

The Contemporary Presidency

Judicial Restraint and the New War Powers

JASMINE FARRIER

University of Louisville

Over the past four decades, members of Congress have filed 10 lawsuits challenging military actions abroad that were ordered or sustained by presidents without prior legislative consent. In dismissing these cases, federal courts told the plaintiffs to use their legislative tools to show disapproval of the actions already in progress. Under this logic, the House and Senate must have a veto-proof supermajority to end an existing military engagement before a case can be heard on the merits. These precedents contrast with previous war powers cases initiated by private litigants, which focused on prior simple majority legislative authority for presidential action.

[I]t is the exclusive province of [C]ongress to change a state of peace into a state of war. (*United States v. Smith* 1806, 1230)

[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. (*Baker v. Carr* 1962, 211-12)

[N]one of the legislation drawn to the court's attention may serve as a valid assent to the Vietnam War. Yet it does not follow that plaintiffs are entitled to prevail. (*Mitchell v. Laird* 1973, 616).

War Is a Three-Branch Question

From the founding to 1950, war usually proceeded in constitutional order: congressional authorization followed by executive enforcement. Over that century and a half, federal judges adjudicated dozens of war-related disputes raised by private litigants that hinged on executive branch adherence to Congress's prior legislative direction. Today,

Jasmine Farrier is an associate professor of political science at the University of Louisville. She is the author of Passing the Buck: Congress, the Budget, and Deficits and Congressional Ambivalence: The Political Burdens of Constitutional Authority.

AUTHOR'S NOTE: I thank Nancy Kassop, James P. Pfiffner, and Robert J. Spitzer for their insightful comments and suggestions. I am also grateful for a research initiation grant from the University of Louisville.

presidents of both parties order new offensive military actions abroad without explicit congressional consent before or even during the conflict. Although House and Senate majorities eventually support these actions one way or another (bills and/or appropriations), on 10 occasions, members of Congress (up to 110 at a time) challenged presidential wars in federal court. These unsuccessful lawsuits deserve new attention because they reflect a quiet, but steady, three-branch constitutional revolution on war that has taken place in the United States, under both parties' watch and under a variety of foreign policy contexts. If all three branches now interpret congressional silence as consent, constitutional war processes have flipped, and the War Powers Resolution is a dead letter.

This article offers three arguments about these developments, using case law, institutional archives, and interviews with members of Congress and their attorneys.¹ First, there is no constitutional reason for federal courts to demur on war powers suits filed by members of Congress, outside of decades of judge-made precedent. Federal judges and scholars are divided on whether courts *should* take these cases, not whether they *can*. Second, federal courts hold member-plaintiffs to a different standard than private interest litigants. Members of Congress must show supermajority disapproval of the president's unilateral actions whereas private war litigation once hinged on prior simple majority authorization of the action. Third, the legal postures of all three branches reflect deeply ingrained institutional habits, not partisan differences. Unlike other public policy areas, presidential war is not ideologically divisive.

Reflecting this new normal, the United States has been engaged in a military campaign against the so-called Islamic State in Iraq and Syria (ISIS) since August 2014, with no Authorization for the Use of Military Force (AUMF). According to the Department of Defense, Operation Inherent Resolve has cost an average of \$11 million per day for 450 days of operations, which destroyed or damaged over 16,000 targets.² While calling for new AUMF in the State of the Union Address in January 2015, and sending a proposal to Congress earlier that year, President Barack Obama and his administration maintained that the necessary authorization is already in place through the 2001 and 2002 AUMFs (against al-Qaeda and Iraq, respectively; Weed 2015b). While ISIS-related terrorist attacks in France have fueled some bipartisan criticism of administration strategy, a new AUMF is unlikely (Carney 2015).

Despite repeated cries of "lawlessness" against the president on domestic policy actions, members of Congress have not pursued a lawsuit on the ISIS actions. Even if members did band together to file a suit that challenged the current ISIS campaign, it is unlikely to jump the formidable hurdles to member suits that federal courts have built over four decades. However, a House-sanctioned lawsuit against the Obama administration on enforcement of the Affordable Care Act (ACA) was recently granted standing to

1. Thus far, I have interviewed four former House member-plaintiffs (three Democrats and one Republican), one legislative director of a current Republican member who was a recent plaintiff, and four attorneys of record on war powers cases. All together, these interviews span eight of the 10 war powers suits from Nixon to Obama. The interview protocol was cleared by the University of Louisville's Institutional Review Board.

2. See http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve (accessed November 29, 2015) for an ongoing summary of operations from the Department of Defense.

proceed on the merits regarding whether the administration spent money on ACA implementation that was not appropriated by Congress (see *United States House of Representatives v. Burwell* 2015). Regardless of the ultimate outcome, members can use this case to push the argument that federal courts are a legitimate alternate arena for interbranch disputes. Divided government, partisan gridlock, and a dysfunctional political culture may prevent Congress from using normal legislative processes to challenge presidential actions, but does that mean any president can operate unilaterally until disapproved?

Scholars have taken up different facets of this question since 9/11, with fresh assessments of the policy, partisan, and institutional contours of a new “imperial presidency” (Rudalevige 2006). We are also reminded that congressional war powers are enumerated in the Constitution and the framers’ intentions for prior congressional authorization are clear, except in cases of emergency defensive actions (Edelson and Starr-Deeken 2015; Fisher 2013). Yet, the Bush and Obama presidencies defend versions of a “unitary executive theory” of war that largely rejects outside institutional meddling (Posner and Vermeule 2011; Yoo 2010), provoking repeated criticism (Edelson 2013b; Kassop 2003; Pfiffner 2008; Pious 2006). The contemporary House and Senate are also getting renewed attention, with some studies highlighting their formal and informal influence prior to presidential war decisions (Howell and Pevehouse 2007; Kriner 2014) and afterward in the oversight process (Kriner 2010). But these studies do not extinguish long-held accusations of congressional abdication (Fisher 2000b). Congress also shows bursts of short-lived ambition as it pivots from delegation of power to regret and criticism of the use of delegated power (and then delegates again) in domestic and foreign policy (Farrier 2004, 2010).

Federal courts are not a panacea to this state of affairs, but a combination of aggressive presidents, ambivalent congresses, and disinterested justices have clearly upended the Madisonian constitutional system. Unlike civil rights, civil liberties, and economic federalism, federal courts are inconsistent in their interest and more ideologically mixed in separation of powers cases. However, there was once a vibrant debate within the law and courts literature regarding whether or not the federal courts (and especially the Supreme Court) should apply their vast constitutional authority to foreign policy conflicts. Advocates of judicial restraint argued that federal courts should preserve legitimacy and institutional capital by eschewing certain types of cases (Bickel 1986). Avoiding separation of powers (and many federalism claims) would allow the courts to concentrate on protecting individual liberties and small group rights because they are structured in part to attend to these claims (Choper 1980, 2005). On legislative processes, however, courts are ill equipped to police interbranch balance, especially when Congress chooses not to defend itself (Devins and Fisher 2015). Other scholars argue that federal courts could provide a deterrent to unilateral presidential war and/or put pressure on Congress to act. While it is not ideal to “settle” war powers conflicts in court, there is no reason for presidential actions to be off the table automatically (Glennon 1990; Keynes 1982; Redish 1985). Far from deciding to go to war, Ely argued courts “have every business insisting that the officials the Constitution entrusts with that decision be the ones who make it” (1993, 54).

Rather than advocating for judicial supremacy, this article argues that federal courts can jumpstart or reframe constitutional dialogues on war, just by accepting a member

lawsuit on the merits and focusing on the origins of presidential authority for the action rather than legislative disapproval after it is already in progress. Rather than being the “final word,” federal courts inspire broader conversations and direct legislative responses (Burgess 1992; Devins and Fisher 2015; Tushnet 1999). For example, a federal court can declare a nonemergency, offensive war action unconstitutional pending legislative authorization. While a formal withdrawal order would be unlikely from the court, and unwelcome by many, Congress could be granted a “reasonable time to consider the issue” (Ely 1993, 54). Presidents would then risk a legal and political rebuke when assuming prior authorization is optional, not required. Congress would be forced to make a decision one way or another, and their deliberations would be on the record. While this idea seems fanciful, Supreme Court scrutiny of presidential war powers was once fairly routine.

Three Branch Constitutional Flip from the Quasi War to Vietnam

A systemic shift on constitutional war processes took place across all three branches in the second half of the twentieth century. Before that time, presidents did not advocate unilateral war outside of defensive and emergency situations (Edelson 2013a). Congress was also protective of its war prerogatives, and federal courts scrutinized presidential military orders for evidence of prior authorization, when cases arose from private interest injury claims (Fisher 2005; Silverstein 1997). The sea change in constitutional processes reflects institutional landmarks stretching over two decades. President Truman’s initiation of the Korean War under UN authority in 1950, Congress’s passage of the broad delegation of the Gulf of Tonkin Resolution in 1964, and the Supreme Court’s handling of Vietnam-era member lawsuits.

Early Judicial Interest in War

From the plain language of the Constitution’s text, war is a three-branch power. Congress receives the power to declare war in Article I, Section 8, Clause 11. In Article II, Section 2, the “President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, *when called into the actual Service* of the United States” (emphasis added). Article III, Section 2 says “judicial power shall extend to all cases . . . arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” These clauses were interpreted early on by government officials present at the ratification. The Supreme Court decided the first of three “Quasi War” case in 1800, predating *Marbury v. Madison* by three years (and never overturned, see Adler 2000, 159). From these cases through the rest of the nineteenth century, the Court not only ruled for legislative primacy in war, as noted in the first chapter epigraph, but also for the Court’s power to review presidential action.

In the Quasi cases, all filed by private litigants, the Supreme Court had to decide whether France was an “enemy” of the United States and, in effect, whether the country was at war. The ambiguities stemmed from the fact that Congress had passed laws authorizing limited military activity by the executive branch, but did not declare war against

France formally. Justice Salmon Chase explained that “perfect” (declared by Congress) and “imperfect” (authorized by Congress) military actions were still wars for the purposes of the private compensation at issue in the case (*Bas v. Tingy* 1800, 37, 40-41). Another Quasi War case decision, written by Chief Justice John Marshall, said even more explicitly that to understand the state of affairs with another nation, one has to look at legislative actions. “The whole powers of war being by the Constitution of the United States vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry” (*Talbot v. Seeman* 1801, 28). In the final Quasi case, Chief Justice Marshall ruled against the president’s orders *during*, not after, the military action, saying his “instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass” (*Little v. Barreme* 1804, 170, 179).

Through the rest of the century, including the War of 1812, Mexican–American War, Civil War, and the Spanish American War, additional Supreme Court rulings addressed the authorization for individual actions against foreign governments, habeas corpus petitions, property disputes; and much more. In these cases, federal court decisions repeatedly endorsed a Congress-centered foreign policy by focusing on laws (or lack thereof) to determine the outcome. Landmark twentieth-century war-related cases still hinged on tracing some congressional authorization of the action, even if the president’s actions were sustained (*Korematsu v. United States* 1944; *United States v. Curtiss-Wright Export Company* 1936). Also through judicial scrutiny of Congress’s wishes, *Youngstown Sheet & Tube Co. v. Sawyer* (1952) denied President Truman the right to order his commerce secretary to seize domestic steel mills to avert labor strife that he argued would undermine U.S. war efforts during the Korean conflict. The often-cited concurring opinion by Justice Robert Jackson said the president has greatest power when he is given explicit authority to act (*Youngstown Sheet and Tube Co., v. Sawyer*, 1952, 637, Jackson, J., concurring).

Beginning around this time, however, three additional events shifted constitutional assumptions away from Justice Jackson’s statement. First, the Korean War was launched in 1950. It was the first truly presidential war because President Truman executed a UN resolution to delegitimize and repel Communist forces in the Korean peninsula without explicit congressional authorization (see Fisher 1995; Keynes 1982). A decade later, the Supreme Court issued the landmark case on the “political question doctrine” (*Baker v. Carr* 1962), which said the court should avoid certain kinds of cases because they are committed by the Constitution, or better suited to, the other branches. (As noted in the epigraph, foreign policy was not yet cordoned off as a political question.) Then, in 1964, President Lyndon Johnson received broad authorization to escalate U.S. commitments in Vietnam. President Richard Nixon’s expansion of the inherited conflict brought the first member lawsuits and a judicial pivot toward restraint.

Judicial Division and Rebuff on First Member War Cases

The Tonkin Gulf Resolution passed unanimously in the House of Representatives, and only two senators voted against it. It said “Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to

repeal any armed attack against the forces of the United States and to prevent any further aggression.”³ Johnson’s escalation of the war through this broad guideline prompted a national popular antiwar movement and congressional backlash, leading to his decision not to seek the Democratic nomination in 1968. Richard Nixon inherited the 1964 authority when he took office in 1969 and within a year expanded U.S. military action into Cambodia and Laos. Congress passed the “Fulbright Proviso” in 1970, saying any action in these countries must be limited to assisting the withdrawal of U.S. troops. Congress repealed the Tonkin Gulf Resolution in 1971. The two branches tangled over the contours of the Cambodia operations in particular for the next three years, with Nixon’s arguing that his administration could not be micromanaged by Congress.

Nixon’s actions also inspired 70 federal lawsuits, filed by novel types of litigants including soldiers, their families, citizens, taxpayers, and even a state (Massachusetts). The named defendants in these suits were executive branch department heads or Nixon himself. At all three levels (district, appeals, and Supreme), federal judges seemed to wrestle openly with how and whether to take these unconventional kinds of cases. In the member suits, federal courts were divided, but ultimately opted to burden Congress, not the president. The House and Senate had not exhausted all modes of disapproval of Nixon’s expansion of the war through other constitutional weapons, including overturning presidential vetoes and even impeachment.

Mitchell v. Laird (1973). This case was the first Congress-member lawsuit in U.S. history. It was filed by Representative Parren Mitchell (D-MD) and 12 other members of the House in 1971 against the president, secretaries of state, defense, and the three branches of the military. The plaintiffs alleged that the United States had been engaged in new expansions of the war for seven years (since the 1964 Resolution) without obtaining “either a declaration of war or an explicit, intentional and discrete authorization of war,” which had the effect of “unlawfully impair[ing] and defeat[ing] plaintiffs’ Constitutional right, as members of the Congress of the United States, to decide whether the United States should fight a war.” The first demand of the lawsuit was a judicial order to stop the executive branch from prosecuting the current military campaigns unless, within 60 days, Congress “explicitly, intentionally and discretely authorized a continuation of the war.” The second demand was for “a declaratory judgment that defendants are carrying on a war in violation of Article I, section 8, clause 11 of the United States Constitution.” A district court dismissed the case on standing (*Mitchell v. Laird* 1973, 613).

The court of appeals examined several issues, some not raised in the first round, then agreed to dismiss the case. In the opinion, Judge Charles Wyzanski and David Bazelon (appointed by Franklin Roosevelt and Harry Truman, respectively) acknowledged that the three-judge panel came to the dismissal through different jurisprudential paths. The case was ripe, not moot, and standing was approved. The political question doctrine was the fundamental barrier. In 1973, the Vietnam and Laos parts of the conflict were winding down or ended, but the Cambodia involvement was still ongoing. The panel

3. Tonkin Gulf Resolution, P.L. 88-408, 88th Cong., 2d sess. (1964). For additional documents and links, see also http://avalon.law.yale.edu/20th_century/tonkin-g.asp (accessed December 5, 2015).

conceded that the Vietnam War was a war in the Article 1 sense and that Congress had not authorized all the president's actions. Therefore, President Nixon's only duty was to end the military operations. The nonjusticiable political question was the factual determination of how and whether he was winding it down, or not.

If not, the judges cited a variety of other paths afforded to plaintiffs, including legislation, veto overrides, and pursuit of impeachment and conviction. The judges acknowledged that prior authorization was lacking (noted in the third epigraph), and that appropriations and even conscription bills were incomplete expressions of congressional policy preferences. "This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war" (*Mitchell v. Laird* 1973, 616). The logic of this argument is that while congressional majorities had not explicitly authorized the Cambodia campaign, nor had they used all the supermajority powers at their disposal to stop it. According to an attorney involved in the case, while the judges appeared sincerely torn by the war's questionable authorization and outcome, there was no interest in taking any responsibility for the next steps of policy or directly challenging President Nixon.⁴

Holtzman v. Richardson/Schlesinger (1973). The continued impasse on Cambodia directly inspired two related lawsuits filed by House member Elizabeth Holtzman (D-NY) and nine Air Force personnel against both of Nixon's secretaries of defense in 1973 (Schlesinger replaced Richardson when the latter was appointed attorney general that same year). At the time of the first filing in April, a cease-fire was in effect in Vietnam, and all American prisoners of war had been returned; still, no explicit congressional authorization existed for the ongoing bombing of Cambodia. In response to the lawsuit, according to a statement of facts in the first {*Richardson*} case, "the Executive has informed Congress that it is prepared to continue its military activities whether or not the Congress appropriates funds for the Cambodian combat operations" (*Holtzman v. Richardson* 1973, 547). Congress nevertheless tried to stop the bombings via an appropriations bill rider, President Nixon vetoed the bill, and the House did not have enough votes to override.⁵ Nixon signed a compromise bill that mandated the bombings stop August 15.

As this legislative conflict played out, district Judge Orrin Judd (nominated by President Johnson) broke with the *Mitchell* ruling and confirmed that Holtzman "has raised a serious constitutional question dealing with the war-making power of Congress enumerated in Article I, § 8 of the Constitution . . . The power to wage war is a controversy arising under the Constitution and therefore within the jurisdiction of this court." Rejecting the political question doctrine and other justiciability objections by the government, Judge Judd said the constitutional question was not hypothetical or abstract in this suit and that Holtzman had standing (*Holtzman v. Richardson* 1973, 549). In July, after the

4. Phone interview with attorney, December 6, 2013.

5. "Presidential Veto Message: Nixon Vetoes Supplemental Appropriations," in *CQ Almanac* 1973, 29th ed., 66-A (Washington, DC: Congressional Quarterly, 1974).

case's name had been switched to *Schlesinger* (new secretary of defense), Judd ruled again for Holtzman, providing both declaratory and injunctive relief. The judgment declared that "there is no existing Congressional authority to order military forces into combat in Cambodia or to release bombs over Cambodia, and that military activities in Cambodia by American armed forces are unauthorized and unlawful" and restrained defendants and their staff from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall [there]" (*Holtzman v. Schlesinger* 1973, 553).

The order was stayed until the end of July as the legislative conflicts continued. However, Judge Judd acknowledged that the barrier to congressional control of the war was its lack of two-thirds to override Nixon's veto. Simple majorities were already on the record.

It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized . . . In order to avoid a constitutional crisis that would have resulted in a temporary shutdown of vital federal activities. . . Congress agreed to hold off any action affirmatively cutting off funds for military purposes until August 15, 1973. (*Holtzman v. Schlesinger* 1973, 565)

Between the district and appeals court rulings, the Supreme Court became involved through applications to vacate the stay issued by Judge Judd. In the first round, Justice Thurgood Marshall (in his circuit justice capacity) denied the plaintiff's application to vacate. Although he strongly hinted at his policy agreement with Congresswoman Holtzman, Marshall said he needed to reflect the votes of the rest of the court when acting in his circuit capacity. He said, "if the decision were mine alone, I might well conclude on the merits that continued American military operations in Cambodia are unconstitutional. . . . When the final history of the Cambodian war is written, it is unlikely to make pleasant reading. The decision to send American troops [to Southeast Asia] . . . may ultimately be adjudged to have been not only unwise, but also unlawful" (*Holtzman v. Schlesinger* 1973, 1312-13). Justice Douglas filed a dissent on the procedural issue regarding vacating the stay and disagreed with Marshall's premise that the court had no place in weighing in on what Douglas viewed as an equivalent of a capital punishment case. "It has become popular to think the President has that power to declare war. But there is not a word in the Constitution that grants that power to him. It runs only to Congress But even if the 'war' in Vietnam were assumed to be a constitutional one, the Cambodian bombing is quite a different affair" (*Holtzman v. Schlesinger* 1973, 1319-20).

The appellate court heard the case on August 8. Judge Judd's district court opinion was overturned 2-1 by the DC Circuit (all three were Nixon appointees). The majority cited the August 15 cutoff date as an indication that all actions up to that point were authorized and invoked the political question doctrine. The dissent said military capacity and authority are separate (*Holtzman v. Schlesinger* 1973, 1308-10). The case had two long-term legacies. First, the political question doctrine was applied to war in two back-to-back cases, building a powerful set of precedents against future lawsuits. Second, the case litigants connected undeliberated war expansion with failed policy that destabilized Cambodia for decades.⁶

6. In-person plaintiff interview, December 24, 2014; in-person attorney interview, July 24, 2015.

Member Litigation after the War Powers Resolution

At the same time as the *Mitchell* and *Holtzman* cases went through the federal system, Congress debated and passed the War Powers Resolution (WPR) of 1973. Its intention was to force interbranch collaboration before and during new military operations abroad. Yet almost every president since its passage has explicitly denied, or implicitly tested, the WPR's constitutionality, beginning with President Nixon's veto.⁷ Presidents have since reported 160 actions as "consistent" with the WPR requirements (Weed 2015a). Eight lawsuits filed by members of Congress accused presidents of not complying with the WPR and other legal and constitutional requirements for offensive actions, including Ronald Reagan (interventions in El Salvador, Nicaragua, Grenada, and Iran-Iraq war), George H. W. Bush (first Persian Gulf War), Bill Clinton (Kosovo), George W. Bush (Iraq), and Barack Obama (Libya) (Garcia 2012).

While its purpose is clear in its preamble, rebalancing congressional–presidential power over war decisions, the WPR included loopholes and internal contradictions that did little to help restrain presidents or embolden Congresses.⁸ Section 2(c) appears to provide clear, limited parameters for new military action, saying the president, as commander in chief, can introduce U.S. armed forces into situations of hostilities or imminent hostilities "only pursuant to—(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."⁹

But these presidential restrictions are undermined by sections 3 and 4. In section 3, presidents are required to consult with Congress "in every possible instance" before introducing U.S. forces (of any military branch) into "hostilities or . . . situations where imminent involvement in hostilities is clearly indicated by the circumstances." In section 4 (a)(1), regardless of the extent of consultation, the president must report to Congress within 48 hours of the start of a military action if a declaration of war or other legislative authorization had not been passed by both chambers. In section 5(b), if Congress did not vote to approve the action, before or after forces were committed, they would be withdrawn by the president within 60 days, which could be extended to 90 days for special military circumstances. However, section 5(c) says Congress can also vote to remove forces by concurrent resolution at any time, which would not be subject to a presidential veto. Sections 6 and 7 lay out the expedited legislative procedures to prioritize congressional authorization related to the reported conflict, or a withdrawal resolution. Section 8

7. Veto message, October 24, 1973. For links to the legislative process and additional history of the War Powers Resolution, see <http://library.cqpress.com/cqalmanac/document.php?id=cqal73-1227822> and <http://www.loc.gov/law/help/war-powers.php> (accessed December 6, 2015).

8. Joint Resolution Concerning the War Powers of Congress and the President, P.L. 93-148, 93d Cong., 1st sess. (1973). For full text, see http://avalon.law.yale.edu/20th_century/warpower.asp (accessed December 6, 2015).

9. Bypassing section 2(c), presidents have often reported military deployments to Congress after the action began, saying the communication is "consistent with" the WPR requirement without acknowledging any 60 to 90 day "clock" triggered by the report. Only one president, Gerald R. Ford, explicitly cited section 4(a) of the WPR. And Congress has waived the 60-day period to allow the military action to continue in just four instances (see Weed 2015b).

says that authorization for military force cannot be construed from appropriations bills or treaties, unless accompanied by a separate authorization. Hinting at future litigation, a “separability” clause in section 9 says if any part “is held invalid” then the rest still stands.¹⁰

Influencing later WPR cases, two separate member lawsuits challenged President Jimmy Carter’s unilateral changes to the Panama Canal and Taiwan treaties. In the Taiwan case, Senator Barry Goldwater (R-AZ) and others said the Senate must consent to the action of undoing a treaty, just as the Constitution requires two-thirds of the body to ratify it. Writing for a divided court, the majority contrasted the case with *Youngstown*, saying in that case “private litigants brought a suit contesting the President’s authority under his war powers to seize the Nation’s steel industry, an action of profound and demonstrable domestic impact. Here, by contrast, we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum” (*Goldwater v. Carter* 1979, 1004, Rehnquist, J. concurring). Both treaty cases placed the burdens on the House and Senate to demonstrate a genuine interbranch impasse, which can only occur if Congress passes formal legislation (Fisher 2014, 284-88).

Member Litigation against Presidents Reagan and Bush I

All post-WPR litigation built on the *Mitchell* and *Holtzman* precedents. First, the cases are dismissed on a variety of justiciability grounds; judges did not rule directly on the legitimacy and application of the WPR. Second, unlike private litigation prior to Vietnam, most judges do not trace presidential action to prior congressional authorization, nor compel reporting under the WPR, but rather reverse the burden to inquire whether there is supermajority disapproval of action in progress. Third, while there is ample evidence of partisanship in the lineup of member–plaintiffs against opposition party presidents, there is no ideological distinction in the constitutional claims made by Democrats and Republicans in either branch. Congress members of both parties assert the same constitutional points, as do presidents of both parties. Judges appointed presidents of both parties are largely dismissive of the cases.

Crockett v. Reagan (1982-83). During a brewing civil war that was destabilizing El Salvador, President Jimmy Carter tried to shore up support for its military government through various forms of assistance beginning in 1979. Although called “non-lethal” aid, the United States sent equipment such as “tear gas grenades, grenade launchers, night vision instruments, image intensifiers, and other riot control and counterinsurgency equipment” (Harris and Espinosa 1981, 297). An attack on American nuns by a death squad linked to the rightist faction of the junta in December 1980 led Carter to suspend some of the aid pending an investigation. Then, in February and March 1981, newly elected

10. For more information on the Supreme Court’s invalidation of the legislative veto in *INS v. Chadha* (1983), and its effects on the WPR, see Glennon (1990, 43-50, 98-104) and Fisher (2013, 299-302).

President Ronald Reagan sent 35 military advisors to assist the Salvadoran government, in addition to maintaining the 19 dispatched by President Carter. President Reagan's interest in expanding U.S. influence in El Salvador reflected a hemispheric cold war strategy. The new secretary of state, Alexander Haig, argued that U.S. interests required supporting the right-wing junta to head off a new Latin America "domino" effect of Communist influence emanating from Cuba (LeoGrande 1981).

While the legislative-executive wrangling went on for three more years over El Salvador, *Crockett v. Reagan* was filed early on by opponents in Congress. The lawsuit was the first one to allege violations of the WPR when it was filed in 1981 by 29 House members (all Democrats) who protested the lack of a formal WPR report, among other claims. In a one-of-a-kind response by the president's supporters in Congress, the lawsuit prompted the same number of Republicans (13 senators and 16 Congress members including one southern conservative Democrat) to file an amicus curiae brief against their colleagues, claiming the original group was going to court too hastily. The allegations by Representative George W. Crockett (D-MI) et al. against the administration included violations of the Constitution, the WPR, and a legislative ban on foreign aid and military assistance to any regime alleged to have engaged in extensive human rights abuses. The defendants (President Reagan, Secretary of Defense Caspar Weinberger, and Secretary of State Alexander Haig) argued that the plaintiffs lacked standing, and assistance had been authorized by an act of Congress in 1981. While not conceding the constitutionality of the WPR, the administration said there were no "hostilities."

Federal District Judge Joyce Hens Green (nominated by President Carter) dismissed the case, saying federal courts were not institutionally equipped or situated to define the nature of the El Salvador operation. In an interview, a House coplaintiff who had also voted in favor of the WPR in 1973 vehemently disagreed with Judge Green's claim that fact finding on war was not possible for a judge. The member had visited El Salvador during the early 1980s and said "it looked like a war to us." The member added that judges routinely engage in other types of fact finding.¹¹ Judge Green instead dismissed the lawsuit on political question grounds.

First, citing *Baker v. Carr*, *Mitchell v. Laird*, and *Holtzman v. Schlesinger*, she said the courts could not assess the facts of the case on which the two sides disagreed: were there "hostilities" in El Salvador or not? Second, Judge Green cited *Goldwater v. Carter* in her argument that a "constitutional impasse appropriate for judicial resolution would be presented" only if the president ignored a resolution requiring a report per WPR section 5(b) or withdrawal of the advisers. "[T]he nature of the fact finding in these circumstances precludes judicial inquiry," but she allowed that the WPR was still open for future justiciability (*Crockett v. Reagan* 1982, 897-98). An appeals court affirmed, saying members lack standing without a clear "nullification or diminution of a congressman's vote" shown by bill passage (*Crockett v. Reagan* 1983, 1357, Bork, J. concurring). Defendants prevailed with another pro-presidential precedent.

11. Phone interview, October 23, 2013. The "nullification" standard comes from *Coleman v. Miller* (1939).

Sanchez-Espinoza v. Reagan (1983-85). In 1979, the Sandinistas, a left-wing guerrilla group, overthrew the Somoza family dictatorship that had ruled Nicaragua since the 1930s. In President Reagan's first term, he issued national security findings and directives to create the "Contras," a counterrevolutionary force. After Congress appropriated money to support the Contras in 1981, the first "Boland Amendment" passed in 1982 (named for Representative Edward P. Boland, D-MA), banning the executive branch from spending any money "for the purpose of overthrowing the government of Nicaragua."¹² Leaked classified memos proved the Reagan administration was not adhering to Boland. In 1983, the House voted to cut off all Contra aid, but a Senate-based compromise allowed \$24 million, a fraction of the administration's request. Ultimately, two more restrictive amendments passed the House and Senate in the first term.

Sanchez-Espinoza v. Reagan was filed in 1983 and focused on adherence to the first Boland. Twelve members of the House of Representatives (all Democrats) joined over a dozen private citizens of Nicaragua (who alleged damages due to actions of the U.S.-supported Contra rebels) and Florida (who alleged damages due to paramilitary training operations). The suit was filed to protest U.S. paramilitary operations that the plaintiffs alleged violated various neutrality laws, the National Security Act of 1947, the Boland Amendment, WPR, and the Constitution (Michaels 1987). The plaintiffs said that the judiciary is needed to control executive abuses of power in this case "because Congress has done all it can, namely, pass legislation." District court judge Howard Corcoran (nominated by President Lyndon Johnson) dismissed the case as a political question. He said "a court must take special care, when confronted with a challenge to the validity of U.S. foreign policy initiatives, to give appropriate deference to the decisions of the political branches, who are constitutionally empowered to conduct foreign relations" (*Sanchez-Espinoza v. Reagan* 1983, 599-600). Judge Corcoran cited *Baker v. Carr*, the Vietnam-era cases, as well as the recent *Crockett* precedent. He also echoed Judge Green, saying the case required fact finding that is beyond the court's competence.

Were this Court to decide . . . that President Reagan either is mistaken, or is shielding the truth, one or both of the coordinate branches would be justifiably offended . . . and there is a real danger of embarrassment from multifarious pronouncements by various departments on one question . . . Such an occurrence would, undoubtedly, rattle the delicate diplomatic balance that is required in the foreign affairs arena . . . It is, therefore, prudent for us to decline to adjudicate plaintiffs' claims at this time. (*Sanchez-Espinoza v. Reagan* 1983, 599)

The appeals court affirmed Judge Corcoran's decision unanimously. Future Supreme Court Justice Antonin Scalia (a Reagan appointee) delivered the opinion, citing mootness because the appropriations rider at issue in this lawsuit (Boland I) expired in 1983.

12. Defense Appropriations Act for FY 1983, P.L. 97-377, 97th Cong., 2d sess., sec. 783 (1982). For a summary of Contra funding before and after the Iran-Contra scandal, see <https://fas.org/irp/offdocs/walsh/execsum.htm> (accessed December 7, 2015).

The congressional appellants also allege that assistance to the Contras is tantamount to waging war, so that they 'have been deprived of their right to participate in the decision to declare war' in violation of the war powers clause of the Constitution, art. I, § 8, cl. 11 . . . Dismissal of this claim is required by our decision in *Crockett v. Reagan*, which upheld dismissal of a similar claim by twenty-nine members of Congress relating to alleged military activity in El Salvador on the ground that the war powers issue presented a nonjusticiable political question. (*Sanchez-Espinoza v. Reagan* 1985, 210)

Another future justice, Ruth Bader Ginsburg (a Carter appointee), filed a concurrence on ripeness grounds, blaming Congress for ambiguities on U.S. support for the Contras. Ginsburg also cited *Goldwater v. Carter*, saying Congress had not thrown down the "gauntlet" by using its own tools, which are more powerful than the federal court (*Sanchez-Espinoza v. Reagan* 1985, 211).

Conyers v. Reagan (1984). October 1983 was an active month for U.S. military engagement. On October 12, 1983, President Reagan signed a congressional resolution that spelled out an 18-month continuation of U.S. troop presence in Lebanon, ending an interbranch dispute about Congress's role in the deployment. Upon signing, Reagan said it "was not to be used as any acknowledgement that the President's constitutional authority can be impermissibly infringed by statute" (Rubner 1985, 629). The next day, Maurice Bishop, the left-leaning prime minister of Grenada who had seized power in 1979, was arrested by members of his own militia. Bishop was temporarily freed by supporters on October 18 but was assassinated later that day. Bishop was replaced by what Reagan described as a more staunchly pro-Cuban junta. President Reagan decided to invade Grenada on October 24 and then announced it the next day, citing the presence of around 1,000 U.S. medical students on the island.

Reagan sent a written report of the invasion to the speaker of the House, Thomas P. O'Neill (D-MA), and the president pro tempore of the Senate, Strom Thurmond (R-SC), on October 25. The president said the letter was "consistent with" the WPR. He did not mention that troops were going into "hostilities," which would trigger the WPR clock. The House and Senate moved swiftly to approve resolutions to hold the Grenada operations to a 60-day timetable.¹³ Around the same time, Representative John Conyers (D-MI) was the lead plaintiff in a lawsuit filed against the president that challenged his authority to invade Grenada in the first place without congressional authorization. Ten other House Democrats signed onto the suit, most of whom had joined in previous suits, including Parren Mitchell (D-MD).

District judge Joyce Hens Green dismissed the suit, citing the member war suit precedents (two before and two after the WPR), including her own *Crockett* decision. She also utilized the novel equitable discretion doctrine theory that said courts should be leery of accepting cases from plaintiffs (especially members of Congress) who have other methods of resolving their disputes (see McGowan 1981).

13. See *Congressional Record* 129, 98th Cong., 1st sess., October 26, 1983, S14610 and roll call 321, *Congressional Record* 129, 98th Cong., 1st sess. (October 28, 1983), S14876-14877.

If plaintiffs are successful in persuading their colleagues about the wrongfulness of the President's actions, they will be provided the remedy they presently seek from this Court. If plaintiffs are unsuccessful in their efforts, it would be unwise for this Court to scrutinize that determination and interfere with the operations of the Congress . . . the Court must withhold jurisdiction of this matter and exercise judicial restraint. (*Conyers v. Reagan* 1984, 327)

By the time the case reached the Appeals Court in 1985, the final noncombat troops were slated to leave Granada. The appeal was dismissed for mootness unanimously by the three judges, Tamm, Wald, and Bork (nominated by Presidents Johnson, Carter, and Reagan, respectively). The issue of whether the WPR clock was triggered by "hostilities" was not resolved. In the mission, 18 U.S. soldiers were killed and 116 were wounded, 24 Cuban soldiers were killed and 59 wounded, and Grenadian casualties included 45 killed and 337 wounded (Rubner 1985, 628). The final suit against President Reagan pivoted away from Central American to the Persian Gulf.

Lowry v. Reagan (1987). Beginning in 1986, during the Iran–Iraq War, Iranian military vessels around the Persian Gulf threatened Kuwaiti oil tankers. Kuwait reached out to both the Soviet Union and the United States for protection. Upon hearing that Kuwaitis requested that the United States reflag six vessels and the Soviet Union five, the Reagan administration offered to reflag all eleven tankers (Ciarrocchi 1987, 7). In 1987, 37 U.S. sailors were killed by a missile attack on the *USS Stark* in the Persian Gulf by Iraq. In response, the administration augmented a single aircraft carrier with 11 warships, six minesweepers, and over a dozen small patrol boats. Secretary of State George P. Shultz submitted a letter on the buildup to Speaker of the House Jim Wright (D-TX) but did not mention the WPR or clock. The administration did not file formal reports after two U.S. ships struck mines in summer 1987, nor when a U.S. fighter plane shot missiles at an Iranian aircraft the U.S. crew perceived as threatening.¹⁴ During this time, military personnel were also receiving "danger pay," reflecting potential "hostilities" (Grimmett 2012, 16-17).

Alleging the presence of "hostilities" and "imminent hostilities," 110 Democratic House plaintiffs filed a federal suit to demand a formal WPR report. In the district court's dismissal of the case, *Lowry v. Reagan*, the judge said a "profusion of relevant congressional activity" in response to the president's actions in the Persian Gulf was evidence that this was a matter for the two branches to work out among themselves. The litigants had in fact worried that legislative activity would shift the judicial spotlight from Reagan's actions to Congress.¹⁵ Judge George H. Revercomb (nominated to the federal bench by Ronald Reagan) delivered the opinion, citing the equitable discretion and political question doctrines in this particular case.

14. House of Representatives, Subcommittee on Arms Control, International Security, and Science, Hearing, "War Powers: Origins, Purposes, and Applications," 100th Cong., 2d sess., 278, August 4 and September 22, 1988.

15. Democratic Study Group archive, Library of Congress, box 170, folder 12, memos November–December, 1987.

This Court declines to . . . impose a consensus on Congress. Congress is free to adopt a variety of positions on the War Powers Resolution, depending on its ability to achieve a political consensus. If the Court were to intervene in this political process, it would be acting ‘beyond the limits inherent in the constitutional scheme . . .’ Judicial review of the constitutionality of the War Powers Resolution is not, however, precluded by this decision. A true confrontation between the Executive and a unified Congress, as evidenced by its passage of legislation to enforce the Resolution, would pose a question ripe for judicial review. (*Lowry v. Reagan* 1987, 337-339, 341)

On an expedited appeal, the panel affirmed as a political question (*Lowry v. Reagan* 1988).¹⁶ Yet, in an encouraging turn for member–litigants, this standard was rejected two years later.

Dellums v. Bush (1990). On August 2, 1990, Iraq invaded Kuwait. Within a week, the United Nations imposed economic sanctions against Iraq and, on August 25, the UN Security Council authorized “such measures as may be necessary” to cease and regulate cargo shipping to Iraq. On August 8, Bush announced the deployment of U.S. forces to Saudi Arabia in a live televised speech, saying he “shared [meaning communicated] the decision” with Congress. On August 17, 1990, Acting Secretary of State Robert M. Kimmitt sent a letter to Congress (not mentioning the WPR) saying “[i]t is not our intention or expectation that the use of force will be required to carry out these operations. However, if other means of enforcement fail, necessary and proportionate force will be employed to deny passage to ships that are in violation of. . . sanctions” (Grimmett 2012, 21). On November 8, 150,000 additional troops were sent to the Gulf. Bush sent a second report to Congress over a week later describing the continuing and increasing deployment of forces to the region but said hostilities were not imminent, in part due to the massive buildup. In this phase, called Operation Desert Shield, around 350,000 U.S. troops were eventually deployed.¹⁷

In response, 53 members of the House and one senator (all Democrats) filed an injunctive suit against the president to prevent his going to war against Iraq without explicit congressional consent. *Dellums v. Bush* was rejected for ripeness by district judge Harold Greene (a Carter appointee). Judge Greene said it is up to the other branches to parse the diplomatic and military meaning of “war,” but at a certain scale, the label clearly applies. Judge Greene explored the history of member litigation on war and concluded that political question, standing, and equitable discretion precedents *did not* apply here. The hurdle for the members was simply ripeness. Rejecting the administration’s argument, Greene implies that there is a door to future litigation if a president’s claim of unilateral authority is clearly out of line with the Constitution.

If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military

16. In a phone interview, an attorney involved in this case expressed disappointment in the three-judge panel, two of whom were appointed by Democrats, December 15, 2014.

17. For all documents, see George H. W. Bush Presidential Library, <https://bush41library.tamu.edu/archives/persian-gulf/> (accessed December 7, 2015).

attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an ‘interpretation’ would evade the plain language of the Constitution, and it cannot stand . . . here the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat, and it is therefore clear that congressional approval is required if Congress desires to become involved. (*Dellums v. Bush* 1990, 1145)

The ripeness challenge came from the fact that U.S. troops had not yet engaged Iraq. Only around 10% of Congress’s membership signed onto the suit, implying that a majority-sanctioned suit might have a better chance at being heard on the merits (*Dellums v. Bush* 1990, 1151).¹⁸

Within a month of the federal opinion, on January 8, 1991, President Bush sent a request to the congressional leadership to pass legislation that supported military enforcement of UN Resolution 678, which called for member nations to use force to expel Iraq from Kuwait if it did not do so by January 15, 1991. The AUMF passed with party-line votes in the House (250-183) and Senate (52-47) and said explicitly that the legislation was complying with section 2 of the WPR. President Bush’s signing statement on January 14 said none of the debates, and even the resolution, was interpreted as threatening to his “constitutional authority to use the Armed Forces to defend vital U.S. interests or [acknowledging] the constitutionality of the War Powers Resolution.”¹⁹ Days later, Bush reported the beginning of combat operations “consistent with” the WPR (Grimmett 2012, 24).

Member Litigation after *Raines v. Byrd*

The landmark case on Congress members’ standing in court came in 1997. Senator Robert C. Byrd (D-WV) sued to prevent the Line Item Veto Act of 1996 from taking effect. Although the district court sided with Byrd on both justiciability and substance, the Supreme Court reversed on the former, saying members cannot claim an institutional injury stemming from a loss of political power (*Raines v. Byrd* 1997). The majority opinion, like the war powers precedents, emphasized that Congress has legislative options to recover power. However, the Court found the act unconstitutional the following year on presentment grounds once private interests claimed injury (*Clinton v. City of New York*, 1998; see also Farrier 2004, 2011).

Campbell v. Clinton (1999-2000). The Republican Congress granted President Clinton item veto power but did not explicitly authorize military action in Somalia, Iraq, Bosnia, and Haiti in his first term (Adler 2000). In Clinton’s second term, however, his military orders related to Kosovo inspired a congressional lawsuit in the final year of the administration. In 1998-99, a move for independence by ethnic Albanians in the Serbian province of Kosovo brought a new wave of conflict and, in 1999, a joint U.S./NATO

18. Federal District Judge Rosemary M. Collyer upheld member-litigant standing in part because the House of Representatives sanctioned the current lawsuit on ACA enforcement (*House v. Burwell* 2015, 41).

19. Signing Statement, January 14, 1991, P.L. 102-1, __ 101st Cong., 1st sess. (1991), See <https://bush41library.tamu.edu/archives/public-papers/2620> (accessed February 9, 2016).

(North Atlantic Treaty Organization) military response. The story of U.S. action in Kosovo is similar to previous cases discussed here, despite a partisan switch in both branches.

Judge Greene implied in *Dellums* that member–plaintiffs would have standing if they voted against a specific engagement abroad that proceeded anyway. That theory was tested in the spring of 1999. On March 24, the NATO air campaign began against targets in Serbia. Clinton announced the action in a national address and submitted a report two days later to Congress, saying it was “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive” and the report was “consistent with the War Powers Resolution.” On April 7, Clinton updated congressional leaders, saying “it is not possible to predict how long [the] operations will continue.” Defense Secretary William Cohen told the Senate Armed Services Committee: “We’re certainly engaged in hostilities, we’re engaged in combat.”²⁰ During the fifth week of strikes, on April 28, 1999, the House voted on multiple resolutions the same day, which ultimately neither declared war, authorized the campaign, nor withdrew forces. The Senate, however, did pass an AUMF. Then, on May 21, 1999, the president signed an emergency supplemental appropriations act that funded the operation.²¹

Representative Tom Campbell (R-CA) and over 20 fellow members, almost all Republicans, filed a complaint on May 19, seeking a declaratory judgment that President Clinton violated the WPR and the Constitution. The suit also demanded “that no later than May 25, 1999, the President must terminate the involvement of the United States Armed Forces in such hostilities unless Congress declares war, or enacts other explicit authorization, or has extended the sixty day period” (*Campbell v. Clinton* 2000, 33). The suit was dismissed by district court judge Paul Friedman (appointed by Clinton) who reviewed the congressional actions and concluded “plaintiffs have failed to establish a sufficiently genuine impasse between the legislative and executive branches to give them standing. The most that can be said is that Congress is divided about its position on the President’s actions in the Federal Republic of Yugoslavia and that [Clinton] has continued . . . in the face of that divide” (*Campbell v. Clinton* 1999, 44).

The appeals court upheld the district court but was divided on reasoning. The panel offered four opinions among the three judges (an opinion for the court and three concurrences). The panel’s opinion was written by Judge Laurence Silberman (nominated to the appellate court by Ronald Reagan), who said the congressional votes were not sufficiently “nullified” by the president’s actions for an injury. The three judges then went in different directions. In his separate concurrence, Judge Silberman said the appellants’ claim of “hostilities” in Yugoslavia does not lend itself to resolution, even if it appears to be true: “[a]ppellants cannot point to any constitutional test for what is war.” Judge Raymond Randolph (nominated by George H. W. Bush) emphasized the principles of standing and mootness. He looked at the totality of the House votes on April 28, saying they were “not

20. *Weekly Compilation of Presidential Documents* 35 (14), 603, April 7, 1999, <http://www.gpo.gov/fdsys/pkg/WCPD-1999-04-12/pdf/WCPD-1999-04-12.pdf> (accessed December 9, 2015).

21. 1999 Emergency Supplemental Appropriations Act, P.L. 106-31, _106th_ Cong., _st_ sess. (1999). For full background, see also House Committee on Appropriations Conference Report, H. Rep. 106-143 (1999).

for naught” because Clinton did not introduce ground troops, which he might have if the full war declaration had passed. Judge David S. Tatel (appointed by President Clinton), offered the most sympathetic reading of the member–plaintiffs complaint. Although he agreed with the majority that the standing problems were too severe, overall he said war is justiciable. “Since the earliest years of the nation, courts have not hesitated to determine when military action constitutes ‘war’” (*Campbell v. Clinton* 2000, 16-37).

In interviews, a member and staffer involved in *Campbell* expressed frustration. They said the lawsuit was designed to bring public attention to Congress’s “lack of will” to confront President Clinton on war. “Republicans pride themselves as constitutionalists. Democrats pride themselves as learning lessons from Vietnam.” Yet “war brings . . . institutional disinterest.”²²

Doe v. Bush (2003). Despite campaigning against Bill Clinton’s “nation building,” and promising a “humble foreign policy” in 2000,²³ President George W. Bush’s presidency was built on post-9/11 foreign interventions. However, the second Iraq war suit is unlike the previous ones because the Congress debated and passed a resolution authorizing President George W. Bush to decide when/if to invade. A dozen Democratic House members focused on the latter in a lawsuit saying that it is unconstitutional for Congress to delegate away the war powers that are enumerated in Article I. Because the nub of their argument focused on a passed law, and President Bush waited until the AUMF was in place to invade, this case had less promise for the plaintiffs than the others discussed here.²⁴

Just weeks before the invasion began, the House members, joined by 20 private plaintiffs (active military and their families) tried to prevent the AUMF’s execution. They made two somewhat contradictory constitutional claims: Congress delegated too much war power and what they granted to President Bush was not a green light for invasion. Judge Joseph Tauro (nominated by Richard Nixon) agreed with the defendants and dismissed the case as a political question, saying there was no clear conflict between the political branches. Tauro said, “there is a day to day fluidity in the situation that does not amount to resolute conflict between the branches – but that does argue against an uninformed judicial intervention” (*Doe v. Bush* 2003, 440). Circuit judges Sandra Lynch (nominated by Clinton), Conrad Cyr (nominated by Reagan and Bush I) and Norman Stahl (nominated by Bush I) dismissed the case on ripeness rather than the “murky” political questions (*Doe v. Bush* 2003, 138). The previous year, however, the Bush administration got a separate member suit dismissed on political question precedent.²⁵

22. Phone interviews with a former member-plaintiff, July 13, 2013, and a current member’s staffer, August 13, 2013.

23. Second debate, <http://www.debates.org/?page=october-11-2000-debate-transcript> (accessed December 9, 2015).

24. Joint Resolution to Authorize the Use of United States Armed Forces against Iraq, P.L. 107-243, 107th cong., 2d sess. (2002). For full legislative history, see <https://www.congress.gov/bill/107th-congress/house-joint-resolution/114> (accessed December 11, 2015).

25. Thirty two members of the House challenged Bush’s unilateral abrogation of an Antiballistic Missile Treaty with Russia in December 2001; the case was dismissed on the *Goldwater v. Carter* precedent. See *Kucinich v. Bush* (2002).

Kucinich v. Obama (2011). Like President Bush's flip from candidate to president, Barack Obama's war powers interpretations changed dramatically from 2007 to 2011 (see Edelson-Deelen 2015). During the "Arab Spring" revolts from 2010 to 2011, street protests in Benghazi, Libya, began to turn toward regime change and the ouster of longtime dictator Colonel Muammar Qadhafi. The UN Security Council passed two resolutions that together condemned violence against civilians, encouraged member nations to place asset freezes and travel bans on the Libyan leadership, endorsed the travel bans already being put into place by the Arab League and other regional organizations, introduced a no-fly zone and authorized member states through regional organizations to use "all necessary measures" to protect civilians. Operation Odyssey Dawn was a multinational coalition led by the United States in response to the second UN resolution; Operation Unified Protector was the NATO operation that "responded to the UN call" by enforcing an arms embargo as well as the no-fly zone. On March 31, NATO assumed command for all international operations in Libya.²⁶

The constitutional question through these months was whether President Barack Obama needed explicit authorization from Congress to engage in this offensive military action abroad. The president and his administration argued that he possessed unilateral authority, bolstered by treaty obligations.²⁷ Echoing the Kosovo situation, Congress neither authorized nor banned action. The mission began on March 19; the president reported to Congress two days later that he "directed U.S. military forces to commence operations to assist an international effort authorized by the United Nations." The strikes will be "limited in their nature, duration, and scope . . . I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution. I appreciate the support of the Congress in this action."²⁸ Without any supportive action in Congress, President Obama asserted that the United Nations can "authorize" members' military campaigns (which the WPR specifically denies in section 8), and said "it is U.S. policy that Qaddafi needs to go" (Fisher 2013, 240). The administration took the position that the mission was not "war" in a constitutional sense that required congressional authorization. Nor did President Obama acknowledge explicitly that he was bound to a withdrawal clock under the WPR.²⁹ However, when the 60-day clock expired on May 20, the president wrote to leaders to express support for a resolution passed in the Senate that would authorize the mission. The House did not pass it. A few days before the 90-day clock expired on June 19, the White House said there were no "hostilities" without US casualties (for more information on legal position and debates within the

26. See "Precursor to Operation Unified Protector," *NATO and Libya*, http://www.nato.int/cps/en/natolive/topics_71652.htm (accessed December 9, 2015).

27. Remarks by the President on the Situation in Libya, March 18, 2011, <http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya> (accessed December 9, 2015).

28. Letter from the president regarding the commencement of operations in Libya, March 21, 2011, <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya> (accessed December 9, 2015).

29. "Authority to Use Military Force in Libya," Memorandum for the Attorney General, Office of Legal Counsel, Department of Justice, April 1, 2011, 8, <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> (accessed December 9, 2015).

administration on this issue, see Edelson and Starr-Deelen 2015; Savage 2011; and Savage and Lander 2011).

Meanwhile in Congress, several House actions indicated interest in holding the president to the WPR. First, House Concurrent Resolution 51 was introduced by Dennis Kucinich (D-OH, who would soon be the lead plaintiff in the member lawsuit) and said “[p]ursuant to section 5(c) of the War Powers Resolution . . . Congress directs the President to remove the United States Armed Forces from Libya by not later than the date that is 15 days after the date of the adoption of this concurrent resolution.” The resolution failed on the floor 148-265, with bipartisan groups on both sides of the question; the “yea” votes had 87 Republicans and 61 Democrats and the “nay” votes had 144 Republicans and 121 Democrats. Second, on June 3, Speaker John Boehner himself sponsored House Resolution 292, which banned ground troops and passed on a party line vote. Third, on June 15, Boehner wrote to warn the president he was about to violate the WPR. The fourth major House action of the month came when Representative Alcee Hastings (D-FL) sponsored a resolution to authorize the mission, which failed 123-295, with only eight Republicans voting “aye.” Finally, Representative Tom Rooney (R-FL) sponsored a resolution to de-fund the NATO mission, which also failed 180-238.³⁰ These last two (seemingly contradictory) votes took place on the same day.

In the middle of this active month, 10 members of the House of Representatives (two Democrats and eight Republicans) filed suit against President Obama on June 15, 2011. The complaint noted that “the Obama Administration had yet to ask Congress for specific funding [for military action in Libya]” nor sought “a declaration of war from Congress or even congressional approval for [the military action].” Information from the Department of Defense estimated spending around \$550 million in the first 10 days of the military engagement, paid for with reallocations (Bennett 2011). Nevertheless, U.S. District Judge Reggie Walton (a G. W. Bush appointee) agreed with the defendants, and the case was dismissed in mid-October. Judge Walton rejected the members’ standing to sue as legislators and taxpayers. Citing several previous member lawsuits, he said that the alleged injuries to these 10 plaintiffs are not separate from those that may have been suffered by the other 425 members of the House (*Kucinich v. Obama* 2011, 113). Therefore, what Kucinich et al. claim is an “institutional injury,” which had been dismissed as a standing category in *Raines v. Byrd* (1997, discussed above). If an institutional injury characterizes the situation, then it should be endorsed by the body, which was precisely what Judge Rosemary Collyer noted in the current suit on enforcement of the ACA, *House v. Burwell*. The next issue was whether a legitimate conflict arose from the president’s actions in light of congressional votes. Specifically, did President Obama “nullify” any particular congressional action, including the defeat of the authorization bill on June 24? Judge Walton endorsed the Obama administration’s view, saying “[t]he President’s actions, being based on authority totally independent of the June 24, 2011 vote, cannot be construed as actions that nullify a specific Congressional prohibition” (*Kucinich v.*

30. Roll Call 412, <http://clerk.house.gov/evs/2011/roll412.xml>; <http://clerk.house.gov/evs/2011/roll411.xml>; <http://www.speaker.gov/press-release/speaker-boehner-challenges-president-obama-legal-justification-continued-operations>; Roll Call 483, <http://clerk.house.gov/evs/2011/roll493.xml>; Roll Call 494, <http://clerk.house.gov/evs/2011/roll494.xml> (all 112th Cong., 1st sess., accessed December 9, 2015).

Obama 2011, 113). The decision came on October 20, 2011. The NATO campaign ended on October 31. Kucinich did not file an appeal. The tenth member war suit failed to disrupt the new order.

Conclusion

While federal courts are accused of activism on many policy fronts, war questions meet restraint. Whatever the motivations of federal judges who have formed these multi-layered barriers around war powers, the consistency of the judicial position defies ideological polarization on other issues, and transcends change on the bench, majority control of the House and Senate, the occupant of the White House, and even the foreign policy zeitgeist. All this is not to say there is an ideal, rigid model of war powers that is appropriate to all contemporary situations, nor that courts can and should “save” the country, and Congress, from the president. It is not federal court’s burden to uphold the Constitution or WPR alone. But federal courts can take up a future suit and declare a presidential action unconstitutional pending congressional approval within a certain period of time, possibly prompting a national policy debate that will put House and Senate members on the record. It is also possible that federal courts could accept a case and rule for the president on the merits, possibly even declaring the WPR unconstitutional. In the meantime, presidential assertiveness is supported by default through congressional ambivalence and judicial discomfort or disinterest (Keynes 1982; Koh 1990).

All three branches and both parties have contributed to our nation’s flipped understanding of constitutional war. After-the-fact public criticism, oversight hearings and investigations, and party changes in the White House and Congress have not changed this dynamic. Today, in addition to bombing ISIS targets since August 2014, President Obama has sent 3,500 troops and special operations advisors to the field by October 2015 with one commando death thus far (Baker, Cooper, and Sanger 2015). The president has chided Congress repeatedly for not sending a new AUMF, but neither branch has said the lack of explicit authorization matters. These postures support modern constitutional interpretations that have received remarkably little outcry or debate. Unlike marriage, health care, campaign finance, privacy, and many other high-profile legal conflicts that ricochet through the branches, public discourse, and elections for years (and even decades at a time), Congress’s war powers are actually enumerated in the Constitution.

References

- Adler, David Gray. 2000. “The Clinton Theory of the War Power.” *Presidential Studies Quarterly* 30 (1): 155-68.
- Baker, Peter, Helene Cooper, and David E. Sanger. 2015. “Obama Sends Special Operations Forces to Help Fight ISIS in Syria.” *New York Times*, October 30.
- Baker v. Carr*, 369 U.S. 186 (1962).
- Bas v. Tingy*, 4 U.S. (4 Dall.) (1800).

- Bennett, John T. 2011. "Lawmakers Worry about Libya's Costs as \$550M Tab Revealed." *The Hill*, March 29.
- Burgess, Susan R. 1992. *Contest for Constitutional Authority: The Abortion & War Powers Debates*. Lawrence: University Press of Kansas.
- Bickel, Alexander M., 1986. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 2nd ed. New Haven, CT: Yale University Press.
- Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.2d 19 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000).
- Carney, Jordain. 2015. "Senators Use Paris Attacks to Renew Push for ISIS War Bill." *The Hill*, November 17.
- Ciarrocchi, Robert J. 1987. "U.S., Soviet, and Western European Naval Forces in the Persian Gulf Region." *Congressional Research Service Report* 87-956 F, December 8.
- Clinton v. City of New York* (consolidated cases), 24 U.S. 417 (1998).
- Coleman v. Miller*, 307 U.S. 433 (1939).
- Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984), *aff'd*, 765 F.2d 1124 (D.C. Cir. 1985).
- Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).
- Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).
- Devins, Neal, and Louis Fisher. 2015. *The Democratic Constitution*. 2nd ed. New York: Oxford University Press.
- Doe v. Bush*, 257 F. Supp. 2d 436 (D. Mass. 2003), *aff'd*, 323 F.3d 133 (1st Cir. 2003), *petition for rehearing denied*, 322 F.3d 109 (1st Cir. 2003).
- Edelson, Chris. 2013a. "In Service to Power: Legal Scholars as Executive Branch Lawyers in the Obama Administration." *Presidential Studies Quarterly* 43 (3): 618-40.
- . 2013b. *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror*. Madison: University of Wisconsin Press.
- Edelson, Chris, and Donna G. Starr-Deelen. 2015. "Libya, Syria, ISIS, and the Case against the Energetic Executive." *Presidential Studies Quarterly* 45 (3): 581-601.
- Ely, John Hart. 1993. *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*. Princeton, NJ: Princeton University Press.
- Farrier, Jasmine. 2004. *Passing the Buck: Congress, the Budget, and Deficits*. Lexington: University Press of Kentucky.
- . 2010. *Congressional Ambivalence: The Political Burdens of Constitutional Authority*. Lexington: University Press of Kentucky.
- . 2011. "President Obama and Budget Deficits: Signs of a Neo-Whig Presidency." *Presidential Studies Quarterly* 41 (3): 617-33.
- Fisher, Louis. 2000a. "Litigating the War Power with 'Campbell v. Clinton.'" *Presidential Studies Quarterly* 30 (3): 564-74.
- . 2000b. *Congressional Abdication on War and Budgets*. College Station: Texas A&M University Press.
- . 2005. "Judicial Review of War." *Presidential Studies Quarterly* 35 (3): 466-95.
- . 2013. *Presidential War Power*. 3rd ed. rev. Lawrence: University Press of Kansas.
- . 2014. *The Law of the Executive Branch: Presidential Power*. Lawrence, University Press of Kansas.
- Garcia, Michael John. 2012. "War Powers Litigation Initiated by Members of Congress since the Enactment of the War Powers Resolution." *Congressional Research Service Report* RL30352.
- Glennon, Michael J. 1990. *Constitutional Diplomacy*. Princeton, NJ: Princeton University Press.
- Goldwater v. Carter*, 444 U.S. 996 (1979).
- Grimmett, Richard F. 2012. "The War Powers Resolution: After Thirty-Eight Years." *Congressional Research Service Report* R42699, September 24.
- Harris, Kevin, and Mario Espinosa. 1981. "Issues and Policy: Reform, Repression, and Revolution in El Salvador." *Fletcher Forum* (Tufts University, Summer): 295-318.
- Holtzman v. Richardson*, 361 F. Supp. 544 (E.D.N.Y. 1973).

- Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir.1973), *vacated*, 414 U.S. 1304 (1973).
- Howell, William G., and Jon C. Pevehouse. 2007. *While Dangers Gather: Congressional Checks on Presidential War Powers*. Princeton, NJ: Princeton University Press.
- INS v. Chadha*, 462 U.S. 919 (1983).
- Kassop, Nancy. 2003. "The War Power and Its Limits." *Presidential Studies Quarterly* 33 (3): 509-29.
- Keynes, Edward. 1982. *Undeclared War: Twilight Zone of Constitutional Power*. University Park: Pennsylvania State University Press.
- Koh, Harold Hongju. 1990. *The National Security Constitution: Sharing Power after the Iran-Contra Affair*. New Haven, CT: Yale University Press.
- Korematsu v. United States*, 323 U.S. 214 (1944).
- Kriner, Douglas L. 2010. *After the Rubicon: Congress, the President, and the Politics of Waging War*. Chicago: University of Chicago Press.
- . 2014. "Obama's Authorization Paradox: Syria and Congress's Continued Relevance in Military Affairs." *Presidential Studies Quarterly* 44 (2): 309-27.
- Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002).
- Kucinich v. Obama*, 821 F. Supp. 2d 110, 113 (D.D.C. 2011).
- LeoGrande, William M. 1981. "A Splendid Little War: Drawing the Line in El Salvador." *International Security* 6 (1): 27-52.
- Little v. Barreme*, 6 U.S. (2 Cranch) (1804).
- Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir. 1988).
- McGowan, Carl. 1981. "Congressmen in Court: The New Plaintiffs." *Georgia Law Review* 15 (3): 241-67.
- Michaels, Peter S. 1987. "Lawless Intervention: United States Foreign Policy in El Salvador and Nicaragua." *Boston College Third World Law Journal* 7 (2): 223-62.
- Mitchell v. Laird*, 488 F.2d 611, 159 U.S. App. D.C. (D.C. Cir. 1973).
- Pfiffner, James P. 2008. *Power Play: the Bush Presidency and the Constitution*. Washington, DC: Brookings Institution Press.
- Pious, Richard M. 2006. *The War on Terrorism and the Rule of Law*. New York: Oxford University Press.
- Posner, Eric A., and Adrian Vermeule. 2011. *The Executive Unbound: After the Madisonian Republic*. New York: Oxford University Press.
- Raines v. Byrd*, 521 U.S. 811 (1997).
- Redish, Martin. 1985. "Judicial Review and the Political Question." *Northwestern University Law Review* 79: 1031-61.
- Rubner, Michael. 1985. "The Reagan Administration, the War Powers Resolution, and the Invasion of Grenada." *Political Science Quarterly* 100 (4): 627-47.
- Rudalevige, Andrew. 2006. *The New Imperial Presidency: Renewing Presidential Power after Watergate*. Ann Arbor: University of Michigan Press.
- Savage, Charlie. 2011. "Two Top Lawyers Lost to Obama in Libya War Policy Debate." *New York Times*, June 17.
- Savage, Charlie, and Mark Landler. 2011. "White House Defends Continuing U.S. Role in Libya Operation." *New York Times*, June 15.
- Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 602 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).
- Silverstein, Gordon. 1997. *Imbalance of Power: Constitutional Interpretation and the Making of American Foreign Policy*. New York: Oxford University Press.
- Talbot v. Seeman*, 5 U.S. (1 Cranch 1801).
- Tushnet, Mark V. 1999. *Taking the Constitution Away from the Courts*. Princeton, NJ: Princeton University Press.
- United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
- United States v. Smith*, 27 Fed. Case 1192 (C.C.N.Y. 1806).
- United States House of Representatives v. Burwell*, Civil Action 14-1967 (D.D.C. 2015).

- Weed, Matthew C. 2015a. "The War Powers Resolution: Concepts and Practice." Congressional Research Service Report R42699, April 3.
- . 2015b. "A New Authorization for Use of Military Force against Islamic State: Issues and Current Proposals in Brief." Congressional Research Service Report R43760, January 15.
- Yoo, John. 2010. *Crisis and Command: A History of Executive Power from George Washington to George W. Bush*. New York: Kaplan Books.
- Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).