

A Positive Theory of the War Powers Constitution
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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 international crisis. This Article argues that the presidential decision to seek congressional authorization is determined by a two-level strategic 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 for the domestic audience if he believes that the war is going to be fairly long or costly, or if he is uncertain about the immediate 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 powers initiatives. Rather than follow public opinion and withdraw from a politically unpopular war, the President is more likely to escalate the war and gamble that the course of the war and public opinion will change in his favor. Thus, a presidential decision to withdraw from an unpopular war is more likely to be a result of congressional intervention than a reaction to negative public opinion. This Article uses historical case studies, including the 2003 invasion of Iraq, to test these theoretical arguments.

CONTENTS

INTRODUCTION..... 2

I. A THEORY OF WAR-MAKING AUTHORITY 7

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

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<i>Crisis Escalation Agenda</i>	7
1. <i>The Sole Organ of Communications in Foreign Affairs</i>	10
2. <i>The High Public Visibility of Use of Force Issues</i>	12
B. <i>Uncertainty About the Use of Force Outcomes and the Scope of the Two-Level Interaction</i>	13
1. <i>The Domestic Level: Buying Political Insurance in Wars with Uncertain Outcomes</i>	15
2. <i>The International Level: Sending Costly Signals to Foreign Adversaries</i>	24
II. THE CASE STUDIES OF PRESIDENTIAL-CONGRESSIONAL INTERACTION ON WAR- POWERS.....	26
A. <i>The 1982-1984 Intervention in Lebanon and the 1983 Intervention in Grenada</i>	27
1. <i>Lebanon</i>	27
2. <i>Grenada</i>	36
B. <i>The 1992-1993 intervention in Somalia</i>	41
C. <i>The 2003 Invasion of Iraq</i>	45
D. <i>The Cases That do Not Seem to Conform to the Model</i>	51
III. IMPLICATIONS OF THE THEORY FOR NORMATIVE WAR POWERS SCHOLARSHIP..	54
A. <i>Why Congress Does Not Have an Incentive to Change the Balance of War Powers </i>	55
<i>Why the Courts are Unlikely to Tip the Balance of War Powers In Congress's Favor</i>	58
IV. CONCLUSION.....	60

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 From an institutional perspective, however, the bigger challenge is to understand the diverse and sometimes inconsistent roles that the political branches play 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 do so? 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?

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.

Although there is a plethora of legal scholarship on war powers, hardly any of it focuses on the actual dynamics of political branch relations on war powers. 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

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 sometimes able to constrain his national security choices?

This Article attempts to fill the gap in the war powers debate by presenting a theoretical framework that seeks to answer these questions. 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 public's appetite 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

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); 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).

³ See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 205-06 (1996); JOHN HART ELY, *WAR AND RESPONSIBILITY* 4-5 (1993); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 72 (1981).

⁴ See 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; ELY, *supra* note __ at 48; Yoo, *supra* note __, at 182.

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 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

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).

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 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

⁶ See KOH, *supra* note __ at 39; ELY, *supra* note __ at 61; BARBARA HINCKLEY, LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS 99 (1994).

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).

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 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

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.

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—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

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).

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

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 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

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.)

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.

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 will suffer significant domestic audience costs.”²¹ In other words, the existence of domestic audience costs at the crisis 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

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

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.

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.

crisis in order to divert attention from domestic problems.²⁶ But other commentators who have studied the diversionary war hypothesis have found no clear evidence between electoral cycles and the presidential decision to use force.²⁷ 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.²⁸ 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.²⁹ 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.”³⁰

The rest of this section points to two possible explanations for the President’s domination of the conflict escalation agenda at the beginning of a conflict: (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.

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.³¹ The textual basis for this authority is not explicit, but courts and commentators have

²⁶ 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).

²⁷ 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.”)

²⁸ 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).

²⁹ 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).

³⁰ Brett Leeds & David Davis, *Domestic Political Vulnerability and International Disputes*, 41 J CONF RES. 814, 817 (1997).

³¹ 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.”).

assumed that it is derived from the President's power to appoint and receive ambassadors.³² 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.³³ 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.³⁴ 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.³⁵ 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.³⁶ 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 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.³⁷

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

³² See HENKIN *supra* note __ at 41-42.

³³ 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.").

³⁴ See discussion at *supra* notes __

³⁵ See Fearon, *supra* note __ at 577.

³⁶ See Michael Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency 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").

³⁷ 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.").

impose political change on another country.³⁸ 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.³⁹ However, foreign policy goals that involve curbing foreign aggression or a perceived external threat enjoy significant popular support.⁴⁰ 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 domestic audience perceives the President as having access to superior information as to the nature of an international crisis, it is more likely to accept 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.⁴¹

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.⁴² 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.⁴³ 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 where the costs to the public are dispersed but the benefits to interest groups are concentrated.⁴⁴

³⁸ 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).

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ 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 POLICY* 18 (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").

⁴² 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).

⁴³ 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).

⁴⁴ 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

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.⁴⁵ 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.⁴⁶ 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.⁴⁷

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

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 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").

⁴⁵ 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).

⁴⁶ 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.'")

⁴⁷ See generally MATTHEW BAUM, *SOFT NEWS GOES TO WAR: PUBLIC OPINION AND AMERICAN FOREIGN POLICY IN THE NEW MEDIA AGE* xii (2003).

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.⁴⁸ 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.⁴⁹ 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 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.

⁴⁸ See Fearon, *supra* note __ at 583.

⁴⁹ 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).

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

Success	Failure
	
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.

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.⁵⁰ 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.

⁵⁰ 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.")

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.⁵¹ 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 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

⁵¹ 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”).

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.⁵²

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.⁵³ 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 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 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.⁵⁴ 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:

⁵² 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).

⁵³ 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.

⁵⁴ 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").

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 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.⁵⁵ 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.⁵⁶ Of course, members of Congress may 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.⁵⁷

The most obvious institutional device at Congress's disposal for constraining the presidential use of force is the War Powers Resolution ("WPR").⁵⁸ 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.⁵⁹ These critics focus on what seems to be a severe loophole in the reporting requirements of section 4.⁶⁰ 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,⁶¹ the termination requirements of section 5(b) can be easily evaded.⁶² 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

⁵⁵See 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.").

⁵⁶ 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 develops").

⁵⁷ 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).

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

⁵⁹ 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).

⁶⁰ See 50 U.S.C. § 1543(a).

⁶¹ See 50 U.S.C. § 1544(b).

⁶² See KOH, *supra* note __ at 126-127; ELY, *supra* note __ at 49 (describing "pattern of presidential evasion").

of the SS *Mayaguez*.⁶³ 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 WPR argue that this loophole transforms the WPR into a symbolic statute that does little to enhance Congress's war powers authority.⁶⁴

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.⁶⁵ 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,

⁶³See HINCKLEY, *supra* note ___ at 86.

⁶⁴ 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).

⁶⁵ See David Auerswald & Peter Cowhey, *Ballotbox Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505, 509 (1997).

executive officials behave as though it does.”⁶⁶ In other words, although presidents tend to routinely disclaim the applicability of the WPR, they nonetheless seem to be wary of ignoring its provisions.

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.⁶⁷ 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 composition of Congress and legislative resistance to the use of force.⁶⁸ 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.⁶⁹ 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.⁷⁰

⁶⁶ LOUIS FISHER, *PRESIDENTIAL WAR POWER* 133 (1995).

⁶⁷ 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).

⁶⁸ See Meernik, *Congress, the President, and the Commitment of the U.S. Military*, *supra* note __ at 384.

⁶⁹ See HOWELL, *POWER WITHOUT PERSUASION*, *supra* note __ at 14.

⁷⁰ Koh, *supra* note at __.

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.⁷¹ 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.⁷² In other circumstances, such as when casualties 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.⁷³

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.⁷⁴ 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.⁷⁵ 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

⁷¹ See Robert Shapiro & Lawrence Jacobs, *Lyndon Johnson, Vietnam, and Public Opinion: Rethinking Realist Theory of Leadership*, 29 PRES. STUD. Q 592 (1999) (observing that President Johnson led and directed public opinion on the Vietnam war).

⁷² HINCKLEY, *supra* note __ at 80.

⁷³ See Timothy Cotton, *War and American Democracy: Electoral Costs of the Last Five Wars*, 30 J CONFLICT RES. 616, 619-20 (1986).

⁷⁴ See Fearon, *Domestic Political Audience*, *supra* note __ at 581.

⁷⁵ 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.").

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.⁷⁶

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 engagement.⁷⁷ 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.⁷⁸ 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.⁷⁹ When there is a rally around the flag effect, the President is

⁷⁶ 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 Roche, *Conflict, Agency, and Gambling for Resurrection: The Principal Agent Problem Goes to War*, 38 Am. J. Pol. Sc. 362, 375 (1994). Downs and Roche characterize the practice as "gambling for resurrection." *Id.* at 374.

⁷⁷ 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).

⁷⁸ 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).

⁷⁹ 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).

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.⁸⁰ Since the President bears a disproportionate burden of the costs of military failure, the opposition members of Congress might prefer to terminate a conflict early even if they suffer some domestic audience costs since they know the President is likely to suffer even higher costs.⁸¹

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.⁸² By undertaking 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.⁸³

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.⁸⁴ 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."⁸⁵

⁸⁰ See *id.*

⁸¹ 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.")

⁸² See Fearon, *Domestic Political Audiences*, *supra* note __ at 582.

⁸³ Some commentators have noted that the President will seek 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).

⁸⁴ See Paul Huth & Todd Allee, *Domestic Political Accountability*, *supra* note __ at 759.

⁸⁵ 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

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.⁸⁶ 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.⁸⁷ 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, it 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

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 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).

⁸⁶ See discussion at *supra* notes ___

⁸⁷ See discussion at *supra* notes ___

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.

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.⁸⁸ The final section of this Part reviews cases that do not seem to fit the political insurance model.

These case studies reveal that presidents are more likely to seek congressional authorization in use of force situations that require extensive troop deployments (greater than 20,000 ground troops) over a long period of time (longer than three months). 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 an unpopular response to the October 1983 barracks bombing that killed 239 servicemen.⁸⁹

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. Other instances of unilateral use of force by the President in low-risk conflicts in the post-Vietnam era include: the 1975 rescue mission on the U.S. merchant ship *Mayaguez*, the 1980 Iran rescue mission, the 1986 air strikes against Libya, the 1989 invasion of Panama, 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 during the Kosovo intervention.

⁸⁸ 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).

⁸⁹ See discussion *infra* notes ___

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, 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.⁹⁰ 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.⁹¹ 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 victories.

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.⁹² 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

⁹⁰ See ELY, *supra* note __ at 20-21 (suggesting that the Johnson administration misled Congress in reporting the Tonkin Gulf incidents).

⁹¹ 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.

⁹² Steven Strasser, *The Marine Massacre*, NEWSWEEK, 31 Oct. 1983.

first deployment, which lasted less than a month, occurred in August 1982 and involved overseeing the withdrawal of PLO forces from Lebanon.⁹³ 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.⁹⁴ Initially, President Reagan did not seek congressional authorization for either of these deployments.⁹⁵ 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.⁹⁶ 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.⁹⁷

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.⁹⁸ 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.⁹⁹ Eventually, President Reagan signed the resulting legislation--the Lebanese Emergency Assistance Act of 1983 (the "LEAA").¹⁰⁰ 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.¹⁰¹ The President reported these casualties to certain congressional leaders but

⁹³ Richard Whittle, *Report on Marines Skirts War Powers Issues*, 1982 Cong. Q. 2157, 2158

⁹⁴ Richard Whittle, *Congress Uncertain about Aid to Isreal*, 1982 Cong. Q. 2357, 2357/

⁹⁵ John Felton, *Some in Congress Uneasy About New Role for Marines in Lebanon Peace Force*, 1982 Cong. Q. 2469

⁹⁶ *Id.*

⁹⁷ *Id.* at 2469.

⁹⁸ DANIEL P. BOLGER, *SAVAGE PEACE* 172 (1995).

⁹⁹ 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).

¹⁰⁰ See 129 Cong. Rec. 14,349-50 (1983)

¹⁰¹ Steven R. Weisman, *From Santa Barbara, Shock, Grief and Blame*, N.Y. Times, August 30, 1983 at A9.

disclaimed that the Marines were facing any imminent hostilities within the meaning of section 4(a)(1) of the WPR.¹⁰² The President also quickly escalated the conflict and ordered the additional deployment of 2,000 Marines to ships off the coast of Lebanon.¹⁰³ 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 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.¹⁰⁴ 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, 1983.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ In signing the legislation, President Reagan praised the cooperative spirit of Congress but

¹⁰² BOLGER, *supra* note ___, at 179.

¹⁰³ William E. Farrel, *U.S. Positioning 2000 Marines Off Beirut Coast*, NY TIMES, September 2, 1983 at A1.

¹⁰⁴ *Id.*

¹⁰⁵ Hedrick Smith, *Reagan Upgrading Lebanon Presence*, NY TIMES, September. 13, 1983 at A1.

¹⁰⁶ See opinion polls data in Table 2 *infra*.

¹⁰⁷ 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”).

¹⁰⁸ Felton, *Domestic Debate Follows Lebanese Violence*, 1983 Cong. Q. 1912, 1912.

¹⁰⁹ See 129 Cong. Rec. 25,747 (1983) (text of S.J. Res. 159).

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.¹¹⁰

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.¹¹¹ 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 Lebanon.¹¹² 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.¹¹³ 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.¹¹⁴

On October 26, barely three days after the bombing in Beirut, the President ordered the invasion of the Caribbean island-nation of Grenada.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ 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"

¹¹⁰ Ronald Reagan, statement upon signing PL 98-119 (Oct. 12, 1983), reprinted in 1983 Cong. Q. 2142, 2142.

¹¹¹ See Strasser, *supra* note ___ at 1.

¹¹² Robert McFadden, *Americans React to Attack with Frustration and Doubt*, NY TIMES, 24 October 1983, at A.9.

¹¹³ Steven Roberts, *Some Democrats Want Marines Out*, NY TIMES, October 25, 1983 at A16.

¹¹⁴ *Id.*

¹¹⁵ *Wednesday, October 26, 1983 Invasion of Grenada*, NY TIMES, October 26, 1983 at B1.

¹¹⁶ Drew Middleton, *U.S. Forces: Need Arising for More Troops, Ships and Planes*, NY TIMES, October 26, 1983, at A 16.

¹¹⁷ *Quotation of the Day*, NY TIMES, October 28, 1983, at B1.

¹¹⁸ *Transcript of Address by President on Lebanon and Grenada*, NY TIMES, October 28, 1983, at A10.

than intervention in the internal political affairs of another country.¹¹⁹ 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 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.”¹²⁰ He concluded that American citizens were under great danger and were seeking to escape from the political chaos.¹²¹

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.¹²² 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.¹²³ 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 anti-aircraft positions in East Beirut.¹²⁴ 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.¹²⁵ 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.¹²⁶ 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.¹²⁷ Earlier, Senator Charles Mathias of Maryland, another prominent Republican legislator,

¹¹⁹ See discussion in text at *supra* notes ___

¹²⁰ See Denise Bostdorf, *The Presidency and Promoted Crisis: Reagan, Grenada, and Issue Management*, 21 PRES. STUD. Q. 737, 742 (1991).

¹²¹ *Id.*

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

¹²³ 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).

¹²⁴ Thomas Friedman, *U.S. Ships Attack Syrian Positions in Beirut Region*, NY TIMES, Dec. 14, 1983, at A1.

¹²⁵ Gallup Poll, Dec 9-12, 1983 in Table 2 *infra*.

¹²⁶ See 129 Cong. Rec. 28, 863 (1983).

¹²⁷ Philip Taubman, *O'Neil Considers Backing a Change in Marine Mission*, NY TIMES, December 30, 1983, at A1.

announced that he would support a Resolution that would reduce the 18 month withdrawal timeframe under the MFLR to 6 months.¹²⁸

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.”¹²⁹ Later on at a news conference in 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.¹³⁰ 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.¹³¹ 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.¹³²

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.¹³³ But given the growing decline in public opinion polls in support of the deployment,¹³⁴ 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.¹³⁵ 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.¹³⁶ The Senate and House Democratic Caucus eventually endorsed a proposed bill that called for the immediate withdrawal of U.S. troops from Lebanon.¹³⁷

¹²⁸ See John Felton, *Senate Democrats Push Lebanon Policy Review*, 1983 Cong. Q. 2359.

¹²⁹ Francis Clines, *Reagan Defends Policy in Lebanon*, NY TIMES, December 17, 1983, Section 1 at 17.

¹³⁰ Steven Weisman, *Reagan Predicts Role Till Beirut Stands or Falls*, NY TIMES December 15, 1983 at A1.

¹³¹ See James Carity, *Mondale says U.S. Must Get Marines Out of Beirut Now*, NY TIMES, December 31, 2003 at A1.

¹³² See Report of the Long Commission, 1984 Cong. Q. 31 (Released Dec. 28, 1983).

¹³³ Michael Glennon, *Lebanon Policy Is Questioned As Support Waivers on the Hill*, 1984 Cong. Q. 3, 3.

¹³⁴ See Gallup Poll, Jan. 13-16, 1984 in Table 2 *infra*

¹³⁵ See *Id.*

¹³⁶ 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

¹³⁷ 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.

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.¹³⁸ In addition, the President seemed to react to the news by escalating the conflict and increasing the strikes on enemy positions in Lebanon.¹³⁹ Indeed, as the situation in Lebanon got worse, President Reagan's level of resolve seemed to increase.¹⁴⁰ But by early February, however, the President caved into congressional pressure and started drafting plans for the withdrawal of troops.¹⁴¹ By February 21, the Marines were deployed to ships offshore and by March 30, 1984 the United States formally ended its participation in the multinational forces deployed in Lebanon.¹⁴²

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.¹⁴³ 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."¹⁴⁴ Various members of Congress countered this attack and argued that the failure of the Lebanese deployment was exclusively the President's fault.¹⁴⁵

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

¹³⁸ 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.")

¹³⁹ 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.

¹⁴⁰ See Leslie Gelb, *The U.S. Commitment Continues to Deepen*, NY TIMES, February 7, 1984, at A 16.

¹⁴¹ 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.

¹⁴² 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.

¹⁴³ 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.

¹⁴⁴ *Excerpts from President Reagan's Speech on Foreign Policy and Congress*, NY TIMES, April 7, 1984 at 6; see also Francis Clines, *Reagan Attacks Congress's Role on Many Fronts*, NY TIMES, April 4, 1984 at A1; see also Shultz Says Pullout Harmed U.S., NY TIMES, April 2, 1984 at A3.

¹⁴⁵ See Martin Tolchin, *O'Neill Asserts Deaths in Beirut 'Lie on' Reagan*, NY TIMES, April 5, 1984 at A12.

for the failure of the deployment.¹⁴⁶ 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 policy "the biggest blunder, the biggest mistake [Reagan] had made in the White House."¹⁴⁷ 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.¹⁴⁸

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 seemed to resign themselves to a long term U.S. troop deployment.¹⁴⁹

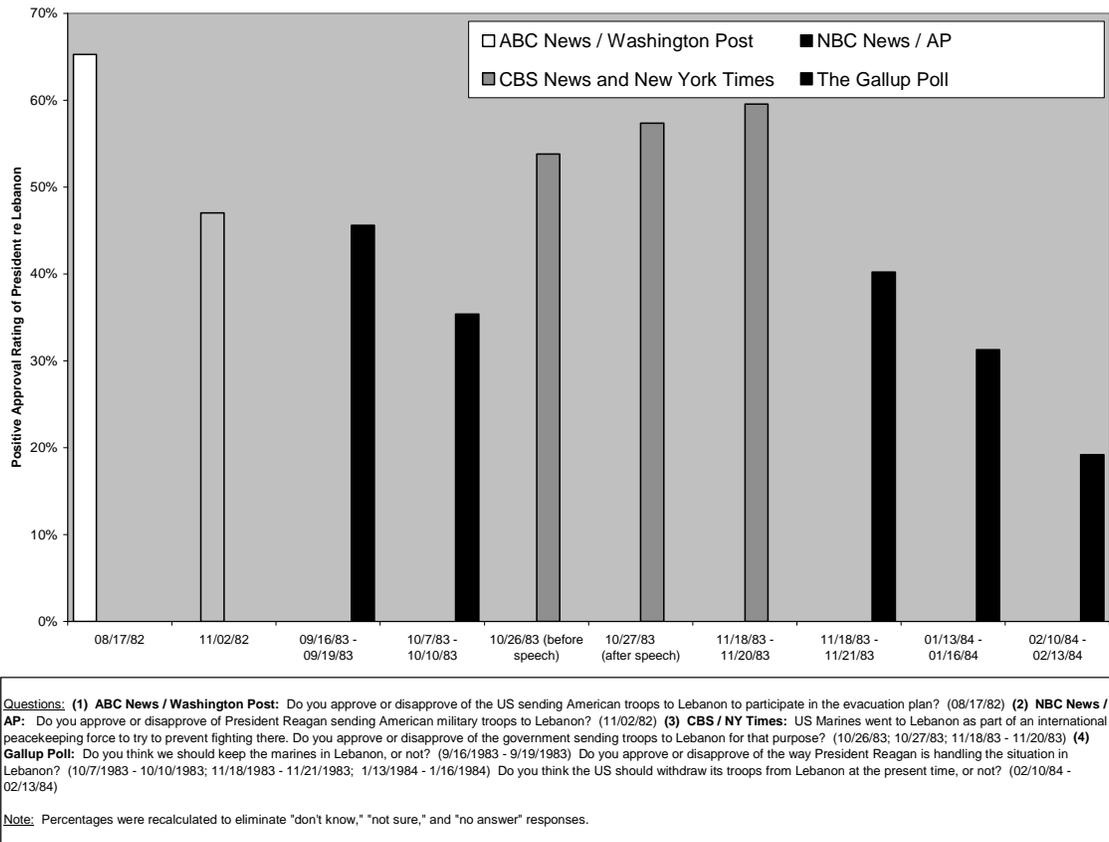
¹⁴⁶The administration subsequently acknowledged that seeking congressional approval of the deployment served a strategic purpose for the White House: it would mean that Congress would get to share the blame for any potential failure in the Lebanese intervention. For instance, Deputy Secretary of State Eagleburger later stated that Congress has a share of responsibility because of its enactment of Multinational force in Lebanon Resolution. See Felton, *Democrats Step up Pressure for Beirut Pullout*, 1984 Cong. Q. 227, 227-28

¹⁴⁷ Martin Tolchin, *O'Neill Asserts Deaths in Beirut 'Lie on' Reagan*, NY TIMES, April 5, 1984 at A12.

¹⁴⁸ *Id.*

¹⁴⁹ Steven Roberts, *Pullout in Beirut Rejected in House*, NY TIMES, Nov. 3, 1983, at A15.

TABLE 2
Public Opinion Polls on the United States Intervention in Lebanon, 1982-1984 (in percentages)



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.¹⁵⁰ At various points in early 1984, President Reagan suggested that the enemy in the Middle

¹⁵⁰ 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.’”).

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.¹⁵¹ 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."¹⁵² 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.¹⁵³ 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.¹⁵⁴ 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 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.¹⁵⁵ 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

¹⁵¹ *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.").

¹⁵² Steven Weisman, *Aides Say President Started Pullback Process Weeks Ago*, NY TIMES, February 9, 1984 at A 12.

¹⁵³ See CQ Congress Collection, Foreign Policy, 1981-1984 Legislative Overview

¹⁵⁴ See *Id.*

¹⁵⁵ President's Remarks, 25 October 1983, Department of State Bulletin, vol. 83 (Dec. 1983), p.

political situation on the Island; and to restore law and order.¹⁵⁶ The intervention occurred approximately 2 weeks after a coup deposed the leftist regime of Prime Minister Maurice Bishop.¹⁵⁷ Subsequently, the coup plotters executed Bishop and declared a dusk to dawn curfew with instructions to shoot on sight any violators.¹⁵⁸

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.¹⁵⁹ *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.”¹⁶⁰ *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.¹⁶¹ 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.¹⁶² 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 the bill—H.J. Res. 402—passed on November 2, 1983.¹⁶³ 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, 1984.¹⁶⁴ Congress eventually adjourned without ever successfully passing a two-chamber bill that formally invoked the WPR in the Grenadian invasion.¹⁶⁵ In any event, the invasion was over in about a week and any further congressional action would have proven irrelevant by that time.

¹⁵⁶ Gary Williams, *Prelude to an Intervention: Grenada*, 29 J. Lat. Amer. Stud., 131-169 (1983).

¹⁵⁷ *Id.* at 133.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See Bernard Gwertzman, *An Invasion Prompted by Previous Debacles*, NY TIMES, October 26, 1983, at A1.

¹⁶¹ 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.

¹⁶² See 129 Cong. Rec. 29,997 (1983).

¹⁶³ See 1983 Cong. Q. 2326.

¹⁶⁴ See 129 Cong. Rec. 29,835 (1983)

¹⁶⁵ *Id.*; see also Hedrick Smith, *O’Neill Now Calls Grenada Invasion ‘Justified’ Action*, NY TIMES, Nov. 9, 1983, at A1.

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.”¹⁶⁶ 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.”¹⁶⁷ Senator Weiker, a Republican from Connecticut, also accused Reagan of “flouting the law” by invading Grenada.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ In addition to skeptical members of Congress, most of the United State’s traditional allies—including Great Britain, Italy and France—also strongly condemned the invasion.¹⁷¹

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.¹⁷² In any event, they did not obviously expect the overwhelming military success of the invasion and the resulting

¹⁶⁶ 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.

¹⁶⁷ See *Responses are Wide-Ranging*, NY TIMES, October 27, 1983 at A21.

¹⁶⁸ See Steve Roberts, *O’Neill Criticizes President; War Powers is Invoked*, NY TIMES, October 29, 1983, at 4.

¹⁶⁹ *Id.* at 4.

¹⁷⁰ 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

¹⁷¹ See Bernard Gwertzman, *Allies Criticism of U.S. Raises Wider Questions*, NY TIMES, October 27, 1983 at A21.

¹⁷² 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.”).

wave of patriotic euphoria that followed.¹⁷³ As medical students arriving from St. George expressed gratitude and praise to the President for rescuing them,¹⁷⁴ opinion polls in favor of the invasion soared.¹⁷⁵ 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.¹⁷⁶ 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.”¹⁷⁷ 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.¹⁷⁸ 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.

TABLE 3
Public Opinion Polls on the United States Invasion of Grenada, 1983 (in percentages)

¹⁷³ Draymond Ayres, *U.S. Says Grenada Invasion is Succeeding; 600 Cubans Seized After Heavy Resistance*, NY TIMES, Oct. 27, 1983, at A1.

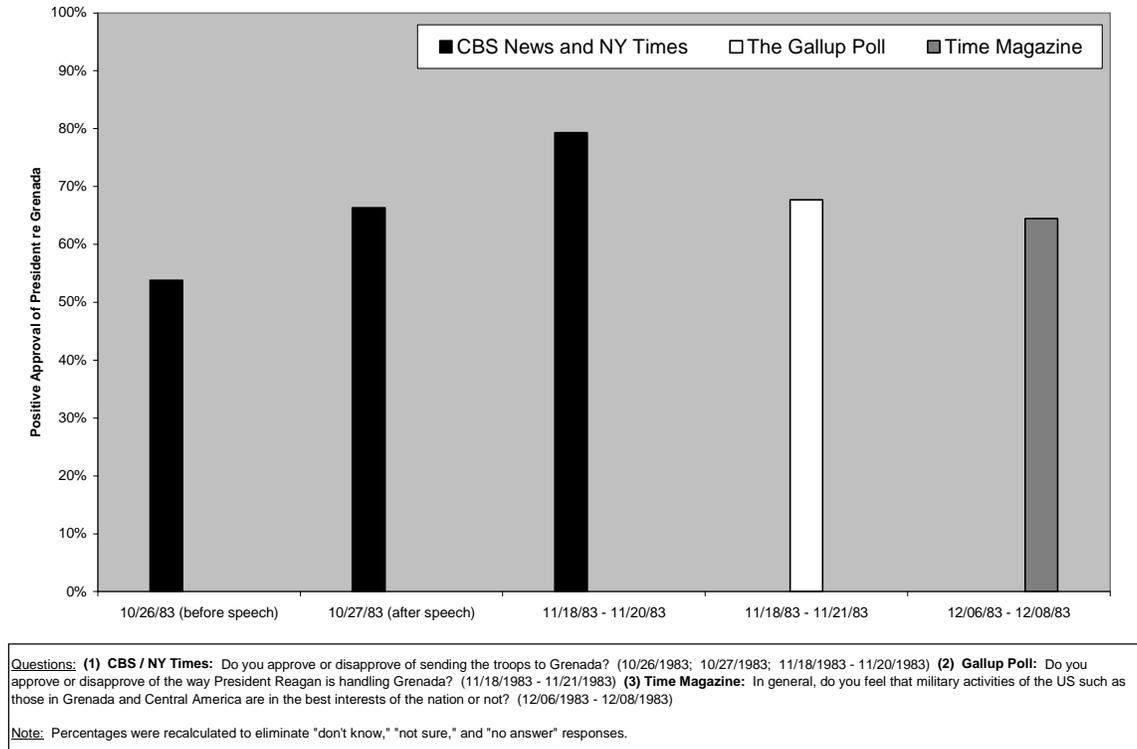
¹⁷⁴ Robert McFadden, *From Rescued Students, Gratitude and Praise*, NY TIMES, October 28, 1983 at A1; *First Evacuees Arrive in U.S. From Grenada*, NY TIMES, October 27, 1983 at A1.

¹⁷⁵ See CBS News/NY TIMES Poll, Nov. 18-20, 1983 in Table 3 *infra*.

¹⁷⁶ 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.

¹⁷⁷ See Hendrick Smith, *Capitol Hill Outcry Softens as Public's Support Swells*, NY TIMES, November 4, 1983, at A18.

¹⁷⁸ 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.



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.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

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

¹⁷⁹ See *Transcript of the President's News Conference on Rumsfeld and Grenada*, NY TIMES, Nov. 4, 1983, at A16.

¹⁸⁰ Francis Clines, *It was a Rescue Mission, Reagan Says*, NY TIMES, Nov. 4, 1983, at A16.

¹⁸¹ See *id.*

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.

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”).¹⁸² 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.¹⁸³ 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 1993.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶

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 Operation Restore Hope—S.J. Res. 45—and declared that the Resolution was consistent with the WPR.¹⁸⁷ The Resolution also requested the transfer of the humanitarian mission to the UN at the earliest possible date.¹⁸⁸ The House passed its own version of the Resolution on May 25 and the House version invoked the WPR more explicitly.¹⁸⁹

¹⁸² Michael Wines, *Mission to Somalia; Bush Declares Goal in Somalia to 'Save Thousands,'* NY TIMES, Dec. 4, 1992, at Section 1.

¹⁸³ *Senate Gives Belated Blessing to Somalia Intervention*, 1993 Cong. Q. 277, 277.

¹⁸⁴ *See id.*; *Bush Sends U.S. Troops to Somalia*, 1992 Cong. Q. 535, 535.

¹⁸⁵ *See* ABC News Poll, Dec. 11-14, 1992 in Table 5 *infra*.

¹⁸⁶ *See* Carroll J. Doherty, *The Reluctant Warriors*, 1993 Cong. Q. 323, 323.

¹⁸⁷ *Senate Gives Belated Blessing to Somalia Intervention*, 1993 Cong. Q. 277, 277.

¹⁸⁸ *Id.*

¹⁸⁹ 139 Cong. Rec. H2764 (May 25, 1993).

The Senate and House versions were never reconciled, however, so the Resolution never really became law.

The situation in Somalia went 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.¹⁹⁰ By the time the transfer was completed only about 4,000 United States troops remained in Somalia.¹⁹¹ 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.¹⁹²

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.¹⁹³ The UN Security Council denounced the incident and ordered the arrest and punishment of all those responsible.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ Then in early September, a U.S. helicopter operation resulted in the death of almost 200 Somali citizens, including women and children.¹⁹⁷ Moreover, in that same period 7 Nigerian peacekeepers were killed.¹⁹⁸ In the later part of September a U.S. army Blackhawk helicopter was shot down resulting in the death of 3 U.S. soldiers.¹⁹⁹ By late September the public opinion polls in support of the operation had dipped to around 40 percent.²⁰⁰

¹⁹⁰ S.C. Res. 814, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/814 (1993).

¹⁹¹ *U.S. General Hands Over Relief Operation in Somalia to U.N.*, NY TIMES, May 5, 1993, at A5.

¹⁹² See Time/CNN Poll, Jan. 13-14, 1993 in Table 5 *infra*.

¹⁹³ Jennifer S. Thomas, *A Somalia Chronology*, 1993 Cong. Q. 2826, 2826.

¹⁹⁴ *Id.*

¹⁹⁵ See Bolger, *supra* note __, at 300-01.

¹⁹⁶ Karen De Witt, *Four U.S. Soldiers are Killed by Mine in Somali Capital*, NY TIMES, August 9, 1993 at A1.

¹⁹⁷ 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.

¹⁹⁸ *7 Nigerian Troops Die in Somalia*, NY TIMES, September 6, 1993, Section 1 at 2.

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

²⁰⁰ See Gallup Poll, Sept. 9-12, 1993 in Table 5 *infra*.

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.²⁰¹ 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 15.²⁰² 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."²⁰³

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.²⁰⁴ 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.²⁰⁵ 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, 1994.²⁰⁶ 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, 1994.²⁰⁷ Under congressional pressure, President Clinton agreed to the March 31, 1994 withdrawal date proposed in the Senate bill.²⁰⁸

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

²⁰¹ See 139 Cong. Rec. 11123, 11124 (Sept. 8, 1993).

²⁰² See 139 Cong. Rec. 11123, 11124, 11272-77 (Sept. 9, 1993).

²⁰³ Clifford Krauss, *House Vote Urges Clinton to Limit American Role in Somali Conflict*, NY TIMES, Sept. 29, 1993, at A1, A6.

²⁰⁴ JOHN. L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING 127-129 (1995).

²⁰⁵ See ABC News Poll, Oct. 7, 1993 in Table 5 *infra*.

²⁰⁶ Amend. No. 1-42, to the 1994 Defense Appropriations Act, reprinted in 139 Cong. Rec. S13, 516 (daily ed. Oct. 14, 1993)

²⁰⁷ 139 Cong. Rec. E 2451 (daily ed. Oct. 15, 1993).

²⁰⁸ Carroll J. Doherty, Clinton Calms Rebellion On Hill By Retooling Somalia Mission, 1993 Cong. Q. 2750, 2750.

to change our policies is to kill our people.”²⁰⁹ 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.²¹⁰ 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.²¹¹ He acknowledged, however, that he would pull out the troops by March 31 but insisted that he would “leave on our terms.”²¹² 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.²¹³

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.

TABLE 5

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

²⁰⁹ *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.

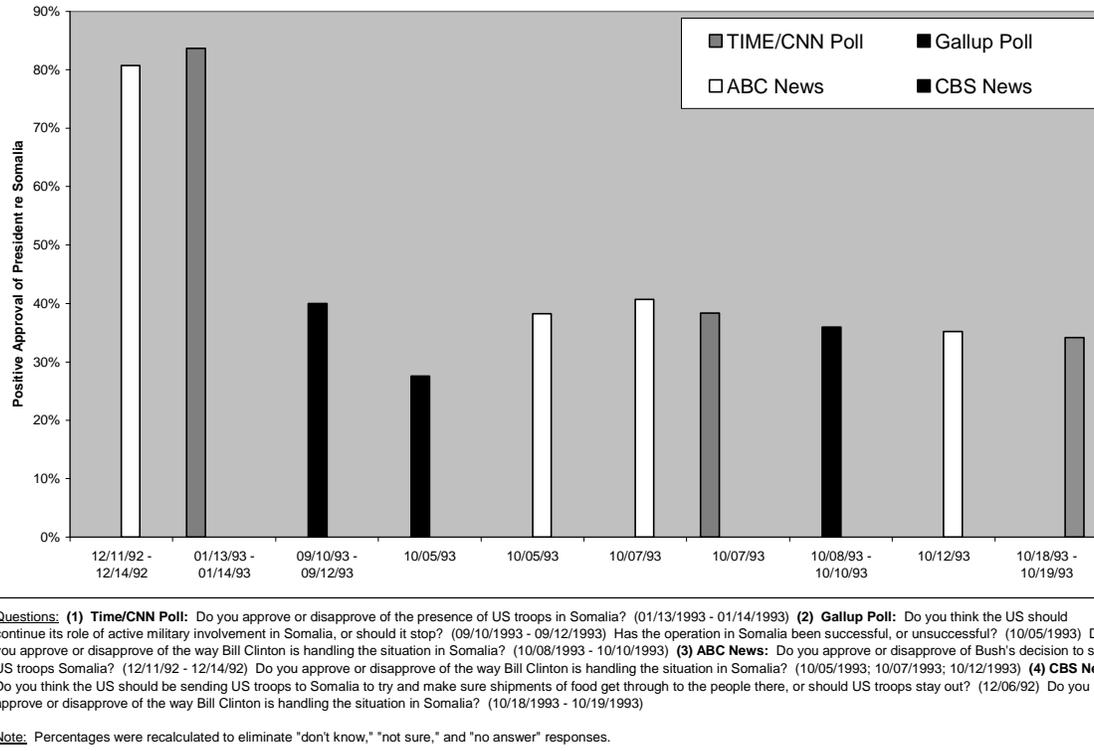
R.W. Apple, *The Somalia Mission: An Old War Refrain*, NY TIMES, October 7, 1993 at A1 (quoting Secretary of Defense Aspin’s speech.).

²¹⁰ 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.

²¹¹ *Id.*

²¹² *Clinton’s Words on Somalia: The Responsibilities of American Leadership*, NY TIMES, October 8, 1993, at A15.

²¹³ *Id.*



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."²¹⁴ 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.²¹⁵ Formal congressional action to cut off funds for the operation subsequently followed.²¹⁶ In the end, President Clinton withdrew the troops from Somalia under the threat of congressional intervention.

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.²¹⁷ President Bush

²¹⁴ Thomas Friedman, *Somalia Mission; Clinton Reviews Policy in Somalia as Unease Grows*, NY TIMES, October 6, 1993, at A1.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Elaine Sciolino & Patrick Tyler, *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.

subsequently hinted at a link between al-Qaeda 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.”²¹⁸ 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.”²¹⁹ 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.”²²⁰

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.²²¹ 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.²²² 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 September 11, 2001 attacks.²²³ 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.”²²⁴

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-

²¹⁸ George W. Bush's *Moment*, NY TIMES, Jan. 30, 2002, at A26.

²¹⁹ Elisabeth Bumiller, *U.S. Must Act First to Battle Terror, Bush Tells Cadets*, NY TIMES, June 2, 2002, at Section 1.

²²⁰ *President Broadens Anti-Hussein Order*, WASH. POST, June 16, 2002, at A1.

²²¹ Weekly Compilation of Presidential Documents, 38: 1393 (August 21, 2002).

²²² Elisabeth Bumiller & James Dao, *Cheney Says Peril of a Nuclear Iraq Justifies Attack*, NY TIMES, August 27, 2002, at A1.

²²³ See Mike Allen, *Bush Asserts That Al-Qaeda Has Links to Iraq's Hussein*, Washington Post, September 26, 2002, at A1; Eric Schmitt, *Rumsfeld Says U.S. Has "Bulletproof Evidence" of Iraq's Links to Al Qaeda*, NY TIMES, September 28, 2002.

²²⁴ 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>.

chief.²²⁵ 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.²²⁶

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.²²⁷ 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.²²⁸ 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 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 11.²²⁹ 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.²³⁰

²²⁵ Mike Allen & Juliet Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote*, Wash. Post, August 26, 2002, at A1.

²²⁶ 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.

²²⁷ Dan Balz & Dana Milbank, *Iraq Policy Shift Follows Pattern*, Wash. Post, September 6, 2002, at

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²²⁸ Elisabeth Bumiller, *President Notes Dissent on Iraq, Vowing to Listen*, NY TIMES, August 17, 2002, at ____.

²²⁹ 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.”).

²³⁰ 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

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.”²³¹ 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—77-23.²³² 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 2002,²³³ 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.²³⁴

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.²³⁵ Nonetheless, despite reservations in the polls about the United States proceeding unilaterally, by early September a significant majority of Americans indicated

such a coalition. See *id.*; see also Dan Balz & Jim VandeHei, *Democratic Hopefuls Back Bush on Iraq*, WASH. POST, Sep. 14, 2002.

²³¹ 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.

²³² 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.

²³³ See 148 Cong Rec § 700; see also Robert Byrd, *Congress Must Resist the Rush to War*, NY TIMES, Oct. 10, 2002.

²³⁴ 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 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”).

²³⁵ See CBS/NY TIMES Poll, October 20-21, 2002 (63 percent preferred to wait).

that they thought that a war against Iraq was inevitable.²³⁶ 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.²³⁷ 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.²³⁸ On March 20, the U.S. Senate voted 99-0 in support of the President's invasion of Iraq.²³⁹

TABLE 6

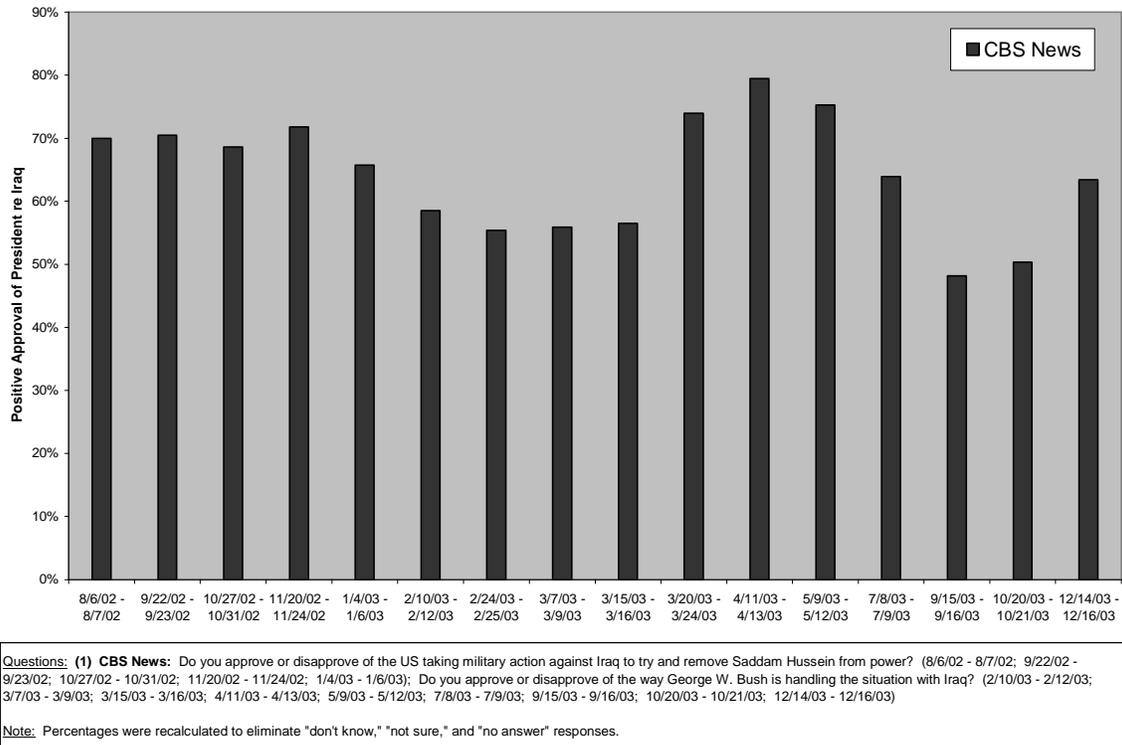
Public Opinion Polls on the United States Invasion of Iraq, 2002-2003 (in percentages)

²³⁶ 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 ___

²³⁷ See Tom Zeller, *The Nation: Reading the Polls*, New York Times, February 23, 2003, at 5.

²³⁸ 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.

²³⁹ See Eric Schmitt & Steven Weisman, *A Nation at War; House Joins Senate In Praising Troops*, NY TIMES, April 11, 2003, at A1.



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.”²⁴⁰ 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.²⁴¹

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 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

²⁴⁰ See Elisabeth Bumiller, Threats and Responses: The Allies; In Blunt Words, Bush Threatens Hussein Again, NY TIMES, Nov. 21, 2002, at A1.

²⁴¹ See Gallup Poll, April 11-13, 2003.

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.²⁴²

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.²⁴³ 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.²⁴⁴ 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.²⁴⁵ 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 Korean crisis, congressional leaders from both sides of the aisle publicly endorsed President Truman's commitment of troops.²⁴⁶ Indeed, Truman actually sought to present

²⁴²Jodi 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.")

²⁴³ 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).

²⁴⁴ See *id.* at 24-27 (discussing President Truman's efforts to seek a UN Security Council Resolution on Korea).

²⁴⁵ 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.

²⁴⁶ See HESS, *supra* note __ at 24.

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.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰

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 impeachment.²⁵¹ Thus, unlike most of the conventional use of force cases, the President

²⁴⁷ 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 . . . 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).

²⁴⁸ See HESS, *supra* note __ at 26.

²⁴⁹ For a brief synopsis of the Cuban Missile Crisis, see "An Overview of the Crisis," available at <http://library.thinkquest.org/11046/days.index.html>; see also GRAHAM ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

²⁵⁰ See Tom W. Smith, *The Polls-Trends: The Cuban Missile Crisis and U.S. Public Opinion*, 67 *PUBLIC OPINION Q* 265, 269-70 (2003).

²⁵¹ 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)).

did not play an active role in creating or escalating the Cuban missile crisis.²⁵² 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.²⁵³ 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.²⁵⁴

Finally, the American military intervention in Kosovo in 1999 also presents somewhat of a challenge to the political insurance 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.²⁵⁵ 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.²⁵⁶ 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.²⁵⁷

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

²⁵² 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.”)

²⁵³ 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”).

²⁵⁴ 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).

²⁵⁵ 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).

²⁵⁶ 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).

²⁵⁷ See *Campbell*, 203 F.3d at 29-30; see also *Campbell v. Clinton*, 52 F. Supp. 2d 34, 37 (D.D.C. 1999).

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.²⁵⁸ 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.²⁵⁹ Finally, Congress also agreed to increase funding for the Kosovo operation,²⁶⁰ 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 sufficient threat in terms of potential casualties to American troops to warrant full-blown political insurance from Congress. 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.

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.²⁶¹ But this 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

²⁵⁸ S. Con. Res. 21, 106th Cong. (1999).

²⁵⁹ 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).

²⁶⁰ 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).

²⁶¹ 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).

turns against the President's conduct of a war, members of Congress have political incentives to constrain the President's national security initiatives.

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.²⁶² Although Yoo does not seek to explain the war powers interactions between Congress 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,²⁶³ 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.²⁶⁴

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? 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

²⁶² 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).

²⁶³ See *id.* at 1664 (observing that WPR has been weak in constraining executive authority and suggesting that the constitutionality of the WPR is questionable).

²⁶⁴ 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).

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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸

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

²⁶⁵ 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 . . . [O]ften it is not as important to choose the best convention as it is to choose one convention, and stick to it.").

²⁶⁶ See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1372-75 (1997).

²⁶⁷ 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).

²⁶⁸ 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."); 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.")

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.²⁶⁹ 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.²⁷⁰ Constitutional questions of foreign affairs do not seem to factor heavily as a congressional concern.²⁷¹

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.²⁷² 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.”²⁷³

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 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

²⁶⁹ 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.

²⁷⁰ *See id.* at 150-51.

²⁷¹ *See id.* at 148, 150.

²⁷² 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.

²⁷³ 141 Cong. Rec. H5648-01 (June 7, 1995).

commentators have, that “the President almost always seems to win in foreign affairs.”²⁷⁴ 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.

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.²⁷⁵ 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.²⁷⁶

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 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

²⁷⁴ Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1317 (1988).

²⁷⁵ See ELY, WAR AND RESPONSIBILITY, *supra* note ___ at 54-67; KOH, THE NATIONAL SECURITY CONSTITUTION, *supra* note ___ at 222-28.

²⁷⁶ See ELY, WAR AND RESPONSIBILITY, *supra* note ___ at 54-67.

“political pass the blame” game by insisting that the courts will not do what Congress refuses to do for itself.²⁷⁷

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,²⁷⁸ they are still likely to face a slew of other procedural obstacles, including ripeness,²⁷⁹ mootness,²⁸⁰ and the political question doctrine.²⁸¹

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

²⁷⁷ 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).

²⁷⁸ 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).

²⁷⁹ 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).

²⁸⁰ 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.”).

²⁸¹ 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).

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.²⁸² 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.²⁸³ 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 be much of a public appetite for increased judicial involvement in foreign affairs disputes.²⁸⁴ Moreover, unlike in the domestic realm where the courts play a key legitimating function in separation of powers disputes, the political branches have very little incentive to embrace a more active judicial role in disputes over the allocation of war powers.²⁸⁵

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.

²⁸² 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).

²⁸³ See Nzelibe, *supra* note __ at 987-89.

²⁸⁴ See *id.* at 989-90.

²⁸⁵ See *id.* at 990; Benvenisti, *supra* note __ at 426.

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 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.