9-12, 2002 in Table 6 *infra*. Adam Nagourney & Janet Elder, *A Nation at War: The Poll; Support for Bush Surges at Home, But Split Remains*, NY TIMES, March 23, 2003 at 1.

[256] *See* Eric Schmitt & Steven Weisman, *A Nation at War; House Joins Senate In Praising Troops*, NY TIMES, April 11, 2003, at A1.

TABLE 6

Public Opinion Polls on the United States Invasion of Iraq, 2002-2003 (in percentages)



Questions: **(1) CBS News:** Do you approve or disapprove of the US taking military action against Iraq to try and remove Saddam Hussein from power? (8/6/02 - 8/7/02; 9/22/02 - 9/23/02; 10/27/02 - 10/31/02; 11/20/02 - 11/24/02; 1/4/03 - 1/6/03); Do you approve or disapprove of the way George W. Bush is handling the situation with Iraq? (2/10/03 - 2/12/03; 3/7/03 - 3/9/03; 3/15/03 - 3/16/03; 4/11/03 - 4/13/03; 5/9/03 - 5/12/03; 7/8/03 - 7/9/03; 9/15/03 - 9/16/03; 10/20/03 - 10/21/03; 12/14/03 - 12/16/03)

Note: Percentages were recalculated to eliminate "don't know," "not sure," and "no answer" responses.

Rather than let the public opposition for unilateral action fester in the build-up to the invasion of Iraq, President Bush undertook a broad initiative to convince the public that he had exhausted diplomatic options and that Hussein's regime constituted an imminent threat. Through a combination of high profile speeches before the war and carefully orchestrated televised programs that showed possible nuclear and chemical weapons facilities, President Bush was able to overcome public skepticism of unilateral intervention. President Bush was also able to sell the invasion as a multilateral intervention—even in the absence of a UN Resolution—by assembling a "coalition of the willing."[257] The rapid and overwhelming nature of the U.S. led coalition's victory eventually cemented public approval for the war. At the conclusion of the main ground war, a significant percentage of Americans expressed confidence that war went well. Indeed, public opinion polls by Gallup in April showed that a majority of Americans said the war would still be justified even if the U.S. did not discover any weapons of mass destruction.[258]

Although the Iraq invasion officially ended about a month after it started, the military activities in Iraq are still ongoing and it is hard to predict whether public support

[257] *See* Elisabeth Bumiller, Threats and Responses: The Allies; In Blunt Words, Bush Threatens Hussein Again, NY TIMES, Nov. 21, 2002, at A1.

[258] *See* Gallup Poll, April 11-13, 2003.

for the "nation-building" aspect of the intervention will last. As the experience with the 1982-1983 Lebanese intervention shows, the American public tends not to have a strong appetite for prolonged military engagements, especially when there are significant casualties and where the perceived threat to the United States' security interest is not obvious. Public support for the Iraqi invasion has declined somewhat significantly from its peak levels in April 2003, although the President received a bump in December 2003 after the capture of Saddam Hussein. The model predicts that if public support for the invasion falls below 50 percent for a sustained period of time (let us say two months), congressional intervention in support of a troop withdrawal is very likely. Nonetheless, in the shadow of the terrorist attacks of September 11, a majority of Americans still give President Bush high marks for his efforts in combating international terrorism. Indeed, during the 2004 election campaign, President Bush maintained a consistent lead over his Democratic challenger on the question of whom Americans trusted more on the issue of national security and fighting terrorism—a factor that likely contributed to the President's 2004 reelection victory.[259]

D. *The Cases That do Not Seem to Conform to the Model*

The build-up to all the conflicts described in the foregoing case studies were all consistent with what a political insurance and signaling model would predict. But there are a variety of other uses of force (or decisions not to use force) that one cannot easily harmonize with the stylized political insurance or signaling model. This Section addresses three such cases: the Korean war of the 1950s; the Cuban missile crisis of 1963; and the 1999 military intervention in Kosovo.

At first blush, the American military intervention in Korea that started in 1950 seems like an anomaly because it involved a high stakes conflict in which the President did not obtain prior congressional authorization.[260] With respect to the political insurance that congressional authorization accords, however, one could argue that President Truman acquired enough such insurance by successfully securing the approval of the UN Security Council before he started deploying troops in the region.[261] But in the modern era presidents have still sought congressional authorization for the use of force even after the obtaining approval of the UN Security Council.[262] In any event, however, there is less to the lack of formal congressional authorization for the Korean conflict than meets the eye. Although Congress never formally authorized U.S. involvement in the

[259] Jodi Wilgoren, *The 2004 Campaign: Political Memo; Kerry Blends His Attacks on Bush Record*, NY TIMES, Oct. 20, 2004, at A 20 (observing the despite setbacks in Iraq "polls show that voters still trust Mr. Bush more when it comes to fighting terrorism.")

[260] *See* GARY HESS, PRESIDENTIAL DECISIONS FOR WAR: KOREA, VIETNAM, AND THE PERSIAN GULF 26 (2001) (recounting Truman's decision to proceed in the Korean war without congressional authorization).

[261] *See id.* at 24-27 (discussing President Truman's efforts to seek a UN Security Council Resolution on Korea).

[262] For instance, President Bush's decision to repel Iraqi forces from Kuwait in 1991 both received UN Security approval and authorization from Congress. *See* HESS, *supra* note __ at 162-63; 189-90.

Korean crisis, congressional leaders from both sides of the aisle publicly endorsed President Truman's commitment of troops.[263] Indeed, Truman actually sought to present the Korean crisis to Congress but was repeatedly rebuffed by legislative leaders who told him that it was unnecessary to seek congressional authorization for what was already a really popular decision.[264] Robert Taft, a Republican Senator from Ohio, did publicly challenge the constitutionality of President Truman's action on the Senate floor, but he also made it clear that had President Truman sought congressional authorization, he would have voted for it.[265] In the end, there is sufficient evidence that Congress had endorsed the Korean crisis informally even if it did not do so through formal legislative action.

One of the gravest foreign policy crises of the post-WWII era was the Cuban missile crisis of 1963. Yet President Kennedy did not formally seek congressional authorization before making his decision to mount a blockade to induce the removal of Soviet missiles from Cuba.[266] Moreover, President Kennedy decided not to use force against the Cubans or the Soviets in the midst of a rapidly escalating crisis and yet he did not seem to suffer any domestic audience costs. Indeed, the public opinion polls at the time overwhelmingly endorsed President Kennedy's decision to mount a blockade against Soviet ships.[267]

A broader examination of the Cuban missile crisis yields some factors that go a long way in reconciling some of the apparent inconsistencies between that crisis with what the political insurance and signaling model would predict. First, the Cuban missile crisis ostensibly involved an international crisis that was foisted upon the United States in which the President had little choice but to react. Indeed, President Kennedy purportedly viewed presidential inaction on the Cuban Missile Crisis as possible basis for

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[263] *See* HESS, *supra* note __ at 24.

[264] As one scholar notes, Truman's efforts to seek a congressional role in the Korean conflict were shunned by leading legislators:

> (C)ontrary to popular misconception, President Truman did not "ignore" Congress. On the contrary, he played it by the book, repeatedly consulting personally with the joint leadership of Congress, asking specifically whether he should seek a declaration of war, and instructing the Department of State to draft a resolution in case they felt it appropriate. Truman repeatedly expressed a desire to address a joint session of Congress about what was going on in Korea.
>
> But everywhere he turned, Congressional leaders told him that he had ample authority under the Constitution and under the Charter to do what he was doing, and they went further and told him that he should "stay away" from Congress.

Malvina Haberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT'L & COMP. L. 865, 869 (2004).

[265] *See* HESS, *supra* note __ at 26.

[266] For a brief synopsis of the Cuban Missile Crisis, see "An Overview of the Crisis," available at hht://library.thinkquest.org/11046/days.index.html; *see also* GRAHAM ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1971).

[267] *See* Tom W. Smith, *The Polls-Trends: The Cuban Missile Crisis and U.S. Public Opinion*, 67 PUBLIC OPINION Q 265, 269-70 (2003).

impeachment.[268] Thus, unlike most of the conventional use of force cases, the President did not play an active role in creating or escalating the Cuban missile crisis.[269] One could argue that when a foreign adversary commits acts of aggression on U.S. soil, or in close proximity to U.S. soil, the President may have no option but to react by using force or taking decisive measures short of using force. Because it is almost certain that the President will react in those situations, the signaling value or the political insurance afforded by congressional authorization for the use of force diminishes. Thus, in those instances where the President has responded to attacks on U.S. soil—such as in WWII after the Japanese bombing of Pearl Harbor or in Afghanistan after the September 11 terrorist attacks—the President could have plausibly dispensed with congressional authorization without suffering significant domestic audience costs.

Second, President Kennedy's choice of a blockade rather than a use of force during the Cuban missile crisis also makes sense because a use of force could have resulted in a nuclear showdown between the Soviet Union and the United States.[270] All else equal, the domestic audience will likely not prefer a use of force incident when the prospects of prevailing in a military engagement are trivial. Given that a full-fledged war between the Soviet Union and the United States would in all likelihood be unwinnable by either side, public opinion polls at the time showed a strong preference for a reaction to the crisis that would fall short of a use of force.[271] In the end, not only did the President Kennedy's blockade satisfy the public's demand for decisive action, it ostensibly achieved the goal of preventing the further shipment of Soviet missiles to Cuba.[272] In any event, unlike the superpower confrontation at stake during the Cuban missile crisis, the United States is not likely to confront such a formidable foe in routine use of force decisions.

Finally, the American military intervention in Kosovo in 1999 also presents somewhat of a challenge to the political insurance/signaling model. In March 1999, President Clinton ordered air strikes against Serbian forces in Kosovo in order to protect ethnic Albanians in Kosovo from Serbian aggression and also to persuade Serbian forces

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[268] Robert Kennedy, who was then Attorney-General, reported this colloquy he had with his brother regarding the risk of confronting the Soviet Union over the crisis. Robert Kennedy: "I just don't think there was any choice .. and not only that, if you hadn't you would have been impeached." President Kennedy: "That's what I think . . . I would have been impeached." (quoted in Richard Lebow, *The Cuban Missile Crisis: Reading the Lessons Correctly*, 98 POL. SC. Q 431, 433 (1983)).

[269] *See, e.g.*, Fearon, *supra* note __ at 579 ("Historically, war has virtually followed from the deliberate choice of state leaders, if not always as the result they originally intended.")

[270] *See* ALLISON, *supra* note __ at 59 ("An invasion would force American troops to confront 20,000 Soviets in the Cold War's first case of direct contact between troops of the superpowers. Such brinkmanship courted nuclear disaster, practically guaranteeing an equivalent move against Berlin").

[271] *See* Smith, *supra* note __ at 271 (observing that public opinion polls showed that 83 percent approved of the blockade decision while a consistent majority opposed the invasion of Cuba).

[272] *See id.* Allison characterizes the blockade choice as the optimal middle ground: "It was a middle course between inaction and attack, aggressive enough to communicate firmness of intention, but still not so precipitous as a strike." ALLISON, *supra* note __ at 61.

to accept NATO's presence in the region.[273] Congress never formally approved the Kosovo operation and President Clinton justified his unilateral action as an exercise of his constitutional authority as chief executive and commander in chief.[274] The constitutionality of President Clinton's Kosovo decision eventually became the basis of lawsuit filed by Representative Thomas Campbell and about two-dozen other members of Congress.[275]

While Kosovo seems like a separation of powers anomaly, certain factors suggest that it could be reconciled with a political insurance model. First, the Kosovo crisis was not a particularly high risk engagement because it mostly involved aerial attacks without any significant commitment of ground troops. Second, President Clinton received some congressional political insurance when the Senate (but not the House) passed a resolution two days before he ordered the attack authorizing the President to conduct military air operations in conjunction with other NATO forces.[276] Furthermore, the House, which failed to support the Senate resolution authorizing the use of force, subsequently defeated a resolution that would have required the President to remove all troops from Yugoslavia.[277] Finally, Congress also agreed to increase funding for the Kosovo operation,[278] although it never formally authorized the war.

In many respects, the Kosovo intervention represents a low-level international crisis in which the President sought and obtained from Congress a form of low-level political insurance. Because the intervention involved mostly aerial attacks on Serbian targets, it did not represent a significant enough threat in terms of potential casualties to American troops to warrant full-blown political insurance from Congress. Thus, while President Clinton was not averse to formal congressional approval, he probably recognized that the political risks of the intervention did not necessarily require it. Moreover, given that Congress was willing to increase funding for the intervention and that the Senate had already passed a resolution supporting the use of force, the President likely thought he had sufficient political insurance to engage in a limited aerial bombing campaign.

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[273] For a brief factual background of the Kosovo intervention, see Campbell v. Clinton, 203 F.3d 29 (2000). For an analysis of the international law and constitutional implications of the Kosovo intervention, see John Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV 1673 (2000).

[274] *See* Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia, 35 Weekly Comp. Pres. Doc. 527-28 (Mar. 26, 1999).

[275] *See* Campbell, 203 F.3d at 29-30; *see also* Campbell v. Clinton, 52 F. Supp. 2d 34, 37 (D.D.C. 1999).

[276] S. Con. Res. 21, 106th Cong. (1999).

[277] *See* H.R. Con. Res. 82, 106th Cong. (1999). The House did reject the Senate resolution authorizing the conflict by a tie vote of 213 to 213. Moreover, the House also rejected a resolution providing for the declaration of war by a vote of 427 to 2. *See* H.R.J. Res. 44, 106th Cong. (1999).

[278] *See* 1999 Emergency Supp. Appropriations Act, Pub. L. No. 106-31, tit 11, ch. 3, 113 Stat. 57 (1999) (providing funds for operations for operations in Yugoslavia).

III. IMPLICATIONS OF THE THEORY FOR NORMATIVE WAR POWERS SCHOLARSHIP

The widespread assumption that pervades much of the normative war powers scholarship and judicial commentary is that the President and Congress are in a perpetual battle for supremacy in foreign affairs.[279] Both sides of the war powers debate have conceded that the President has won this battle.[280] But the battle for supremacy assumption is mistaken. Congress is not an empire builder in war powers; in most instances the incentives of individual members of Congress may actually be flatly inconsistent with that of increasing the overall institutional prerogative of Congress. This Article has shown that when the President first initiates an international crisis, public opinion usually supports the President's preferred course of military action. The positive electoral payoffs that come from piggybacking on the President's national security agenda means that members of Congress have a strong incentive to initially support the President's use of force decisions regardless as to whether those decisions diminish the overall institutional prerogatives of Congress. But when public opinion turns against the President's conduct of a war, members of Congress have political incentives to constrain the President's national security initiatives. As discussed in the two sections below, suggestions that the courts or Congress mandate a more specific division of war powers authority are unlikely to alter these political incentives.

This Article does not mean to suggest that all normative scholarship embraces a bright-line approach to the allocation of war powers or assumes that a struggle for institutional supremacy is undesirable. Indeed, pro-President scholars like John Yoo have argued that both the constitutional text and structure support a much more flexible approach to war powers in which both Congress and the President can compete for control over war-making.[281] Yoo also points to historical sources that suggest that such a flexible approach to war powers is also consistent with the original understanding.[282] Although Yoo does not seek to explain the war powers interactions between Congress

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[279] *See* Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 915-17 (2005) (discussing prevalence of empire-building approach in separation of powers scholarship).

[280] Pro-President scholars are largely happy with this outcome and argue that increased executive power in war powers is consistent with both the political realities of modern warfare and the original constitutional design. *See, e.g.*, H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 7 (2002) (suggesting that a functional reading of the Constitution supports the vesting of broad foreign affairs authority in the executive branch). Pro-Congress scholars understandably bemoan legislative impotence and often offer elaborate recommendations for re-equilibrating this perceived imbalance in war powers authority. *See, e.g.*, ELY, WAR AND RESPONSIBILITY, *supra* note _ at 3-10; 139-52; KOH, THE NATIONAL SECURITY CONSTITUTION, *supra* note __ at 74-77; Michael Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1559-60 (2002); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 674-75 (1972)

[281] *See* John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1643 (2002); John Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1221 (1999).

[282] Yoo, *War and the Constitutional Text*, *supra* note __ at 1648-1660.

and the President, the normative vision he depicts seems to accord with much of the reality of political branch interaction on war powers. However, while Yoo seems to be less sanguine about a more assertive congressional role in war powers,[283] the evidence does show that members of Congress do play a more prominent role in constraining the President's decision to use force when there are electoral incentives for doing so.

The rest of this Article argues that the most of the conventional prescriptions for addressing the lack of congressional assertiveness in war powers are unlikely to work given certain realities of political branch interaction in foreign affairs.

A. *Why Congress Does not Have an Incentive to Change the Balance of War Powers*

The starting point for much of the literature regarding the proper division of war powers is usually an effort to apply traditional interpretive canons of constitutional law to the textual language that discusses the authority to conduct war. For instance, references abound in the war powers literature to canonical phrases like original intent, formalism, textualism, and functionalism. The assumption is that after positing what the proper division should be, the relevant institutional parties, such as Congress and the President, would then adjust their behavior to fit the outcome dictated by the specific interpretive canon. Thus, some pro-Congress scholars have argued that Congress should develop tools to reassert its institutional powers and re-equilibrate the perceived imbalance in war powers authority.[284]

In much of this normative war powers scholarship, a logically antecedent question is rarely addressed: If the courts are not likely to be involved in war powers controversies, why do we care about interpretive canons that are almost exclusively employed by the courts?[285] Or to phrase the question a little differently, why would we expect the political branches that usually make decisions about the allocation of war powers to care about

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[283] *See id.* at 1664 (observing that WPR has been weak in constraining executive authority and suggesting that the constitutionality of the WPR is questionable).

[284] *See e.g.*, KOH, THE NATIONAL SECURITY CONSTITUTION, *supra* note __ at 185-207 (suggesting elaborate legislative proposals to give congressional role more bite in war powers).

[285] Interestingly, however, many of the arguments supporting a specific allocation of war powers authority are phrased in a manner that almost beckons for judicial resolution. In other words, like many of the normative debates in other areas of constitutional law, the primary audience for much of this scholarship seems to be the courts. But the courts are a very peculiar audience for such scholarship because most constitutional law scholars would agree that the courts have played a fairly marginal role in resolving legal disputes over the allocation of war powers. *See* KOH, THE NATIONAL SECURITY CONSTITUTION, *supra* note __ at 146-49 (noting the propensity of courts to refuse to hear challenges to executive authority on foreign affairs). Admittedly, the normative thrust of some of the war-powers scholarship is a quest to get the courts more involved, *see* ELY, WAR AND RESPONSIBILITY, *supra* note __ at 54-67, but even the most ardent proponents of judicial intervention in war powers would admit that courts are hardly the panacea to the problems they describe.

such interpretive canons? Presumably, many constitutional scholars would say that they should care because these interpretive canons provide mechanisms for discovering what the constitutional text specifically prescribes. But hardly any of the political branches would concede that they are simply ignoring the Constitution when they make war powers decisions. The more relevant question is whether the political branches should coordinate around any specific interpretive approach in circumstances where the constitutional text may be subject to different interpretations. Mysteriously, none of the normative war powers scholarship seems to discuss why the political branches would have any incentives to take interpretive canons seriously. For instance, does either Congress or the President really have any incentive to adhere to either historical fidelity under the originalist approach, or to other non-historical considerations under a more functionalist approach?

The answer is probably not. From a judicial perspective, one of the great virtues of interpretive canons is that they encourage stability in the law even if the courts do not all agree on the best one.[286] Indeed, some commentators have observed that the institutional incentive that courts have in maintaining stability in legal interpretation makes them better interpreters of the constitution than the political branches. [287] Understandably, however, interpretive stability hardly seems to be a virtue for members of Congress who are subject to the whims of public opinion and face reelection concerns.[288] Indeed, because members of Congress are not bound by the same institutional incentives that encourage interpretive stability in the judicial branch, some commentators have argued that Congress may actually have an institutional advantage over the courts in interpreting those constitutional norms that change over time. [289]

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[286] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term--Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 67 (1994) ("The usefulness of the canons ...does not depend upon the Court's choosing the 'best' canons for each proposition. Instead, the canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it.").

[287] *See, e.g.*, Larry Alxander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1372-75 (1997).

[288] As one member of Congress being surveyed for a scholarly article put it: "Being a political body, Congress better have a different approach [to interpretation] or else they'll get voted out of office. Judges have life appointments. If members were elected for life then maybe this would be different." Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001*, 29 Law & Soc. Inq. 127, 162 (2004).

[289] *See* Peabody, *supra note* ___ at 161 ("While courts were somewhat slow to adapt their interpretation to changing social and political conditions (given, among other factors, their relative insulation from the public and the other branches), Congress could serve as an agent of innovation, ensuring that the Constitution applied to contemporary concerns."); Neal K. Katyal, *Legislative Constitutional Interpretation*, 50 Duke L.J. 1335, 1341 (2001) (""Congress . . . frequently makes determinations as to shifts in popular opinion, beliefs, and ideals. Because of Congress's structural superiority in these tasks, it should take a larger role in interpreting those clauses of the Constitution that are meant to evolve over time."); *see also* Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 Iowa L. Rev. 941, 980 (2004) ("[B]ecause the political branches are not bound by the same institutional constraints the courts face, they are better positioned to respond to changing norms in international relations.")

In any event, given the presidential dominance of the national security agenda in most circumstances, Congress has an incentive to adopt an even more flexible approach to constitutional disputes regarding the allocation of war powers. In other words, since the President can easily shape public opinion at the initiation of a conflict, members of Congress are likely going to resist any effort to take a "bright line" approach to constitutional interpretation on war powers issues. Members of Congress are aware that "bright line" rules that mandate congressional intervention under certain circumstances are likely to expose them to unpredictable and considerable electoral risks.

Moreover, to the extent that members of Congress engage in constitutional interpretation about the separation of powers at all, they apparently tend to rely more on local constituency feedback and political considerations in determining the meaning of textual provisions.[290] Since members of Congress usually operate with limited legislative resources and crowded schedules, they are more likely to focus their attention on those constitutional issues that directly involve local and constituent concerns like federalism, separation of church and state, and individual rights issues.[291] Constitutional questions of foreign affairs do not seem to factor heavily as a congressional concern.[292]

Not only do electoral factors dissuade members of Congress from adopting interpretive canons that encourage stable rules, they also dissuade them from taking proactive legislative positions that would impose such bright line rules. For instance, despite increasing calls by commentators to amend the War Powers Resolution to give it more bite, very few members of Congress have ever expressed any interest in expanding the congressional role under that statute. On the contrary, influential members of Congress have actually lobbied rigorously to repeal the Resolution or radically narrow its scope. Indeed, some of the most vocal support for legislative repeal has come from members of Congress who were not even from the President's party. For instance, both Robert Dole and Henry Hyde—leading Republican members of Congress—introduced legislation in 1995 that would repeal the Resolution under Clinton's presidency.[293] Newt Gingrich, the speaker of the house at the time, actively campaigned for Representative Hyde's amendment and encouraged his fellow Republican members of Congress to take the unusual step of "increas[ing] the power of President Clinton."[294]

But Congress's reluctance in imposing bright line rules does not necessarily translate to wholesale legislative abdication in the war powers realm. This Article has

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[290] As one scholar analyzing Congressional approaches to constitutional interpretation put it: "[M]embers of Congress [felt they] had a greater responsibility to apply and 'assess the real world impact of [constitutional questions" including policy consequences and the likely reaction of the public." Peabody, *supra note* ___ at 161.

[291] *See id.* at 150-51.

[292] *See id.* at 148, 150.

[293] Robert Dole proposed replacing the resolution with what he called the Peace Powers Act of 1995, which in his words would "untie the President's hands in using American forces to defend American interests." Wash. Post, Jan. 5, 1995, at A 10.

[294] 141 Cong. Rec. H5648-01 (June 7, 1995).

shown that Congress will often employ a combination of both informal and formal mechanisms to constrain executive action in foreign affairs provided that there are discernible political payoffs for doing so. Thus, it is not true to suggest, as some commentators have, that "the President almost always seems to win in foreign affairs."[295] To the contrary, members of Congress may often prefer to negotiate the division of war powers authority with the President using informal political approaches where formal legislative tools may prove to be either inadequate or politically imprudent. Hence, the absence of formal statutory rules that establish bright line rules in war powers does not mean that the President always has the upper hand, it simply means that one ought to look elsewhere for a better understanding of political branch interaction in war powers.

In sum, it is unlikely that the interpretive canons of constitutional law can play a significant role in informing the distribution of war powers. As long as courts continue to decline to play an active role in war powers controversies, both the President and Congress have institutional incentives to prefer an open-ended and flexible approach to the allocation of war powers authority. Members of Congress may prefer to shift most of the political risks of initially going to war to the President but then reserve the option of intervention if the war takes a wrong turn and becomes politically unpopular. For their part, presidents may also want the flexibility of seeking a more active congressional role if they perceive a significant risk of failure in their war initiatives but then go alone when the expected costs of war are low. In many circumstances, the institutional incentives for both branches may run in opposite directions, but the solutions they will likely choose will not involve the imposition of bright line rules.

B. *Why the Courts are Unlikely to Tip the Balance of War Powers in Congress's Favor*

Congress has for prudent political reasons often declined to use its formal powers to constrain the President in war powers issues. But even if members of Congress seem to face significant domestic audience constraints in participating in war-powers issues, one might ask why the courts do not intervene to level the policy-making playing field. Indeed, one oft-cited antidote to the perceived "imperial" actions of the President in the war powers realm is judicial intervention.[296] Judicial intervention, it is commonly argued, will tip the institutional balance of powers in Congress's favor and encourage it to exercise its war powers prerogative.[297]

There are two compelling reasons why courts have resisted, and will likely continue to resist, intervening in war powers disputes: (1) due to the political calculus

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[295] Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L J. 1255, 1317 (1988).

[296] *See* ELY, WAR AND RESPONSIBILITY, *supra* note __ at 54-67; KOH, THE NATIONAL SECURITY CONSTITUTION, *supra* note __ at 222-28.

[297] *See* ELY, WAR AND RESPONSIBILITY, *supra* note __ at 54-67.

that many members of Congress face, the courts usually assume that it is unlikely that there is a genuine confrontation between the two political branches on war powers disputes; and (2) the courts are probably reluctant to intervene in inter-branch disputes in a sphere where they might have low institutional authoritativeness.

On the first point, the courts have been generally reluctant to protect legislative prerogatives in war powers when members of Congress have failed to do so. Indeed, given that many members of Congress often have political incentives not to confront the President on war powers controversies, many of the disputes regarding the division of war-powers that come before the courts routinely involve what are essentially intra-legislative disputes where a segment of Congress (often a minority) seems to disagree with the majority's decision. In most such cases a majority of Congress has either explicitly accepted the President's national security agenda or has implicitly acquiesced to the agenda without taking formal legislative action. In other words, in those cases there has not been a genuine constitutional impasse that might appropriately trigger court scrutiny. Courts, probably anticipating the political spoils at stake, decline to participate in a "political pass the blame" game by insisting that the courts will not do what Congress refuses to do for itself.[298]

Where members of Congress are unwilling to constrain executive branch authority through legislation, courts understandably recognize that judicial intervention might prove to be meaningless. First, where there is insufficient congressional support for a court decision that favors congressional intervention in war powers, members of Congress will very likely lack the political will to implement such a decision. In other words, members of Congress who fear that greater congressional intervention will expose them to electoral risks will have every incentive to sidestep a judicial ruling that awards them more powers in national security affairs.

Second, courts will often lack the opportunity to monitor effectively the successful implementation of a bright-line judicial rule regarding the allocation of war powers. Judicial monitoring will often be difficult because there are so many procedural and jurisdictional hurdles to bringing a legal challenge to the allocation of war powers. Since most citizens will lack standing to bring the lawsuit, most such lawsuits will probably have to come from members of Congress. But even if disaffected members of Congress are able to overcome significant standing obstacles of their own,[299] they are still likely to face a

[298] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 998 (1979) ("If the Congress chooses not to confront the President, it is not our task to do so.") (Powell, J., concurring); *see also* Campbell v. Clinton, 203 F.3d 29 (2000) (holding that Congressmen challenging constitutionality of Kosovo intervention did not have legislative standing because legislative remedies were still available).

[299] Under current Supreme Court doctrine, legislative standing is available only when legislators' votes have been completely nullified by the act of the president such as when there "constitutional impasse" between President and Congress. *See* Raines v. Byrd, 521 U.S. 811, 823 (1997).

slew of other procedural obstacles, including ripeness,[300] mootness,[301] and the political question doctrine.[302]

Thus, although greater political branch collaboration on use of force issues might be normatively desirable, those who argue that judicial intervention will prompt Congress to take a more active role in war powers are probably wrong. Members of Congress are not likely going to embrace a war powers role that has significant electoral risks simply because such a role has been judicially sanctioned. Indeed, not only will members of Congress lack an incentive to comply with such judicial decisions but judicial monitoring of legislative compliance will often prove very difficult to carry out. At most, if compelled to take on a more active role by a judicial decision when it is not in their political interest to do so, members of Congress will likely substitute legislative rubberstamping for silent acquiescence as the preferred response to the President's use of force initiatives. In sum, if greater political accountability for use of force decisions is the end goal, there is little evidence that judicially-prompted congressional intervention will change the current war powers landscape.

Finally, the risk of non-compliance with judicial decisions also implicates the institutional legitimacy of the courts to adjudicate on war powers claims. As some commentators have observed, courts seem to be especially wary about intervening in separation of powers issues in foreign affairs because the popular legitimacy that underlies judicial Resolution of domestic constitutional disputes does not tend to extend to foreign affairs disputes.[303] In other words, when issues involve the adjudication of individual rights claims or domestic separation of powers disputes, courts can often tap into the popular acceptance of their role in resolving such disputes.[304] In disputes regarding the allocation of war powers, however, it is unlikely that the judicial branch will be able to draw on the popular underpinnings of its legitimacy to secure political branch compliance with its decisions because there does not seem to much of a public appetite for increased judicial involvement in foreign affairs disputes.[305] Moreover, unlike in the domestic realm where the courts play a key legitimating function in separation of powers disputes, the

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[300] See Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring) (observing that in disputes between the political branches have to be ripe for adjudication -- meaning there must be a true "impasse" between the branches).

[301] *See* Powell v. McCormack, 395 U.S. 486, 496 (1969) (holding that "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.").

[302] See Baker v. Carr, 369 U.S. 186, 217 (1962) (listing six factors courts may use to determine if a case presents a non-justiciable political question); *see also* Nzelibe, *supra* note __ at 946-65 (discussing widespread application of political question doctrine in foreign affairs cases).

[303] *See* Nzelibe, *supra* note __ at 987-92; Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and International Relations of their State*, 5 Eur. J. Int'l L 423, 426 (1994).

[304] *See* Nzelibe, *supra* note __ at 987-89.

[305] *See id.* at 989-90.

political branches have very little incentive to embrace a more active judicial role in disputes over the allocation of war powers.[306]

IV. CONCLUSION

For too long, the war powers literature has ignored the sometimes divergent incentives the political branches face in the context of an imminent military conflict or international crisis. Indeed, much of that literature has tended to have a strong normative gloss informed by conventional interpretive canons like textualism, functionalism, or historicism. To the extent that this literature attempts to explain political branch interaction in foreign affairs at all, it often assumes an "empire-building" agenda by the relevant domestic actors. According to this view, the President has prevailed in the institutional struggle for supremacy in war powers largely because Congress has found itself without the proper tools to assert its constitutional prerogative. For proponents of increased congressional authority in war powers, the antidote to this perceived institutional imbalance is to have the judiciary step in and act as a bulwark against President's intrusion on Congress's war powers prerogatives.

This Article suggests that the reality of political branch interaction on war powers is much too complex to correspond to the prescriptions of any particular canon of constitutional theory. In other words, despite the prospects of institutional tweaking by the courts or Congress, the political branches are not likely to have much of an incentive to conform their actions to what any specific interpretive canon prescribes, unless such a canon prescribes open-ended flexibility. Rather, the political branches operate in an atmosphere where their institutional or constitutional prerogatives do not often align neatly with the electoral incentives of individual institutional actors.

In this atmosphere, far from being hamstrung by its institutional arsenal, Congress has demonstrated that it is quite capable of constraining executive authority on the use of force when the electoral conditions are ripe. Thus, while members of Congress may be understandably reluctant to challenge the President's authority at the initiation of a conflict, they seem willing to constrain him in the shadow of a recent unpopular use of force. Because of an academic bias towards formal congressional actions, however, much of the legal scholarship has actually underestimated the diverse ways in which Congress constrains the President's war initiatives. In many circumstances, informal legislative actions such as threats to cut-off spending or to derail the President's legislative agenda are often as effective (and less institutionally burdensome) as passing formal legislation to terminate an unpopular war.

Finally, the President has an incentive to seek congressional approval for the use of force when there is a significant enough risk that the war will go wrong. The President either seeks legislative authorization as a form of political insurance in order to spread the

[306] *See id.* at 990; Benvenisti, *supra* note __ at 426.

electoral risks of military failure, or as a costly signal of the nation's resolve to a foreign adversary. Unlike Congress, however, the President rarely follows the course of public opinion in his war powers initiatives. Indeed, a presidential decision to capitulate to a foreign adversary in the face of declining public opinion polls is likely to be perceived as a sign of incompetence. Thus, when there is a decline in public support for the use of force, the President is likely to escalate an international crisis and gamble on the revival of public support through strategic victories in the battlefield.