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ANATOMY OF A FAILURE: THE WAR POWERS RESOLUTION AS LAW ON THE BOOKS AND LAW IN ACTION

*Luis Leon Arzich**

ABSTRACT

The War Powers Resolution (“WPR” or “Resolution”) was enacted to operationalize the Constitutional provisions that govern the external war powers and limit the power of the President to deploy United States forces abroad without Congressional consent. However, all Presidents since the WPR was enacted in 1973 have felt free to breach it with impunity. As of 2020, the WPR has been extraordinarily unsuccessful.

Why has this been the case? In the absence of court decisions on the merits of the WPR, one needs to look beyond the statute itself to understand why it has failed. This Article fills a void in the literature by taking a holistic look at the WPR—both at the law on the books, as well as how the law operates in action. The problems begin with the text. The WPR itself is a product of political compromise and, as such, filled with interpretive issues. They range from a lack of conceptual clarity, with key terms like “hostilities” bereft of statutory definition, to whole sections that could plausibly be unconstitutional. Those issues have been present since the Resolution’s passage, and this article addresses them in light of the many instances when the Armed Forces have been deployed abroad since the WPR’s passage.

This article further argues that, in actual practice, the Resolution does not fare any better. The Office of Legal Counsel (OLC) has interpreted the WPR since the 1980s and has established a line of precedent within the executive, one that very closely tracks presidential action. Since the only source of authoritative interpretation has been an office inside the executive branch, it is unsurprising the Resolution has been construed to grant the President broad discretion; not a single OLC opinion has limited the execu-

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tive's discretion to use force abroad. In practical terms, the WPR has been interpreted into irrelevance.

I. INTRODUCTION

Suppose President Donald Trump had reliable information that Iran was about to gain the capacity to make nuclear weapons. Suppose also that the President had intelligence exposing the exact location of the facilities where the production of said weapons would take place. Setting international law aside, could the President order an attack on these facilities without involving Congress in the decision, based on his domestic prerogatives? If you simply look at the law, the answer would be no: Article I of the Constitution gives Congress, not the President, the power to “declare war.”¹ There is also an additional constraint on the President in the form of the 1973 War Powers Resolution (WPR), which operationalizes the provisions found in the Constitution and sets a procedure the executive branch must follow prior to the use of force.

But in practice, neither the Constitution nor the WPR has served as a constraint on the President. For example, President George H.W. Bush believed he had the authority to lead the United States into war against Iraq regardless of the plain text of the resolution, and it was only Congress's approval of the war that stopped a clash between departments.² Similarly, President Bill Clinton ordered the United States military to take part in the war in Kosovo in the absence of a declaration of war or similar statutory authorization.³ President George W. Bush thought he could go into war with Iraq without congressional authorization,⁴ President Barack Obama engaged in drone strikes against Libya—presumably “hostilities” under the text of the resolution—also without congressional authorization,⁵ and President Donald Trump twice ordered strikes against Syria without asking Congress for permission,⁶ as well as ordering the assassination of Iranian Gen-

1. U.S. CONST. art. I, § 8

2. STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 31 (2013).

3. MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, *THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE* 32–33 (2019), <https://fas.org/sgp/crs/natsec/R42699.pdf>.

4. See MORTON H. HALPERIN ET AL., *BUREAUCRATIC POLITICS AND FOREIGN POLICY* 77 (2nd ed. 2006).

5. See, e.g., Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES (March 21, 2011), <https://www.nytimes.com/2011/03/22/world/africa/22powers.html>; Conor Friedersdorf, *How Obama Ignored Congress, and Misled America, on War in Libya*, THE ATLANTIC, (Sept. 13, 2012), <https://www.theatlantic.com/politics/archive/2012/09/how-obama-ignored-congress-and-misled-america-on-war-in-libya/262299/>.

6. See Michael R. Gordon et al., *Dozens of U.S. Missiles Hit Air Base on Syria*, N.Y. TIMES, (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to->

eral Qassim Soleimani inside Iraqi territory, exceeding the consent of the host government of Iraq⁷ and again lacking Congressional authorization.⁸

To understand why Presidents disregard the limitations on their use of the armed forces abroad with overwhelming regularity, one must first look at the context in which the President and Congress operate. Although “[t]hroughout most of [U.S.] history, Presidents did not claim that they could commit the nation to war without congressional authorization,”⁹ Professor Stephen M. Griffin says a decisive shift in favor of the President’s authority to plunge the United States into war on his initiative alone took place during the Korean War in the 1950s—which was fought as a war but lacked congressional authorization.¹⁰ How could President Truman’s actions be constitutional when they go against the plain text of the Constitution? While it is outside the scope of this article to explore this question in depth, suffice it to say one possible understanding arises from the concept Justice Frankfurter elaborated in his famous concurrence in *Youngstown*: the “gloss on executive power.”¹¹ President Truman’s defense of South Korea was the

weigh-military-responses-to-syrian-chemical-attack.html; Stephanie Ebbs & Ali Rogin, *Members of Congress React to US Strike on Syria*, ABC NEWS (Apr. 13, 2018), <https://abcnews.go.com/International/members-congress-react-us-strike-syria/story?id=54459343>.

7. “Iraqi Prime Minister Adel Abdul-Mahdi condemned the targeted killing as a violation of the terms underpinning the U.S. troop presence in the country.” See Isabel Coles et al., *U.S. Strike Ordered by Trump Kills Key Iranian Military Leader in Baghdad*, WALL STREET JOURNAL (January 3, 2020), https://www.wsj.com/articles/leader-of-iranian-revolutionary-guard-s-foreign-wing-killed-11578015855?mod=article_inline&mod=hp_lead_pos1.

8. The Department of Defense, in a statement made on January 2, 2020, indicated the attack was “[a]t the direction of the President.” U.S. DEP’T OF DEFENSE, STATEMENT BY THE DEPARTMENT OF DEFENSE, (January 2, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/>. Congress was only notified after the fact. Pamela Brown et al., *White House formally notifies Congress about Soleimani airstrike*, CNN, (January 5, 2020), <https://edition.cnn.com/2020/01/04/politics/white-house-notify-congress-soleimani/index.html>.

9. William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 702 (1997). Between 1798 and 1945, the United States used its armed forces abroad 165 times and declared war only twelve times (in 1812 against the United Kingdom of Great Britain and Ireland, in 1846 against Mexico, in 1898 against Spain, in 1917 twice, against Germany and Austria-Hungary, in 1941 against Japan and later against Italy and Germany in that same year, and in 1942 against Bulgaria, Hungary and Romania). BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2019 2–10 (2019), <https://fas.org/sgp/crs/natsec/R42738.pdf>.

10. Griffin, *supra* note 2, at 73–74.

11.

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power

start of a familiar way of proceeding by the Executive branch, where the President openly claims the authority to commit troops to combat without congressional authorization, and Congress says nothing.¹² This would presumably count as acquiescence under Justice Frankfurter's concept of the gloss on executive power, and in the area of foreign relations—where practice is of the utmost relevance—would mark the start of a trend that, to this day, shows no signs of abating.¹³

That is not to say that Congress has never attempted to reverse this trend. As a response to President Nixon's interventions in Southeast Asia, as well as to the Watergate scandal, Congress passed the War Powers Resolution in 1973 to try both to constrain executive power¹⁴ and ensure Congress would have a role to play in decisions that involved the use of force abroad.¹⁵ However, even though the resolution has not been condemned as unconstitutional as a whole by any sitting President besides Richard Nixon,¹⁶ it has made practically no difference in how the President uses force

part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (Frankfurter, J., concurring).

12. John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1391 (1988).

13. See John C. Cruden, *The War-Making Process*, 69 MIL. L. REV. 35, 35 (1975) ("The progressive growth in the power and prestige of the Presidency, especially in the area of foreign relations, has been perhaps the most notable feature of American constitutional development."); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 846 (1996) (book review) (stating that Presidents claimed authority as the Commander in Chief during the Cold War to send troops abroad, without asking for Congress's permission but instead simply informed Congress of the decision or made nominal consultation with some members); CURTIS BRADLEY & JACK GOLDSMITH, *FOREIGN RELATIONS LAW* 49 (5th ed. 2014) ("By repeated exercise without successful opposition, Presidents have established their authority to send troops abroad, probably beyond effective challenge, where Congress is silent . . ."); *id.* at 99 ("Perhaps because Presidents of both major political parties have repeatedly asserted large power and sometimes commanded Congressional and public support, it has become commonly accepted, usually also by many members of Congress, that the President deploy U.S. forces for foreign policy purposes, even to court or engage in hostilities short of war.").

14. See Cruden, *supra* note 13, at 66.

15. The WPR states that

It is the purpose of this joint resolution to . . . insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

War Powers Resolution, 50 U.S.C. § 1541(a) (2019).

16. "There is an oddly widespread myth that every president since Nixon has declared [the sixty-day time limit] to be unconstitutional. This is simply false. Subsequent presidents have challenged other provisions of the War Powers Resolution, but not the sixty-day provision." CHARLIE SAVAGE, *POWER WARS* 640 (2015) (emphasis omitted).

abroad. This article attempts to explain why this has been the case by looking at the statute and in doing so, to answer the question: what are the *actual* limitations on the President's unilateral use of force abroad? Is the WPR "good law" or does experience tell us that there is no law that constrains the Executive? I will answer these questions following, as a framing device, the distinction between law on the books and law in action found in comparative law: it is not enough to explain the WPR's statutory drafting issues to see why the WPR has not worked, one must also explore how the relevant actors have interpreted the resolution in practice, expanding presidential power in the process. It is only by looking at the whole picture that we can understand why the resolution has been so strikingly ineffectual.

The remainder of this article will proceed as follows. Part II is descriptive and consists of an overview of the WPR, as well as the record of Presidential compliance. Part III is the law on the books, where I review the constitutional and interpretive issues with the War Powers Resolution. I examine said issues in light of the accumulated experience (as of 2018) since the WPR was enacted. Part IV of this essay looks at the law in action: how the relevant actor—in this case, the President—has interpreted the statute. To do so, I look at the Office of Legal Counsel's (OLC) interpretation of the resolution as Executive-branch custom; as I will show, OLC opinions track closely how the President works around the WPR, and thus are representative of how the statute is operating in practice. Finally, Part V concludes.

II. THE STATUTORY SCHEME AND THE RECORD OF NONCOMPLIANCE

The WPR has been codified in 50 U.S.C. §§ 1541–1548. Section 1541 states the purposes of the resolution, namely to "fulfill the intent of the framers of the Constitution of the United States" on the constitutional distribution of the war powers.¹⁷ Section 1542 requires the president to "consult with Congress before introducing United States Armed Forces" into: 1) actual hostilities and 2) "situations where imminent involvement in hostilities is clearly indicated by the circumstances."¹⁸ Consultation must continue until either hostilities have ceased or the U.S. Armed Forces have been withdrawn.¹⁹ Neither "hostilities" nor "consultation" are defined anywhere in the statute.²⁰

Section 1543 contains the resolution's reporting requirement, and it calls on the President to report to Congress when the Armed Forces are introduced into hostilities or "situations where imminent involvement in

17. 50 U.S.C. § 1541(a).

18. *Id.* § 1542.

19. *Id.*

20. *Id.*

hostilities is clearly indicated by the circumstances.”²¹ Additionally, when the Armed Forces are introduced into a foreign country “while equipped for combat,” and when they are introduced “in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation,” the President has the duty to report to Congress.²² Section 1544 provides that after a report is submitted or should have been submitted, “[t]he President shall terminate any use of United States Armed Forces with respect to which such report was submitted” within sixty days, which can be extended for an additional thirty days.²³ Section 1545 authorizes Congress to require the President to withdraw troops after Congress passes a joint resolution before the sixty-day period mentioned above has expired.²⁴ Sections 1546 and 1546a regulate the procedure that this joint resolution must follow.²⁵ Section 1547 prohibits an inference of Congressional authorization for the use of force from other statutes—including appropriation acts—or treaties.²⁶ Finally, §1548 is a severability clause.²⁷

21. *Id.* § 1543(a)(1).

22. *Id.* The National Defense Authorization Act for Fiscal Year 2018 complements the WPR’s reporting requirement with a specific provision, § 1263, where subsection (a) establishes a duty on the president to present “[a] report on the United States strategy to defeat Al-Qaeda, the Taliban, the Islamic State of Iraq and Syria (ISIS), and their associated forces and co-belligerents.” Under subsection (b), such a report does not need to include any reference to the WPR. H.R. REP. NO. 115-404, at 410 (2017) (Conf. Rep.) <https://www.congress.gov/115/crpt/hrpt404/CRPT-115hrpt404.pdf#page=448>. The report released by the Trump administration has the same problems that reports submitted under the WPR have, namely that they are extremely cursory; the report has only nine pages and does not go into any great detail on what actions the United States’ armed forces are taking abroad. See Matthew Kahn, *Document: White House Legal and Policy Frameworks for Use of Military Force*, LAWFARE (Mar. 14, 2018), <https://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force>. This is not to say there is nothing noteworthy or that the report simply parrots information that was already made public:

In this sense, the Section 1264 report is likely to fall short of the detailed discussion for which many may have hoped. Nonetheless, it does give real insight on a number of important points. Perhaps the most surprising is an undisclosed—at least as far as we can tell—encounter between U.S. troops and enemy forces assessed to be part of the Islamic State in Iraq and Syria in Niger on or about Dec. 6, 2017, two full months after the tragic ambush that resulted in the deaths of four U.S. service members.

Allison Murphy & Scott R. Anderson, *We Read the New War Powers Report So You Don’t Have To*, LAWFARE (Mar. 14, 2018), <https://www.lawfareblog.com/we-read-new-war-powers-report-so-you-dont-have>. Compare Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Dec. 11, 2017), <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2/>.

23. 50 U.S.C. § 1544(b).

24. § 1545.

25. Section 1546 lays out the normal procedure Congress must follow, § 1546, while § 1546a expedites the normal joint resolution process, § 1546a.

26. § 1547.

If the WPR is to be judged on whether it has prevented the unilateral use of force by the Executive,²⁸ then it is an abject failure. While it would be incredibly difficult to evaluate “consultation”—given that the term is left undefined and any attempt to do so would run into commensurability problems, since we do not have a standard of what consultation should be—it is possible to assess the extent to which the Executive has complied with its reporting obligation. The United States has, since the resolution’s passage in 1973 and until the end of President Obama’s term, used force abroad on 195 occasions,²⁹ not counting “covert actions or numerous occurrences in which U.S. forces have been stationed abroad since World War II in occupation forces or for participation in mutual security organizations, base agreements, or routine military assistance or training operations.”³⁰ Of those, 130 have been reported to Congress.³¹

A 67% reporting rate may appear tolerable at first glance, but once we dive into the data, we can see the numbers are misleading. We can divide the pattern of use of force roughly in two periods: from the passage of the War Powers Act in 1973 until 1991, starting with President Richard Nixon and ending with President George H.W. Bush, and from late 1991 until the present. Presidents who governed during and immediately after the Cold

27. § 1548.

28. The resolution was intended to prevent “other Vietnams,” *see, e.g.*, Note, *Realism, Liberalism, and the War Powers Resolution* 102 HARV. L.REV. 637, 645 (1989); Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 20 (1995); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 838 (1972), as well as to ensure Congress plays a role in use of force decisions. *See* Cruden, *supra* note 13, at 66 (explaining that “the chain of events from 1969 to 1973 contributed . . . to the growing disenchantment” with the Executive and the need for Congress to act as a counterweight); Glennon, *supra* note 28, at 17–18; Ely, *supra* note 12, at 1380. Presumably, this is what the framers intended:

When the proposed Constitution was sent to the respective states for ratification, the memory of the traditional power of kings to commit unwilling nations to war made many fearful of an Executive with broad discretionary authority. The anti-Federalists expressed alarm over unfettered Presidential power while Federalist Alexander Hamilton deprecated the extent of such power.

Cruden, *supra* note 13, at 40–41.

29. TORREON, *supra* note 9, at 11–35.

30. *Id.* at 1. This is not a trivial exception, since covert actions can have far-reaching consequences: for instance, American Green Berets were deployed in Yemen to help Saudi Arabian forces, where they “[a]re helping locate and destroy caches of ballistic missiles and launch sites that Houthi rebels in Yemen are using to attack Riyadh and other Saudi cities.” In other words, they are taking part in hostilities, and going beyond training or equipping allied forces. Helene Cooper et al., *Army Special Forces Secretly Help Saudis Combat Threat from Yemen Rebels*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/us/politics/green-berets-saudi-yemen-border-houthi.html>.

31. *See* TORREON, *supra* note 9, at 11–35 (total of 130 extrapolated from data provided on pages 11 through 35).

War reported fewer uses of the armed forces abroad—possibly because of the WPR’s exclusion of covert actions.³² Thus, President Gerald Ford recorded seven uses of the armed forces abroad, with four reports under the WPR—and his May 15, 1975, report on the Mayaguez incident is the only one, to this day, to make an explicit reference to § 1543(a)(1) of the resolution.³³ President Jimmy Carter recorded four instances, with one report under the WPR.³⁴ President Ronald Reagan listed fifteen instances, with eight reports, and President George H.W. Bush, with fourteen uses of the armed forces abroad, reported six.³⁵ The number of WPR reports skyrocketed during the subsequent three administrations, but so did the uses of the armed forces abroad. President Bill Clinton used the armed forces abroad sixty-five times, with fifty-eight reports to Congress under the terms of the WPR, albeit with no mention of any particular provision;³⁶ President George W. Bush reported to Congress on thirty-eight different occasions out of the thirty-nine instances of use of the armed forces abroad; and President Barack Obama partially reversed the trend, with fifteen reports out of fifty-one instances of uses of the armed forces abroad.³⁷

At first glance, the WPR’s reporting requirement appears to have been effective. After all, there has been a report in about two-thirds of all instances where the President has used the United States armed forces abroad.³⁸ However, the lack of measurable consultation—as well as the fact that in only one instance did the President bind himself under the terms of § 1543(a)(1) and thus acknowledge the start of the sixty-day clock—at the very least casts doubt on the proposition that the WPR serves, in any shape or form, as a constraint on the Executive. As we will see over the next two sections, that intuition turns out to be correct.

III. CONSTITUTIONAL AND INTERPRETIVE ISSUES WITH THE WAR POWERS RESOLUTION

From a purely formal perspective—a “law on the books” one—the WPR places stark limitations on the President’s external war powers. However, the statute is deeply flawed; as the result of political compromise, the

32. *Id.* at 11–35.

33. *War Powers*, LIBRARY OF CONG., <http://www.loc.gov/law/help/usconlaw/war-powers.php> (last updated Oct. 15, 2019).

34. TORREON, *supra* note 9, at 12.

35. *Id.* at 12–13.

36. “During this time the President made a number of reports to Congress ‘consistent with the War Powers Resolution’ regarding the use of U.S. forces, but never cited § 4(a)(1), and thus did not trigger the 60 day time limit.” *War Powers*, *supra* note 33.

37. TORREON, *supra* note 9, at 14–35.

38. *Id.* at 11–35.

WPR suffers from several interpretive shortcomings. Among these, (1) the lack of a definition section—in particular, definitions of “consultation” and “hostilities”—provides a considerable degree of latitude for the Executive to interpret those concepts in the way most favorable to the Executive’s preferences; (2) the section that limits the situations when the Executive can use force without prior Congressional authorization could be considered an intrusion into the President’s commander-in-chief power, although due to structural concerns it has been of no practical application; (3) the cutoff mechanisms—the sixty-day time limit on use of armed forces and the cutoff provision—both depend on the President acting in response to “hostilities,” a term that the resolution fails to define; and finally, (4) the joint resolution and the interpretive sections both raise glaring constitutional issues.

A. Definition of Consultation

The problem of defining “consultation” and “hostilities” illustrates the limits of textualism as an interpretive method.³⁹ Section 1542 calls for the President to “consult” with Congress “in every possible instance” before the introduction of armed forces into “hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances”⁴⁰—that is, situations that fall under § 1543(a)(1).⁴¹ The issue here is that the WPR does not define what “consultation” means under the statute. Justice Kagan stated in *Yates v. United States* that “[w]hen Congress has not supplied a definition, we generally give a statutory term its ordinary meaning.”⁴² But that does not provide much of a starting point. “To consult” is commonly understood as to “[s]eek information or advice from (someone, especially an expert or professional)” and to “[h]ave discussions with (someone), typically before undertaking a course of action.”⁴³ These dictionary definitions fail to answer the critical questions, namely, how much consultation does the WPR call for? Is it sufficient for the president to do a quick question-

39. This is not news by any stretch of the imagination:

The most familiar problem with textualism is that statutory language is sometimes ambiguous or vague. To say that courts should rely on the words or on their ordinary meaning—the plain meaning approach—is unhelpful when statutory words have more than one dictionary definition, or when the context produces interpretive doubt.

Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 418–19 (1989).

40. 50 U.S.C. § 1542.

41. See *id.* § 1543(a)(1) (using the same language for determining hostilities as sections 1542 and 1541(c)).

42. 574 U.S. 528, 553 (2015) (Kagan, J., dissenting).

43. *Consult*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/consult> (last visited Oct. 30, 2019).

and-answer session or does it call for an in-depth discussion of an action taken? And with whom should the President consult? Is it with Congress acting as a whole—and if so, how? Or perhaps consultation should take place with the pertinent subcommittees, or even consultation with some individual members might suffice?

Of course, it would be naïve to assume that there is no consultation happening behind the scenes when the President is planning to commit the armed forces into hostilities. But how can the President “consult” with Congress? The provision seems to be drafted under the assumption that Congress, made up of many individuals, can speak with one voice outside of passing legislation, and yet, save for exceptional circumstances, it is factually impossible for it to do so. Even if consultation with the body as a whole were feasible, logistical and security considerations would be strong reasons not to read the resolution this way.⁴⁴ On the other hand, the WPR’s legislative history shows this is what Congress intended: “The conference committee purposely modified the House consultation requirement, providing for communication with ‘the Congress’ as opposed to only congressional leadership.”⁴⁵ Drafting issues aside, as Eugene Rostow said, “[the President] can consult only with members of Congress and of course he does so in a nearly continuous political process that occurs in many forms.”⁴⁶ That is not to say consultation has never been perfunctory. For instance, during the Cold War “Presidents often simply informed Congress of deployment decisions already made, or nominally consulted with some members.”⁴⁷

When it comes to the kind of consultation that would satisfy the requirement, the resolution is also unclear. Going to the legislative history of the provision once again, we learn that “consultation . . . means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of the action contemplated.”⁴⁸ The question here is what the approval of Congress implies: does approval mean mere acquiescence to a course of action proposed, or is the opinion of Congress

44. Ely, *supra* note 12, at 1400–01.

45. Cruden, *supra* note 13, at 82. The House version of the WPR called in section 3 for the President to report to the President of the Senate and the Speaker of the House of Representatives. *Id.* at 138. Accord Barbara H. Craig, *The Power to Make War: Congress’ Search for an Effective Role*, 1 J. POL’Y ANALYSIS & MGMT. 317, 320 (1982) (“The earlier House Joint Resolution had provided for presidential consultation ‘with the leadership and appropriate committees of Congress’; the final law replaced this specific language with the more ambiguous terminology ‘with Congress.’” (footnote omitted)).

46. Eugene V. Rostow, “*Once More Unto the Breach*”: *The War Powers Resolution Revisited*, 21 VAL. U.L. REV. 1, 41 (1986).

47. See Stromseth, *supra* note 13, at 846. For the situation immediately after the WPR was enacted, see Craig, *supra* note 45, at 321–23.

48. H.R. REP. NO. 93-287, at 6–7 (1973).

supposed to bind the President? If the latter, this would present an issue of congressional encroachment, since “Congress can act only as a collective body, by enacting legislation. The Constitution confers certain legislative powers on Congress, and it can have no other powers.”⁴⁹ Therefore, the approval or rejection by members of Congress of a course of action subject to consultation cannot be binding in the absence of a statute. In terms of statutory purpose,⁵⁰ if the idea behind the resolution is to get Congress involved with the decision-making process, the WPR can scarcely be effective when the required consultation is not defined therein.⁵¹

The WPR is not only unclear about what the process of consultation entails, but also the kind of information the President should be required to disclose to Congress. Former Secretary of State Cyrus Vance said that “congressional leadership should be given all information about a planned action that is material to a judgment about its advisability . . . [and] congressional leadership should receive that information sufficiently in advance of the planned action” to develop an informed judgment.⁵² That proposition appears to be eminently reasonable, yet nothing in the text of the WPR facilitates such an inference. The legislative history of the provision indicates that Congress thought the President must be present in the deliberations,⁵³ but it is silent when it comes to the quantum of information that the Executive must provide.

Finally, another limitation of this provision is that only a § 1543(a)(1) report requires consultation,⁵⁴ which considerably narrows the applicability of the provision—more so when one considers the executive practice of not explicitly mentioning § 1543(a)(1) even when initiating hostilities that would be covered by its terms. In sum, both by its terms and by practice, the consultation provision appears to be no more than advisory in nature.

49. Rostow, *supra* note 46, at 41 (emphasis omitted).

50. By statutory purpose I mean the objective that the legislature had in mind when passing the statute; in other words, that a “guide to the meaning of a statute is found in the evil which it is designed to remedy” and what measures are written in the law in order to do so. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892). This understanding of purpose is not value neutral, since “[t]o understand the meaning of legislation, the interpreter must understand the legislature’s reasons for acting and what the legislature intended to accomplish in passing the statute that was enacted.” SAMUEL ESTREICHER & DAVID L. NOLL, *LEGISLATION AND THE REGULATORY STATE* 126 (1st ed. 2015). However, this approach tracks quite well with the legislative history of the WPR, namely, that Congress saw a problem (the Executive had too much latitude to use force without prior approval from Congress) and sought a way to remedy it.

51. See *Realism, Liberalism, and the War Powers Resolution*, *supra* note 28, at 637–38; Cyrus T. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 90–92 (1984).

52. Vance, *supra* note 51, at 90–91.

53. H.R. REP. NO. 93-287, at 6–7.

54. See 50 U.S.C. §§ 1541–1549 (2014).

B. Definition of Hostilities

When it comes to “hostilities”—arguably the most important term on the resolution, since the presence of hostilities triggers the consultation and the reporting requirements under 1543(a)(1)—the same definitional issues as with “consultation” rear their heads. According to the legislative history, the concept of “hostilities” was intended to be broader than armed conflict, to encompass a situation where “no shots have been fired but where there is a clear and present danger of armed conflict.”⁵⁵ That the term was left undefined was not an accident; as Professor Harold Koh noted, “[m]embers of Congress understood that the term [‘hostilities’] was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the resolution a ‘one size fits all’ straitjacket that would operate mechanically, without regard to particular circumstances.”⁵⁶ This proposition is bolstered if one examines the WPR from a structural perspective;⁵⁷ that the statute lacks a definitions section is a powerful argument in favor of the proposition that the existence of “hostilities” should be determined on a case-to-case basis.⁵⁸

If the resolution had a definition section, then the Executive would have less room to decide under which provision of § 1543 a particular military action should be reported. That the WPR is, as a practical matter, non-justiciable⁵⁹ does give the Executive greater latitude when it comes to its interpretation—interpretation that might even border on a redefinition of the statutory terms. Nevertheless, the presence of a baseline should, as a theoretical matter, serve as a limit on interpretive discretion. As the Supreme Court said in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, once Congress has defined a term in a certain way, only Congress can amend the definition provided by the statute.⁶⁰ The prac-

55. WEED, *supra* note 3, at 2–3.

56. *Testimony by Legal Adviser Harold Hongju Koh, U.S. Dep’t of State, on Libya and War Powers, Before the S. Foreign Relations Comm.*, at 5 (June 28, 2011), <https://2009-2017.state.gov/documents/organization/167452.pdf>.

57. I rely on Philipp Bobbitt’s understanding of the term as inferences drawn from the existence of structures within the Constitution as a whole and the logical inferences that can be drawn from them. PHILIPP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74 (1982).

58. As Judge Revercomb said in *Lowry v. Reagan*, “First, and most importantly, the very absence of a definitional section in the Resolution, coupled with debate suggesting that determinations of ‘hostilities’ were intended to be political decisions made by the President and Congress, suggest to this Court that fixed legal standards were deliberately omitted from this statutory scheme.” 676 F. Supp. 333, 341 n.53 (D.D.C. 1987).

59. *See infra* note 147.

60. *See* 474 U.S. 361, 374 (1986) (“The [statute’s definition of bank] may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to

tical result from leaving the substantive content of the term hostilities purely to the political process is that “[t]he ambiguity of the[] term[] has resulted in legalistic hairsplitting . . . as the executive branch has attempted to justify noncompliance with the resolution, notwithstanding clear military involvement.”⁶¹ Perhaps the most glaring case of dynamic statutory interpretation of the WPR thus far has been the issue of usage of Unmanned Aerial Vehicles (UMVs or “drones”) against hostile targets in Libya; clearly using drones to kill enemy combatants is a use of force (they are not being killed with kindness), but it does not constitute hostilities within the meaning of the resolution for the executive branch, since the concept is taken to mean a “‘situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces,’ but not to include ‘irregular or infrequent violence which may occur in a particular area.’”⁶² A broad definition of hostilities, one that made explicit reference to uses of force, would perhaps not have precluded the executive branch from asserting that use of drones are not included within the meaning of hostilities—since sheer departmentalism⁶³ is the rule in the absence of judicial decisions on the merits in WPR cases—but it would have made the argument much less plausible on its own terms.

C. Permissible Uses of Force in 1541(c)

Although “[n]othing in [the WPR] is intended to alter the constitutional authority of the Congress or of the President,”⁶⁴ a literal reading of § 1541(c) casts doubt on this proposition. Section 1541(c) provides that the President can introduce the armed forces into hostilities or situations where involvement in hostilities is imminent “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.”⁶⁵ The placement of the phrase “only pursuant” immediately before

administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.”)

61. *Realism, Liberalism, and the War Powers Resolution*, *supra* note 28, at 649.

62. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1145–46 (2013).

63. Attorney General Bates gave a concise description of what departmentalism means in his long-discredited habeas corpus opinion: “These departments are co-ordinate and co-equal—that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others” *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y Gen. 74, 76 (1861). And since in questions of the Executive’s foreign relations power the courts opt to step aside, Congress and the President have no “ordained or legal superior” to decide which interpretation of the law is correct. *Id.*

64. 50 U.S.C. § 1547(d).

65. *Id.* § 1541(c).

listing the situations suggests that the only circumstances when the Commander-in-Chief can introduce the armed forces are the three situations listed and no more. Of those three, it is highly unlikely we will see a declaration of war issued again.⁶⁶ That leaves (2) and (3). The problems that arise from the requirement of specific statutory authorization will be discussed *infra*, and while allowing the President to use force in self-defense within American territory is relatively uncontroversial,⁶⁷ the issue with this section remains: other situations might arise where the President could need to use force without prior authorization from the Congress.

In particular, the WPR precludes the president from using the armed forces to rescue or defend American citizens abroad. This has provided an opportunity for several Presidents to go around its terms, with subsequent damage to the legitimacy of the resolution as an effective constraint on the executive's unilateral use of force.⁶⁸ Notice, however, that what appears to be a glaring omission in the WPR was known to Senators at the time the resolution was under discussion: "The Senate sponsors saw the need to extend the scope of these emergency powers to defend U.S. forces stationed abroad and to rescue U.S. citizens if all the other means to protect them had been exhausted,"⁶⁹ but the version of the resolution that finally passed did

66. Congress has formally declared war only in eleven instances, with the latest of them dating from 1942. *Official Declarations of War by Congress*, U.S. SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Nov. 9, 2019). Moreover, the Supremacy Clause in Article VI elevates treaties the United States had entered into constitutional status—at least on paper, absent the executing and non-self-executing distinction. *Missouri v. Holland*, 252 U.S. 416, 432 (1920). Of those treaties, the United Nations Charter only allows a state to use war in self-defense (be it individual or collective) or to comply with measures ordered by the Security Council under Chapter VII. U.N. Charter art. 42, 51. A declaration of war, thus, would be a breach of the charter, and a completely unneeded one in practical terms at that. Moreover, as we will see in the next section, it is in the "national interest" of the United States to preserve the Charter.

67. The authorization is also arguably not needed. While the *Prize Cases* are commonly held to mean that the President can repel an attack without waiting for statutory authorization from Congress, that is not completely accurate; the President had been authorized "by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, . . . to call[] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States." *The Brig Army Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 668 (1863).

68. For example, Gerald Ford rescued American citizens held in Cambodia in 1975. Ronald Reagan did the same in 1982 with respect to Americans endangered in Grenada, and Jimmy Carter in 1980 attempted to rescue American citizens held hostage in the American Embassy in Iran. See *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 185–87 (1980), https://www.justice.gov/sites/default/files/olc/opinions/1980/02/31/op-olc-v004a-p0185_0.pdf.

69. J. Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U.L.J. 57, 60 (2007).

not include rescue of citizens as a situation where the President may use force. The argument has also been made that the President has independent constitutional authority under the Commander-in-Chief clause to effectuate a rescue of this kind, which would make the omission—and thus this section—unconstitutional.⁷⁰

Section 1541(c) also fails to account for the challenges that arise from fighting terrorist organizations. The WPR was drafted with only one kind of armed conflict in mind: conventional interstate warfare, whereas one of the major threats to the United States' security interests comes from non-state actors. As Professors David Barron and Martin Lederman recognize, fighting terrorism poses a series of logistical challenges: the enemy is not another state, but often merges into the civilian population; the conflict is not focused on a single geographic area, however broadly the geographic area might have been defined when fighting against another nation-state; the methods employed are different from those used in a conventional war; and terrorist organizations are by nature diffuse.⁷¹ An actual terrorist threat that doesn't fall into § 1541(c)—"a national emergency created by attack upon the United States, its territories or possessions, or its armed forces"⁷²—would call for a quick response, possibly a preemptive one, and for some degree of secrecy when it comes to the measures the President must take. For instance, this situation would occur if an event like the 2019 attack on Saudi oil fields were carried out by a terrorist organization.⁷³ Naturally, a military response to a terrorist threat is not the only option on the

70. It has been agreed since *Durand v. Hollins* that American "citizens abroad must look for protection of person" to the President of the United States. *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860). Thus, "for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president." *Id.* Justice Nelson's argument rests on a similar basis as Alexander Hamilton's defense of a separate executive power in Federalist 70, since "[a]cts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action." *Id.* Note that the United States is not the only country that asserts protection of nationals abroad as a justification for the use of force, and that while the issue is controversial in international law, there is an argument that this would fall within the UN Charter's Article 51 right of self-defense. GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 26 (2012). See also Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A.L. REV. 683, 683–84 (1984); Cruden, *supra* note 13, at 109.

71. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 692, 713 (2008).

72. 50 U.S.C. § 1541(c).

73. Ben Hubbard et al., *Two Major Saudi Oil Installations Hit by Drone Strike, and U.S. Blames Iran*, N.Y. TIMES (Sept. 15, 2019), <https://www.nytimes.com/2019/09/14/world/middleeast/saudi-arabia-refineries-drone-attack.html>.

table,⁷⁴ and depending on the facts at hand, it may very well be counterproductive, but if the situation calls for the use of force, speed and secrecy appear to be primary considerations. The process of congressional lawmaking can scarcely guarantee either.⁷⁵

“The proposition that force and threats of force are a necessary instrument of diplomacy and have a role to play in foreign policy is part of the conventional wisdom of statecraft.”⁷⁶ Experience has shown this premise is not unknown to the American Executive; “over the course of our history, Presidents have repeatedly engaged the country’s armed forces in hostilities short of war without prior authorization by Congress,”⁷⁷ and the historical trend has been an increase in the assertion of executive authority. To briefly recapitulate the process, in the middle of the nineteenth century, Presidents became increasingly “more assertive” about the use of military action.⁷⁸ Subsequently, they committed American forces to campaigns in the Caribbean and Latin America in order to secure the national interest, lacking congressional authorization.⁷⁹ The trend intensified during the Cold War, when presidents frequently used their authority as Commander in Chief to send troops abroad to defend the national interest.⁸⁰ Even Professor John Hart Ely, a fierce critic of the so-called imperial presidency conceded—albeit in a roundabout way—that the President could use force to repel attacks that placed the national security of the United States in jeopardy, but

74. Discussing the issues with a conventional response to a terrorist threat Atwood says: Terrorists retain a certain tactical advantage when they lure a conventional force onto territory known best by the terrorist organization. The terrorists’ first victory may well be luring the dominant power into combat. The second victory is then gained when the terrorists avoid defeat by melting into the civilian landscape

Atwood, *supra* note 69, at 71.

75. As Justice Kennedy recognized in *Zivotofsky v. Kerry*, “only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise . . . [d]ecision, activity, secrecy, and dispatch.” 135 S. Ct. 2076, 2086 (2015) (quoting THE FEDERALIST NO. 70, 424 (Alexander Hamilton)) (alteration in original).

76. Alexander L. George, *The Role of Force in Diplomacy: Continuing Dilemma for U.S. Foreign Policy*, www.pbs.org/wgbh/pages/frontline/shows/military/force/article.html (last visited Oct. 13, 2017).

77. Walter Dellinger, Symposium, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 114 (1995).

78. Stromseth, *supra* note 13, at 866.

79. *Id.* at 868.

80. *Id.* at 846. An example of this is the United States’ 1988 intervention in Panama, to “further safeguard the canal, U.S. lives, property and interests in the area.” TORREON, *supra* note 9, at 13. Although it predates the WPR, perhaps the most famous example is the United States sending forces abroad to fight in Korea in defense of “the broad interests of American foreign policy.” Stromseth, *supra* note 13, at 869. The topic of the national interest as a justification for the use of military force will be treated later in this article. See *infra* Part IV.B.

whose target was not the “[t]he United States, its territories or possessions, or its armed forces.”⁸¹

International politics is inextricably linked to the use of force abroad. As some scholars have stated,

the United States has sought to advance its core interests in security, prosperity, and domestic liberty by pursuing three overlapping objectives: managing the external environment to reduce near- and long-term threats to U.S. national security; promoting a liberal economic order to expand the global economy and maximize domestic prosperity; and creating, sustaining, and revising the global institutional order to secure necessary interstate cooperation on terms favorable to U.S. interests.⁸²

One way the United States seeks to “advance its core interests” is through security commitments,⁸³ force being another tool in the Executive’s diplomatic toolkit. Consequently, one does not need to rely on the “sole organ” doctrine⁸⁴ to see why a limitation on the use of force as an instrument of foreign policy may be misguided. In particular, strict adherence to § 1541(c) would preclude the threat of force during a negotiation—to be sure, the President could threaten to use force without Congressional authorization,⁸⁵ but the threat would have limited coercive power, given that credibility is a function of whether commitments can be ensured and the possibility of Congress overriding the Executive does nothing but diminish it.⁸⁶ The argument, in short, is that diplomacy requires flexibility, and strict adherence to the terms of § 1541(c) would take it away from the President. Nevertheless, regardless of the many constitutional and interpretive issues present, this section is perhaps the least problematic provision in the WPR,

81. Stromseth, *supra* note 13, at 888–89. Ely, however, does not concede that the Congress has no role: the President must request congressional authorization “at the latest, simultaneously with the issuance of the order dispatching the troops.” *Id.* at 889 (quoting JOHN HART ELY, *WAR AND RESPONSIBILITY* 54, 6 (1993)).

82. Stephen G. Brooks et al., *Don’t Come Home, America: The Case Against Retrenchment*, 37 *INT’L SEC.* 7, 11 (2012).

83. Among those, NATO and the Treaty of Mutual Cooperation and Security between the United States and Japan stand at the forefront but are by no means the only major commitments the United States has undertaken since the end of the Second World War. As President Obama said in his 2009 address accepting the Nobel Peace Prize, “[t]he United States of America has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms . . . promot[ing] peace and prosperity from Germany to Korea, and enabled democracy to take hold in places like the Balkans.” President Barack Obama, *A Just and Lasting Peace* (Dec. 10, 2009), https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

84. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

85. *Realism, Liberalism, and the War Powers Resolution*, *supra* note 28, at 653.

86. David P. Forsythe et al., *United States Use of Force Abroad: What Law for the President?*, 26 *PRESIDENTIAL STUD.* Q. 950, 950 (1996).

since the placement of this provision within the statutory scheme—in the purpose and policy section instead of in the statute proper—has ensured the irrelevance of this section as a practical matter.⁸⁷

D. Cutoff Mechanism in § 1543(a)(1) and § 1544(b)

The WPR attempts to limit Presidential power mainly by establishing an automatic cutoff mechanism to uses of force abroad. From a structural point of view, this mechanism has two parts—the sixty-day time limit and the cutoff provision.⁸⁸ Section 1543(a)(1) calls for a written report when armed forces are introduced “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”⁸⁹ Once a report filed under 1543(a)(1) has been submitted, the actual cutoff provision comes into play. Section 1544(b) mandates the termination of hostilities after sixty days, “unless the Congress (1) has declared war or has enacted specific authorization for such use of the United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.”⁹⁰

The cutoff mechanism—subsections 1543(a)(1) and 1544(b) taken together—is not exempt from constitutional issues. It is an example of encroachment upon executive authority, since it can be read as Congress unduly placing limitations on the President’s Commander-in-Chief power. The Constitution does not define that power’s scope,⁹¹ but we can look to the framers’ understanding of the Commander-in-Chief Clause and Supreme Court decisions. Regarding the former, Alexander Hamilton said in Federalist 23,

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; . . . [and] to *direct their operation* These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.⁹²

87. Ely, *supra* note 12, at 1393.

88. *Id.* § 1544(b).

89. *Id.* § 1543(a)(1).

90. *Id.* § 1544(b).

91. “As David Strauss summarizes, in the contemporary practice of constitutional law, ‘the text matters most for the least important questions,’ and often does not matter at all.” Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1809 (2009) (quoting David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 916 (1996)).

92. THE FEDERALIST NO. 23 (Alexander Hamilton) (emphasis added).

This notion is also reflected in Supreme Court jurisprudence⁹³ and is recognized by most commentators as the way the clause operates,⁹⁴ as well as by the OLC.⁹⁵ This constitutional issue with the cutoff mechanism is compounded by the fact that the mechanism would be triggered by congressional inaction. In practical terms, the mechanism constitutes a “silent veto,” which would allow Congress “to dictate the tactical conduct of military operations—an infringement of both the President’s Commander-in-Chief power and his authority as Chief Executive of the nation”⁹⁶—by simply failing to act. Hypothetically speaking—and using a classic scenario for the purpose of illustration—were the cutoff mechanism to operate as it is supposed to, the President could order the troops on day fifty-nine to take over a hill that is necessary to prevent the enemy from advancing, but *ceteris paribus*, could not do so on day sixty of the campaign, even in the absence

93. The notion was first recognized in *Ex parte Milligan*: “But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns . . .” 71 U.S. 2, 139 (1866) (Chase, J., dissenting). *See also* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), where the Supreme Court adopted Justice Chase’s interpretation of the Commander-in-Chief Clause.

94. It is outside of the scope of this article to delve into the question of what the substantive content of the Commander-in-Chief clause actually is. However, Barron and Lederman—albeit embracing a contrary vision—recognize that most war powers scholars have embraced some variant of the reading that “the Commander in Chief Clause, at its core, establishes that ‘the president has tactical command once Congress decides troops should be used.’” Barron & Lederman, *supra* note 71, at 750–51 (quoting H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS* 115 n.123 (2002)). As an example of the majority view, *see* David Golove, *Against Free-Form Formalism*, 73 N.Y.U.L. REV. 1791, 1855 (1998): “Only the President can direct troop movements, form military strategies, order a battlefield attack, and so on.” But a minority position—exemplified by Louis Henkin—believes that “in war the President’s powers as Commander in Chief are subject to ultimate Congressional authority to ‘make’ the war,” from which it can be deduced that “Congress can control the conduct of the war it has authorized.” LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 103 (2nd ed. 1996). David J. Barron and Martin S. Lederman express a similar position in their article.

95. In discussing the clause, the OLC explains that the president’s military powers are generally not limited by Congress:

It is for the President alone, as Commander-in-Chief, to make the choice of the particular personnel who are to exercise operational and tactical command functions over the U.S. Armed Forces . . . [Congress’s] framework rules may not unduly constrain or inhibit the President’s authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field . . .

Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 185 (1996).

96. Turner, *supra* note 70, at 684.

of any statutory prohibition by the Congress.⁹⁷ Hamilton said the Commander-in-Chief power “would amount to nothing more than the supreme command and direction of the military and naval forces.”⁹⁸ However, if the President’s ability to make operational decisions is bound to a higher authority—one that can veto his decisions without taking any action whatsoever—then how can the President be the *supreme* commander of the armed forces?

But the cutoff mechanism can also be read in a way that favors the Executive. Louis Henkin succinctly makes the case: “instead of limiting Presidential authority, the Resolution indeed enlarges it by giving legislative sanction to Presidential hostilities, even to war, for sixty days.”⁹⁹ Thus, as a matter of drafting, the cutoff mechanism fails to achieve the Congressional purpose of limiting presidential authority, either because the sixty-day cutoff provision is too blunt an instrument (and likely unconstitutional) or because the mechanism would enable the President to use force for sixty days without prior consultation with Congress.

Issues of constitutionality are not the only flaws of this part of the Resolution. Just as importantly, there are two statutory drafting issues that hamper the WPR’s effectiveness. First, operations reported under sections 1543(a)(2) and (a)(3) do not trigger the WPR’s cutoff mechanism, which grants the President a way to avoid having to deal with “[t]he heart of the resolution.”¹⁰⁰ Second, the cutoff mechanism, by a plain reading of the text, comes into operation only when troops are introduced; “the Resolution does not seem to require a report when the troops are already in place and hostilities (or their imminent likelihood) arise later.”¹⁰¹ Therefore, the structure of the WPR itself is at cross-purposes with the legislative objective of constraining the unilateral use of force by the President, since the consultation requirement applies only in one particular circumstance, one that Presidents can (and have) avoided by reporting their actions under the other subsections of 1543 or simply without any reference to particular sections of the WPR.

97. Henkin also says that “[i]t would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the President’s authority is effectively supreme.” HENKIN, *supra* note 94, at 103–04. Regardless, his understanding of war powers in general would have the Congress effectively deciding on tactical matters, by virtue of failing to decide on the broader issue of hostilities itself.

98. THE FEDERALIST NO. 69 (Alexander Hamilton).

99. HENKIN, *supra* note 94, at 107. See also Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1154 (2001); *Realism, Liberalism, and the War Powers Resolution*, *supra* note 28, at 653.

100. Ely, *supra* note 12, at 1393. Note that OLC has adopted this interpretation. See *infra* Part IV, B.

101. Ely, *supra* note 12, at 1402. Incidentally, as I will show later in this article, OLC has taken the same view. See *infra* Part IV, B.

Finally, there are practical issues that would arise were the resolution to operate as intended. First, the mandatory withdrawal provision might compromise United States security interests; an often-cited proposition is that it might give the President an incentive to escalate in order to end a conflict within sixty days.¹⁰² Looking at the issue from the other side, if an adversary knows the President will have to cease operations after sixty days, an argument could be made that the resolution gives an incentive to hold out until the sixty-day time limit has passed, the moment at which the President would be forced to order a withdrawal if he were unable to get authorization from Congress.¹⁰³ The same thing would happen in cases where the armed forces are engaged in police work—which was the case in Haiti, Somalia, and Bosnia—or in any nation-building project, since “the Resolution gives would-be adversaries an incentive to engage American troops in firefights, with the hope that ensuing hostilities will trigger the Resolution’s reporting requirement and necessitate the withdrawal of the forces within sixty days.”¹⁰⁴ However, considering that the enemies the United States is likely to face in the future are non-state actors, it is doubtful in the first place that they are *a priori* acquainted with the terms of the resolution. Assuming they are, it would not be a stretch to suppose they are also acquainted with how the resolution has worked in practice as well.

Far more importantly, Presidents have encountered the need to continue military operations beyond the sixty-day time limit. As Professor Harold Koh notes when recalling his experience with the intervention in Libya, the Obama administration was forced to come up with an alternative rationale—to be discussed in the next section—to sidestep the § 1543 trigger and continue operations.¹⁰⁵ This was not the first time circumstances forced the White House’s hand: Operation Allied Force, initiated in March 1999 by President Clinton against the then Federal Republic of Yugoslavia, “was the first combat operation to continue beyond sixty days without express

102. *Realism, Liberalism, and the War Powers Resolution*, *supra* note 28, at 652.

103. An example of this same reasoning was given by Lieutenant General Kenneth McKenzie of the Marines, speaking to Congress in the context of President Trump’s sudden announcement that the United States will be pulling out from Syria and Afghanistan: “I don’t know how long it’s going to take. I think that one of the things that would actually provide the most damage to them would be if we put a timeline on it and we said we were going out at a certain point in time.” Thomas Gibbons-Neff & Mujib Mashal, *U.S. to Withdraw About 7,000 Troops From Afghanistan, Officials Say*, N.Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/us/politics/afghanistan-troop-withdrawal.html?action=click&module=Spotlight&pgtype=Homepage>. How accurate this kind of reasoning is can be left for discussion, but it is also a fact that it is a way of thinking often employed by military planners.

104. Glennon, *supra* note 28 at 21.

105. Harold Hongju Koh, *The War Power and Humanitarian Intervention*, 53 HOUS. L. REV. 972, 983–87 (2016).

statutory authorization,”¹⁰⁶ and it was initiated pursuant to the President’s Commander-in-Chief and chief-executive authority.¹⁰⁷ Note that after the sixty-day time limit had passed, Congress did not pass a resolution ordering the President to cease operations, nor did it find that the President had violated the WPR.¹⁰⁸ “Thus, by the summer of 1999, the President had been able to proceed with his policy of intervention in the Kosovo crisis” unhindered by the resolution.¹⁰⁹ One commentator stated, in 1996, that “[e]ven if the clock does not tick on the sixty-to-ninety-day deadline, executive officials behave as though it does.”¹¹⁰ However, while this was true for Grenada and Panama—both operations were conducted as if the sixty-day limit was politically enforceable—we can see that is no longer the case: path-dependence has a great deal of power in foreign relations law, and President Clinton’s intervention in Kosovo in spite of the sixty-day clock is a strong historical precedent in favor of the Executive. Case in point, President Obama struggled with the same issue later in Libya, and we already know the results. The fact that the President can ignore the express terms of the resolution is a clear demonstration of the limits of the WPR in action.

The sixty-day clock is also ill-equipped to deal with the issues that arise when the United States is not facing another nation-state as its primary rival. Given the nature of the conflicts the United States will face in the future, this is unlikely to change: most of its adversaries are expected to be irregular combatants, and setting a hard time limitation by law is counter-productive to the conduct of military campaigns, necessarily protracted to deal with such foes,¹¹¹ even when the United States is not taking the lead in

106. Corn, *supra* note 99, at 1154.

107. “I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” William J. Clinton, *Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)*, THE AM. PRESIDENCY PROJECT (Apr. 7, 1999), <https://www.presidency.ucsb.edu/documents/letter-congressional-leaders-reporting-airstrikes-against-serbian-targets-the-federal-0>.

108. See WEED, *supra* note 3, at 34–35.

109. *Id.* at 35.

110. See Stromseth, *supra* note 13, at 871 (quoting LOUIS FISHER, *PRESIDENTIAL WAR POWER* 133 (1995)).

111. Professor Kiras explains the issues with a short-duration campaign against an irregular combatant thus:

Many irregular campaigns result in deadlock after a period of time with neither side able to conclude the conflict decisively. The Liberation Tamil Tigers of Eelam (LTTE) waged insurgency within Sri Lanka for more than four decades; the *Fuerzas Armadas Revolucionarias de Colombia-Ejercito del Pueblo* (FARC) has conducted insurgent and terrorist campaigns within Columbia for almost a half-century. Only very rarely does guerrilla struggle end quickly.

James D. Kiras, *Irregular Warfare: Terrorism and Insurgency*, in *STRATEGY IN THE CONTEMPORARY WORLD* 173, 177 (John Baylis et al. eds., 4th ed. 2013).

the fight. Moreover, irregular wars are fought primarily on the political plane—those who attain political legitimacy within the population are more likely to be the victors.¹¹² How much can the United States truly hope to weaken the adversary’s political support in a period of sixty, or ninety days if extended?

Regardless, outright lack of compliance is not the only way Presidents have gotten around the cutoff mechanism. They often simply report on the use of armed forces to Congress with the notation “pursuant to the War Powers Resolution,” or “consistent with the War Powers Resolution” without explicitly mentioning § 1543(a)(1), in order to avoid starting the clock.¹¹³ Examples abound: President George H.W. Bush did so in 1989 when he deployed armed forces in Panama¹¹⁴ and in 1992 when he sent forces to Somalia,¹¹⁵ President Clinton followed suit in 1993 when he sent forces to Haiti, twice again in 1994,¹¹⁶ in 1995 when he sent troops to Bosnia¹¹⁷ and in 1999 in Kosovo;¹¹⁸ and President George W. Bush did the same in 2001 as a response to September 11.¹¹⁹ Most recently, this is what President Donald Trump did in 2017 and 2018 when he used missiles against Syrian installations.¹²⁰

112. Explaining the irregular fighter’s needs for support Professor Kiras explains: Insurgents and terrorists fighting irregular wars require internal or external support to sustain their struggle. Terrorists and insurgent leaders need to convey the reason for their actions or lose sympathy for its cause. They often seek to legitimize their use of violence and translate this into meaningful support for their cause by demonstrating moral superiority over those who represent the state . . .

Id. at 181.

113. “Reports have been sent to Congress over the years, but they have been very brief and contained no information that was not already in the public domain. Often the reports did not cite Section 4(a)(1) explicitly in an apparent effort to avoid the cut-off trigger.” Atwood, *supra* note 69, at 63.

114. *See* WEED, *supra* note 3, at 18.

115. *Id.* at 25.

116. *Id.* at 35.

117. *Id.* at 31–32.

118. *Id.* at 34–35.

119. *Id.* at 39.

120. The relevant language of President Trump’s message to Congress is: “I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution.” John Bellinger, *President Trump’s War Powers Report on the Syria Attacks*, (Apr. 8, 2017), <https://www.lawfareblog.com/president-trumps-war-powers-report-syria-attacks>. Identical language was used in President Trump’s notice to Congress on the 2018 strikes on Syria. Matthew Kahn, *Document: White House Letter of Notice to Congress on Syria Strike*, LAWFARE (Apr. 17, 2018), <https://www.lawfareblog.com/document-white-house-letter-notice-congress-syria-strike>. President Trump’s report under § 1264 of the National Defense Authorization Act for Fiscal Year 2018, while not being technically a WPR report, employs the same strategy: “The report repeatedly references ‘constitutional authority’ or ‘statutory authority’ without articulating a specific argument or pointing to specific statutory provisions, sometimes making it difficult to discern the actual contours of

Second, the Obama administration might have stumbled upon the One Weird Trick¹²¹ to avoid triggering the § 1544(b) cutoff provision: multiple WPR notifications for short-term, circumscribed military operations.¹²² This raises the interpretive issue of when the sixty-day clock should start running: should it cover all operations that arise from the same strategic objective or could be plausibly construed as part of the same campaign, starting from the earliest one? Or in the alternative, should each operation have its own, independent sixty-day timeline? Needless to say, the latter would be a clear way to “undercut the WPR’s goal of ensuring that U.S. forces were not engaged in hostilities against an enemy force for a sustained period of time without congressional authorization.”¹²³ Ultimately, the resolution itself provides no answer; as Professor Jack Goldsmith mentions, one plausible reading of the text of § 1544(b) is that it calls on the President to terminate hostilities with regard to the use of force for which the § 1543(a)(1) report was submitted, but “[i]f the use of the armed forces with respect to which the report is filed is narrowly defined, then arguably no duty materializes if the discrete use of the armed forces related to the report terminates before 60 days.”¹²⁴ The plain text of this provision strongly encourages the Executive to report uses of force relating to hostilities in the narrowest way possible—a practice that would render the sixty-day cutoff provision irrelevant.

E. Termination of Hostilities by Joint Resolution in § 1544(c)

Section 1544(c) is perhaps the WPR’s most facially problematic section in terms of constitutionality. This section allows Congress to pass a

the executive branch’s legal positions.” Murphy & Anderson, *supra* note 22. Note the Trump administration might have employed similar language in its WPR report on the Soleimani strike, but since it has been classified, we have no way to know at the moment.

121. For an explanation of this ever-popular phrase, see Alex Kaufman, *Prepare to be Shocked!*, SLATE (July 30, 2013), http://www.slate.com/articles/business/moneybox/2013/07/how_one_weird_trick_conquered_the_internet_what_happens_when_you_click_on.html.

122. President Obama made eight WPR notifications between June 16, 2014, and September 8, 2014. While some of them could have conceivably fallen under Sections 1543(a)(2) or (a)(3), at least three of them would have fallen under the 1543(a)(1)—the provision that triggers the cutoff mechanism. See WEED, *supra* note 3, at 45–47.

123. *Id.* at 47.

124. Jack Goldsmith, *A New Tactic to Avoid War Powers Resolution Time Limits?*, LAWFARE (Sept. 2, 2014), <https://lawfareblog.com/new-tactic-avoid-war-powers-resolution-time-limits>. From the examples Professor Goldsmith gives in his article, there can be concurrent operations (the President deploys soldiers on day one, then initiates a series of airstrikes on day five). What matters is that each one of those operations end, in fact, in a period of sixty days. The President could deploy soldiers on day one, bring them back on day fifty-nine, and then deploy them again the next day, as part of a campaign against the same adversary, and that would count as a different use of force.

concurrent resolution directing the President to remove the armed forces from a particular conflict that does not have specific statutory authorization. This, along with the sixty-day time limit provision, was one of the two sections that was explicitly called unconstitutional by President Nixon in his veto message because it “would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.”¹²⁵ The constitutionality of § 1544(c) would be jeopardized further by the Supreme Court’s decision in *INS v. Chadha*, where Chief Justice Burger declared the legislative veto to be unconstitutional, since the Constitution requires both bicameralism and presentment to pass legislation. The legislative veto—according to the majority opinion—was legislation without presentment, and thus unconstitutional.¹²⁶ As Dean Rostow states, the holding in *Chadha* would be fully applicable to a § 1544(c) joint resolution: “Section [1544(c)] is a classic example of the legislative veto . . . [since] it purports to reserve to Congress the power to terminate or reverse a President’s action under a statute”¹²⁷

Holding § 1544(c) to be unconstitutional would, in theory, deprive the WPR of an effective enforcement mechanism. The logic is simple: if the Congress has no way to compel the President to withdraw troops that have been placed in the field in contravention of the resolution, it follows that enforcement of the resolution would fall to the courts, whose reticence to address substantive issues in cases relating to foreign policy is well known.¹²⁸ This explains why some commentators have attempted to distinguish § 1544(c) from a *prima facie* legislative veto. John Hart Ely observed that § 1544(c) should be read together with § 1543(a)(1) and § 1544(b)

as part of a package attempting in concrete terms to approximate the accommodation reached by the Constitution’s framers, that the President could act militarily in an emergency but was obligated to cease and de-

125. Richard Nixon, *Veto of the War Powers Resolution*, THE AM. PRESIDENCY PROJECT <https://www.presidency.ucsb.edu/documents/veto-the-war-powers-resolution> (last visited Nov. 21, 2019).

126. *INS v. Chadha*, 462 U.S. 919, 945–50 (1983).

127. Rostow, *supra* note 46, at 43.

128. The idea is captured in the concept of foreign relations exceptionalism. Simply put, “the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers.” Curtis A. Bradley, *What is Foreign Relations Law?*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 11 (Curtis A. Bradley ed., 2019) (internal citations omitted). As we will see in the following section, this applies fully to WPR litigation, where not a single case has been decided on the merits.

sist in the event Congress did not approve as soon as it had a reasonable opportunity to do so.¹²⁹

Section 1544(c) could also be read as “[t]he functional equivalent of a statute providing that [the President may not commit troops] to combat for more than sixty days (unless this statute is amended).”¹³⁰

Nevertheless, the discussion is merely academic for two reasons: first, it is unlikely that Congress would ever invoke § 1544(c) directly,¹³¹ and thus the courts will not have an opportunity to declare this section unconstitutional. This is in no small part because of the second reason: while Congress has not amended the WPR since its passage, 50 U.S.C. § 1546a, a free-standing measure first adopted in 1983, subjects any joint resolution requiring the removal of troops to § 601(b) of the International Security and Arms Export Control Act of 1976¹³²—which would allow the President to exercise his veto power over a removal resolution.¹³³ The text of § 1546a permits the inference of the possibility of a presidential veto,¹³⁴ which should be enough to cure § 1544(c)’s constitutional infirmity.¹³⁵

129. Ely, *supra* note 12, at 1396.

130. *Id.* at 1401 n.67.

131. Professor Ely sees this as a near certainty:

We need not shed many tears over [the possibility of § 1544(c) being declared unconstitutional], however, as experience suggests that Congress would be most unlikely ever to try to invoke it. If it won’t acknowledge that hostilities exist in situations like the Persian Gulf and thereby start the clock for its further decision, it certainly isn’t going to order the President to remove the troops cold turkey within 60 days of his having committed them.

Id. at 1397. The reasons why Congress has no incentives to invoke § 1544(c)—since it would involve assuming a great deal of responsibility for the outcome of an armed conflict—will be mentioned *infra*.

132. See WEED, *supra* note 3, at 8.

133. See S.J. Res. 54, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-joint-resolution/54/text> (A joint resolution “to direct the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress.” While the preamble cites § 1544(c) directly, no reference to this section appears in the text proper. Instead, section 1 of the resolution makes explicit reference to 1546a and § 601(b) of the International Security and Arms Export Control of 1976).

134. 50 U.S.C. § 1546a (“If such a joint resolution or bill should be vetoed by the President . . .”).

135. This does not make the WPR any more effective in practice. On March 13, 2019, the Senate passed Senate Joint Resolution 7, directing President Donald Trump to “remove United States Armed Forces from hostilities in or affecting the Republic of Yemen, except United States Armed Forces engaged in operations directed at al Qaeda or associated forces.” S.J. Res. 7, 116th Cong. § 2 (2019), <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/7/text>. The resolution also passed in the House and was presented to the President on April 16, 2019, where it was subsequently vetoed—since according to the White House, the United States is not “engaged in hostilities in or affecting Yemen.” and that the resolution “interfere[s] with the President’s constitutional authority as Commander in Chief of the Armed Forces.” Presidential Veto Message to the Senate to Accompany S.J.

F. Limits on Congressional Interpretation in 1547(b)

It is a principle of constitutional law that Congress cannot bind itself through law, since it has the power to change a statute simply by passing another statute.¹³⁶ As the Supreme Court has succinctly stated, “one legislature may not bind the legislative authority of its successors.”¹³⁷ The practical implication of this rule, as Professors Eric Posner and Adrian Vermeule put it, is that “legislatures may not enact entrenching statutes or entrenching rules: statutes or rules that bind the exercise of legislative power, by a subsequent legislature, over the subject matter of the entrenching provision.”¹³⁸

Contrary to this well-settled principle, however, stands § 1547(a)(1), which indicates that authorization to introduce American forces in hostilities “shall not be inferred . . . from any provision of law . . . including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces . . . and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.”¹³⁹ Analytically speaking, this provision would fly in the face of the principle stated in *Marbury v. Madison*, quoted *supra*, since it prohibits Congress from inferring from appropriations statutes au-

Res. 7 (Apr. 16, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-veto-message-senate-accompany-s-j-res-7/>. In the end, the resolution failed to obtain the necessary two-thirds of the Senate to override the President’s veto. United States Senate, *Roll Call Vote 116th Congress – 1st Session*, (May 2, 2019), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=1&vote=00094. It is very likely the same process will unfold with what is known at the moment as Concurrent Resolution 83, which the House passed in January 9, 2020, in response to the Soleimani strike, and which directs the President pursuant to section 5(c) of the WPR to “terminate the use of United States Armed Forces to engage in hostilities in or against Iran.” H.R. Con. Res. 83, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/83/text?q=%7B%22search%22%3A%5B%22War+Powers%22%5D%7D&r=11&s=6>. Opposition to the strike on Soleimani seems greater than the opposition to President Trump’s actions in Yemen at the time, but nevertheless, the resolution passed 229-194, so—and assuming it will pass the Senate—it is hard to see how Congress could override the president’s veto. See Congress.gov, *Actions Overview H.Con.Res. 83—116th Congress (2019-2020)*, [https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/83/actions?q={%22search%22:\[%22War+Powers%22\]}&r=11&s=6&KWICView=false](https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/83/actions?q={%22search%22:[%22War+Powers%22]}&r=11&s=6&KWICView=false) (last visited March 13, 2020).

136. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (comparing the Constitution with statutes, which are “ordinary legislative acts, . . . alterable when the legislature shall please to alter [them]”).

137. *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996).

138. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *YALE L.J.* 1665, 1665 (2002). Note that the article argues that the principle should be discarded.

139. 50 U.S.C. § 1547(a)(1).

thorization for use of force, which is presumably a political question.¹⁴⁰ If it is a political question—an exercise of discretion which in this case belongs to the legislature—then said discretion should be exercised within the limitations that the law has seen fit to impose on Congress, among those, that it cannot bind itself.¹⁴¹ Additionally, the WPR would add additional procedures to subsequent legislation: the provision would limit Congress's power to repeal by inference, since subsequent legislation would have to make explicit reference to the WPR in order to count as authorization—a clear example of the “magical passwords” which the Supreme Court expressly disallowed in *Marcello v. Bonds*.¹⁴²

Perhaps Professors Curtis Bradley and Jack Goldsmith overstate their case—since it is a rule of construction for the courts that is not really binding—but they have a point when they state that “[i]f [§ 1547(a)(1)] were read to block all possibility of inferring congressional approval of military action from any appropriation, unless that appropriation referred in terms to the [WPR] and stated that it was intended to constitute specific authority for the action under that statute, then it would be unconstitutional.”¹⁴³ Regardless, as we will see below, the OLC has chosen not to give a strict textual reading of this provision, but rather to downgrade it to an interpretive aid.

IV. OLC INTERPRETATION OF THE WAR POWERS RESOLUTION

Courts have been unwilling to expand the scope of statutory terms. For instance, in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, the Supreme Court struck down the Board of Governors' update to the definition of “bank” found in § 2(c) of the Bank Holding Company Act, done to cover “nonbank banks”—institutions that offered services similar to banks, but were not covered by § 2(c).¹⁴⁴ As Chief Justice Burger wrote, “the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into the effect the will of Congress as ex-

140. See *Orlando v. Laird*, 443 F. 2d 1039, 1043 (1970) (“The choice . . . between an explicit declaration on the one hand and a resolution and war-implementing legislation, on the other, as the medium for expression of congressional consent . . . invokes the political question doctrine”).

141. See Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1399 (1994) (“If Congress can constitutionally authorize the use of force through its appropriations and authorization procedures, an interpretive statute that denies this inference . . . is without legal effect.”).

142. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

143. BRADLEY & GOLDSMITH, *supra* note 13, at 638.

144. 474 U.S. 361, 365–66 (1986).

pressed in the statute.”¹⁴⁵ What happens, however, when the plain language of a statute is inconclusive, when the legislative history indicates that this ambiguity in the statute was not an accident, and when the courts have declined to hear cases regarding said statute but rather dismissed them on justiciability grounds?¹⁴⁶ Departmentalism—each branch having the power to interpret the Constitution, even to give it meanings that are incompatible

145. *Id.* at 374. As of 2019, that is still the position of the Court. Writing in the context of a case concerning the Federal Arbitration Act, the Supreme Court said that “we are not at liberty to rewrite [a] statute passed by Congress and signed by the President.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 524, 528 (2019).

146. Pushing for justiciability is a losing proposition, albeit one that is inevitable, considering that as Professor Philip Bobbitt has recognized, “[A]merican faith in law [depends] on political conflict being transmuted into legal conflict when issues of constitutional importance [are] involved.” BOBBITT, *supra* note 57, at 27. No wonder this is the reason why several commentators have argued for further involvement by the courts. *See, e.g.*, Ely, *supra* note 12, at 1407–16 (arguing for courts not to use the political question doctrine to avoid coming to a decision on the merits, as well as getting a court to start the sixty-day clock); Michael Glennon, *The Gulf War and the Constitution*, 70 FOREIGN AFF. 84, 99 (1991) (“If the law is to be retained, it must be made judicially enforceable. A first step in rewriting the law is to include provisions aimed at facilitating judicial review by precluding the courts from ducking out as they did in *Lowry* and *Dellums*.”). The federal courts have heard cases where the WPR has been involved since 1983. In not a single instance have they reached the merits, choosing to dismiss the case on other grounds instead. *See Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (dismissed on ripeness grounds); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (dismissed on political question grounds); *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985) (dismissed on mootness); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (dismissed on political question grounds); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (dismissed on standing grounds); *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) (dismissed on standing grounds); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990) (dismissed on political question and ripeness grounds); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (dismissed on ripeness grounds); *Lowry v. Reagan*, 676 F. Supp. 333, 341 n.53 (D.D.C. 1987) (dismissed on political question grounds). For an analysis of the aforementioned cases, see generally MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION (2012), <https://fas.org/sgp/crs/natsec/RL30352.pdf>. The latest case, *Smith v. Obama*, was dismissed by the district court in March of 2017 on justiciability grounds and is awaiting review by the United States Court of Appeals for the District of Columbia. *Smith v. Obama*, 217 F. Supp. 3d 283, 303–04 (*dismissed as moot sub nom. Smith v. Trump*, 731 Fed. Appx. 8 (2018)). *See* Congressional Research Service Reports & Analysis, *UPDATE: Smith v. Obama: A Servicemember’s Legal Challenge to the Campaign Against the Islamic State* (Apr. 4, 2017), <https://fas.org/sgp/crs/natsec/smith.pdf>. This process can be understood as an instance of what Professor Curtis Bradley calls foreign policy exceptionalism, “the view that the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers.” Bradley, *supra* note 128, at 11 (internal quotations omitted). The court in *Dellums*—a WPR case—also endorsed this principle: “The principle that the courts shall be prudent in the exercise of their authority is never more compelling than when they are called upon to adjudicate on such sensitive issues as those trenching upon military and foreign affairs.” 752 F. Supp. at 1149.

with each other—is the result and the one department with the power of initiative, the Executive in the WPR case, is the one that will end up deciding what the law in action is, regardless of what the law on the books may say.¹⁴⁷

To be certain, if the President were attempting to change the statute, it would violate what Professor Samuel Estreicher and Judge Steven Menashi have termed “the *Steel Seizure* principle”: “the president lacks the authority to change enacted law without congressional authorization and must respect the framework established by Congress.”¹⁴⁸ Nevertheless, that is not what has happened here—rather, since the statute is filled with drafting issues by design, the Executive has advanced one plausible interpretation among many within the framework established by Congress, instead of taking action in direct contravention of the statute that would result in nullification. The Executive is merely filling in the blanks, one might say. What also matters in the case of the WPR is that the Executive has given a consistent interpretation to the resolution since its inception, which results in a clear non-judicial precedent—and the only “law” we have with regard to the statute.

This section will proceed as follows: first, I will discuss the issue of executive practice as non-judicial precedent, in particular the problem of custom in foreign-relations law and why OLC opinions do serve to resolve some of the most salient difficulties. Then, I will provide a taxonomy of the interpretive strategies OLC has used to construe the WPR in a way that favors the President—namely, narrowing the scope of the resolution, narrowing the terms of the resolution, and using statutory authorization as a gap filler. Finally, I will conclude this section with an evaluation of OLC’s interpretation of the WPR in its opinions, and what that means for the WPR in practice.

A. Executive Practice as Non-Judicial Precedent

Precedent helps ensure “consistency and predictability in the law [and] efficiency in decision-making” and OLC opinions count as precedent.¹⁴⁹

147. This is also generally true for the foreign relations sphere. See Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 FORDHAM L. REV. 1199, 1249 (2017).

148. *Id.* at 1205.

149. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1148, 1494 (2010). Other reasons that have been mentioned as to why precedent should be followed are:

the importance of stability, respect for established expectations, decisional efficiency, the orderly development of the law, Burkean deference to ancestral wisdom, formal or comparative justice, fairness, community, integrity, the moral importance of treating like cases alike, and the politi-

Although the courts have not spoken on the substantive issues WPR cases raise, that does not mean there are no precedents whatsoever; in the area of foreign relations—and in particular, when it comes to the actual workings of the Resolution—executive practice serves as precedent, albeit one of a non-judicial character. The Executive has been consistent in interpreting the statute in ways that maximize the Executive’s power and has not walked back its interpretation except in one case, which will be discussed below. Courts have referred with some frequency to historical practice,¹⁵⁰ and when coupled with their reticence to reach the merits in the field of foreign relations law,¹⁵¹ it is clear that we need to know how the Executive has acted in the past to know how the WPR has worked in practice. Therein lies the importance of executive-branch precedent: “Non-judicial precedents clarify and shape constitutional structure . . . [They] define the channels through which certain decisions must go in order to be lawful.”¹⁵² It has been practice—and not text alone—which has defined the extent of the President’s authority over foreign relations.¹⁵³

But what should count as non-judicial precedent? Is any action taken by the Executive susceptible of becoming part of the *gloss* Justice Frankfurter spoke about in *Youngstown*? Clearly not. Non-judicial precedent needs to be discoverable in order to function as precedent.¹⁵⁴ Since it would be impossible for an action taken to acquire normative force if it has not been followed in the past, how can a particular action be followed if no one knows about it? That is not the only requirement, however; as Professor Michael Gerhardt states, “[t]he more often that public authorities, including courts, cite or seek to invest past non-judicial activities with normative power, the more discoverable the activities become, and the more their meaning and value increase.”¹⁵⁵ Here, we finally have criteria to discern

cal desirability of disciplining our judges and reducing any opportunity for judicial activism.

Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012). For a classical elaboration of why precedent is desirable, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–69 (1992) (arguing that upholding precedent is desirable on the basis of reliance on a holding by the population).

150. Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 748 (2008).

151. As one court stated, “The principle that the courts shall be prudent in the exercise of their authority is never more compelling than when they are called upon to adjudicate on such sensitive issues as those trenching upon military and foreign affairs.” *Dellums v. Bush*, 752 F. Supp. 1141, 1149 (D.D.C. 1990).

152. Gerhardt, *supra* note 150, at 770.

153. “Historical practice, the Court said, reflects ‘the compromises and working arrangements that the elected branches of Government themselves have reached.’” Michael J. Glennon, *The Executive’s Misplaced Reliance on War Powers “Custom”*, 109 AM. J. INT’L L. 551, 551 (2015) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014)).

154. Gerhardt, *supra* note 150, at 718–19.

155. *Id.* at 719.

between actions that can be considered non-judicial precedent and those that can't: discoverability and frequency of citation. The final component—and similar to the classic understanding of customary international law in its importance—is actual practice: understanding historical events as custom¹⁵⁶ is perhaps the most straightforward source of non-judicial precedent. Other sources, such as OLC opinions, need to have been followed in actual practice to count as this sort of precedent and not mere normative pronouncements. As it happens, they have been.

Professor Gerhardt distinguishes non-judicial precedent that is designed to “exert influence vertically, as binding authority imposed by superior authorities upon inferior ones” from those precedents “designed to exert influence horizontally, as persuasive authority within or across equally powerful institutions.”¹⁵⁷ Office of Legal Counsel opinions appear to be both at the same time; they are vertical precedent, since they “have strict binding authority throughout the executive branch, but they are merely persuasive authority in Congress, courts and the states,” yet they are also horizontal precedent in practice, since they “operate as persuasive authority . . . [and] encompass what we commonly refer to as traditions, customs, or historical practices.”¹⁵⁸

Here the problem of incommensurability of custom arises because “[c]ustom is properly established inductively by lining up historical precedents that are alike, disregarding precedents that are not alike, and then inferring a pattern of practice,”¹⁵⁹ and opinions that deal with the WPR cover situations as diverse as whether the President can commit American troops to Haiti without Congressional approval or whether the use of drones falls within the meaning of hostilities, to mention two very different cases. Regardless, there are good reasons to consider OLC opinions as a sort of interpretive aid that clarifies executive practice, at least when it comes to the

156. Although that concept by itself is not so simple. *See generally* Glennon, *supra* note 153.

157. Gerhardt, *supra* note 150, at 754.

158. *Id.* at 755–56. *See also* Memorandum from David J. Barron, Acting Assistant Att’y Gen, Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions, at 1: “OLC’s central function is to provide, pursuant to the Attorney General’s delegation, *controlling* legal advice to Executive Branch officials in furtherance of the President’s constitutional duties to preserve, protect, and defend the Constitution, and to ‘take Care that the Laws be faithfully executed.’” (emphasis added).

159. Glennon, *supra* note 153, at 552; *accord* Griffin, *supra* note 2, at 78 (“Both in 1950 and later, proponents assembled long lists of interventions, but never developed criteria that would explain why certain incidents counted and others did not. This raised the credible suspicion that a double standard was being employed—when presidents ordered the use of force without authorization from Congress, the incident would make the list, but when Congress prevented such action, affirmatively indicated its disapproval, or failed to acquiesce, the incident was not counted.”).

WPR. Why is this so? Because Office of Legal Counsel opinions not only are discoverable, since they're expressed in written opinions,¹⁶⁰ but often end up reflecting the actual practice of the Executive.¹⁶¹ Thus, anticipating the analysis, we could say those opinions are commensurable in at least one sense: when faced with a War Powers Resolution issue, the Office of Legal Counsel will interpret the resolution in a way that maximizes the President's scope of action under the war powers.

OLC opinions suggest how the Executive has customarily interpreted a statute. This is because, as Dean Trevor Morrison observes, OLC "has been the most significant centralized source of legal advice within the Executive Branch."¹⁶² This can be explained as a function of both the internal policies OLC itself has developed as well as other circumstances. First of all, OLC takes on the hard questions—thus, when OLC speaks, it does so as an agency that deals with issues "sufficiently controversial or complex" on a regular basis, and their "external validation holds special value."¹⁶³ Second, OLC requires agencies asking for its advice to provide a written request, as specific as possible, which "helps constrain the requesting agency" and "makes it more difficult for the agency to press extreme positions."¹⁶⁴ Since OLC itself must provide its opinion in response to a specific question, the resulting opinion should also be limited in scope to the question presented only—albeit an agency can steadily push to enlarge its range of discretion throughout time—instead of asking for OLC's opinion regarding whether a noticeable change in course could be permissible all at once. Third, "OLC's legal advice is treated as binding within the Executive Branch until withdrawn or overruled."¹⁶⁵ This, as we will see below, has clearly been the case when it comes to OLC opinions on the War Powers Resolution, and while "[a] subsequent judicial decision directly on point will generally be taken to supersede OLC's work . . . [and] OLC's opinions are also subject to 'reversal' by the President or the Attorney General,"¹⁶⁶ no court has made a deci-

160. This is a key element when it comes to OLC opinions since what the people working inside the office count as non-judicial precedent themselves is only what has finally taken the form of written opinions. As Walter Dellinger said, "[a]n executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions." Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 109 (1995).

161. Albeit with the obvious caveat that they cannot account for factors such as Congressional support for a certain course of action, popular opinion, and other elements that may make executive action easier or harder to carry out.

162. Morrison, *supra* note 149, at 1451.

163. *Id.* at 1461.

164. *Id.* at 1463–64.

165. *Id.* at 1464.

166. *Id.* at 1466.

sion on the merits in any WPR case, and OLC opinions have always been favorable to the Executive.¹⁶⁷

Finally, OLC's own guidelines state that it is supposed to provide advice based on "its best view of the law,"¹⁶⁸ which presumably would entail some degree of independence; after all, one would need a certain degree of impartiality to reach the "best view of the law" when dealing with complex constitutional issues.¹⁶⁹ Regardless, OLC has never failed to support the

167. See *supra* note 147; *infra* Part IV.B.

168. Morrison, *supra* note 149, at 1455-56. As Professor Daphna Renan mentions, this is not a neutral concept, but rather one that has its basis on a quasi-judicial conception of OLC that can be inferred from its architecture: OLC operates on a case-specific basis and is precedent-based. Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 815 (2017). Basically, as Renan mentions, OLC operates under the assumption that "[t]here is a 'best view' of the law and if you can sufficiently insulate OLC from partisan pressures, that legal answer will emerge." *Id.* at 830-31.

169. The issue of whether OLC can be a check on the Executive came to the fore after John Yoo's torture memos during the Bush administration. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336 (2006) for an overview of the issue. Opinions on whether OLC can be a constraint on the President are mixed, but over-all they do not favor the proposition that it can be a check. The topic is too broad to discuss in depth here, but a review of the literature finds roughly three camps. First, some scholars believe it can be a check on the President. They assert that OLC has developed a set of internal cultural norms that ensure the office can give the President "detached, apolitical legal advice, as if OLC were an independent court inside the executive branch." JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 33 (1st ed. 2009). A second position can be termed the skeptic position, and it encompasses a variety of ideas. For instance, here one would find Dean Trevor Morrison, who believes that "OLC has long espoused a commitment to acting on its best understanding of the law, and the institutional culture of the office reflects that deeply rooted commitment." Trevor Morrison, *Constitutional Alarmism: The Decline and Fall of the American Republic*, 124 HARV. L. REV. 1688, 1708 (2011) (book review). At the same time he recognizes that the institutional architecture of the office places limitations on how much an OLC can go against the President, since at the end of the day it is an office within the executive branch. Morrison, *supra* note 149, at 1456. Professor Daphna Renan has a similar opinion, in that she recounts that "Presidents have regularly relied on OLC opinions to advance a robust vision of presidential authority," without compromising the formalist, quasi-judicial mode of operation of the office. Renan, *supra* note 168, at 832. Professor Goldsmith appears to hold some version of the skeptical view nowadays: "OLC is not in the place it used to be, at least in the national security context." Jack Goldsmith, *The Decline of OLC*, LAWFARE (October 28, 2015), <https://www.lawfareblog.com/decline-olc>. Finally, on the opposite side, several scholars believe that OLC is no constraint at all. A common line of argument is that the office is barely more than a political rubber stamp. Basically, the office is "deeply and systematically deferential to the President." See Adoree Kim, *The Partiality Norm: Systematic Deference in the Office of Legal Counsel*, 103 CORNELL L. REV. 757, 791 (2018); see also Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011). Going even further, Professor Peter Margulies has argued that OLC should be reformed, and there should be a way to cap "OLC's expansive presidential power opinions," which would "provide a further bulwark against abuse." Peter Margulies, *Reforming Lawyers into Irrelevance?: Reconciling Crisis*

Executive's favored interpretation in its WPR opinions. This is not a bug; it's a feature: OLC is an executive office and "understands itself to have a responsibility to help its clients find lawful ways to achieve their policy goals."¹⁷⁰ Thus, when OLC provides its clients with its best view of the law, it's the best view of the law of an office that is part of the Executive—and just like Morrison says, expecting true neutrality would be perhaps too much.¹⁷¹ That does not mean OLC can't serve a constraining role within the executive branch, it's just that OLC has not played that role when it comes to the WPR. What I found instead is that, as Professors Eric Posner and Adrian Vermeule state, OLC has played the part of "keeper of the Presidential fig-leaf" to perfection.¹⁷²

As stated *supra*, in order for a practice to be considered non-judicial precedent, the practice must be discoverable, frequently cited, and must conform with actual practice. OLC opinions fit all criteria when it comes to the War Powers Resolution. OLC opinions are discoverable, since they are written and most of them are public;¹⁷³ they are frequently cited by the Executive; and finally, they do align themselves with executive practice—in other words, they provide an accurate representation of what the "law in action" is, more so in the absence of judicial WPR decisions on the merits. The one exception, OLC's disapproval of the intervention in Libya, was not

and Constraint at the Office of Legal Counsel, 39 PEPP. L. REV. 809, 857 (2012). A different line of argument that would also fit in this category is espoused by Professor Eric Posner, who argues that "OLC does not constrain the executive but enables him to accomplish goals that he would not otherwise be able to accomplish." Eric A. Posner, *Deference to the Executive in the United States after September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL'Y 213, 228–30 (2012).

170. Morrison, *supra* note 149, at 1502. Several formal features of OLC also undermine its purported neutrality: for example, an OLC head is accountable to the President, which makes him or her more likely to respond to the Executive's interests, since "by doing so he protects his position, retains influence with the President and Attorney General, and advances his prospects of promotion." Kim, *supra* note 169, at 780 (quoting John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 422 (1993)). Similarly, OLC heads are political appointees. Kim, *supra* note 169, at 780. See also Katyal, *supra* note 170, at 2337, for a similar account, and Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 514–15 (1993) (arguing that the procedural and jurisdictional rules OLC operates under force to counteract its natural tendency to behave in the model of an "opportunistic . . . private lawyer," one that is eager to please the President.).

171. Morrison, *supra* note 149.

172. Eric Posner & Adrian Vermeule, *Libyan Legal Limbo*, SLATE (July 5, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html (describing OLC's "traditional role"; Posner and Vermeule say that OLC "overstepped" that role in the Libya situation).

173. OLC does not publish all of its opinions. Morrison, *supra* note 149, at 1476–77. However, there are several published opinions on the War Powers Resolution, and as of 2018 only one of them overrides a previously held interpretation.

provided as a written opinion.¹⁷⁴ It also fails to meet all three criteria: discoverability, since we do not have an actual word-by-word account of the discussion; being in writing, since the office refused to give a written opinion—contra the usual OLC standard operating procedure—and finally, actual practice, since OLC advice was not followed.¹⁷⁵

B. OLC Interpretive Strategies

As a practical matter, OLC opinions on the War Powers Resolution can be understood as the written expression of a “gloss on executive [p]ower.”¹⁷⁶ OLC’s interpretation of the War Powers Resolution has consistently construed it in ways that favor the Executive. Indeed, it has transformed the WPR into a lesser constraint on executive power than Congress originally intended. This section proposes a taxonomy of three interpretive strategies OLC has used for this purpose: narrowing the scope of the resolution, narrowing the terms of the resolution, and gap-filling regarding statutory authorization. Note that these interpretive strategies are not mutually exclusive: OLC always deploys more than one rationale simultaneously. And given the abundance of rationales OLC has come up with to justify the President’s unilateral use of the armed forces abroad, this can only serve to expand his power and render the statute and any limitations on the President irrelevant to actual practice.

1. Narrowing the Scope of the War Powers Resolution § 1543(c) as a Declaratory Statement of Policy

OLC has consistently taken the position that § 1543(c) is not legally binding but constitutes rather a declaratory statement of policy, for both legal and practical reasons. As a matter of law, the WPR states in § 1547(d)(1) that nothing in it “is intended to alter the constitutional authority . . . of the President.” Interpreting § 1543(c) to be binding on the Presi-

174. Posner & Vermeule, *supra* note 172.

175. “OLC’s core function is to provide ‘formal advice through written opinions.’” Morrison, *supra* note 149, at 1458 (quoting Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005)). This event also “offered unusually rapid confirmation of Professor [Bruce] Ackerman’s assertion that the executive can avoid negative advice from the OLC by soliciting advice from the White House Counsel’s Office.” Posner, *supra* note 169, at 237. As Dean Morrison mentions, doing a run-around OLC may have political costs, but as we can see with the vociferous opposition to President Trump’s planned withdrawal from Syria, employing force abroad seems to be popular with both sides of the aisle. Morrison, *supra* note 149, at 1455.

176. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

dent would limit the Executive's war powers as they have been developed since President Truman committed troops to Korea,¹⁷⁷ and thus, OLC will not interpret the section as binding on the President but rather declaratory in nature.¹⁷⁸ The second reason is based on a commonly stated—and presumably correct—policy assumption, that “[a]ny attempt to set forth all the circumstances in which the Executive [could] deploy United States Armed Forces would probably be insufficiently inclusive and potentially inhibiting in an unforeseen crisis.”¹⁷⁹

That is not to say that no attempt to list the situations where the Executive may need to act on its own authority has been made—among those, OLC opinions mention the need to direct United States forces to rescue Americans,¹⁸⁰ to “protect U.S. Embassies and legations,” to “suppress civil insurrection[s],” and to “carry out the terms of security commitments,” among others.¹⁸¹ At no point, however, has OLC attempted to list every possible eventuality where the Executive could deploy force without congressional authorization.¹⁸² Moreover, § 1543(c) has been interpreted—from a structural point of view—as an affirmative recognition of the President's constitutional authority to commit troops without congressional authorization. As OLC has said, “[s]ection [1542(c)(3)] correctly identifies *one*, but by no means the only, presidential authority to deploy military forces into

177. Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274 (1984). See generally Glennon, *supra* note 153 (discussing the role of custom in establishing the Executive's war powers).

178. For a clear example of the syllogism OLC employs, see Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 335 (1995) [hereinafter Bosnia Memo]; accord President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 211 (2001) [hereinafter Terrorists Memo].

179. Overview of the War Powers Resolution, *supra* note 177, at 274. See also *id.* at 275 (quoting *Hearings on War Powers: A Test of Compliance, Before the H. Comm. on Int'l Relations*, 94th Cong. (Part VI) 90–91 (1975), where the Legal Adviser to the Department of State said on the record that he did “not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander-in-Chief authority could be exercised”).

180. It is commonly believed that the Executive does have authority to commit the armed forces without Congressional authorization in order to rescue Americans. As Assistant Attorney General Theodore Olson wrote in 1984, “the majority of Members of Congress after the ‘Mayaguez’ incident supported the concept that the President had constitutional authority to use armed forces for a rescue operation of the type involved in that incident.” Overview of the War Powers Resolution, *supra* note 177, at 277.

181. *Id.* at 274.

182. “[E]ven the defenders of the WPR concede that [§ 1541(c)]—found in the ‘Purpose and Policy’ § of the WPR—either is incomplete or is not meant to be binding.” Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 (1994) [hereinafter Haiti Memo].

hostilities,”¹⁸³ and “[t]his structure of [Section 1543(a)(1) together with 1544(b)] makes sense only if the President may introduce troops . . . without prior authorization by the Congress: the WPR regulates such action by the President and seeks to set limits to it.”¹⁸⁴

Of particular note are three situations where OLC has stated that the Executive presumably has the constitutional authority to commit United States Armed Forces without congressional authorization: to protect and rescue Americans abroad, to promote the “national interest,” and in cases of national emergencies. To bolster support for the first proposition, OLC would observe in 1994—citing *United States v. Verdugo-Urquidez*—that the United States had employed force outside American territory over 200 times in the period between the founding and 1990 in order to protect citizens or national security interests.¹⁸⁵ Likewise, Congress appears to share the widespread belief that the President does have such authority; as Assistant Attorney General Theodore Olson wrote in 1984, “the majority of Members of Congress after the ‘Mayaguez’ incident supported the concept that the President had constitutional authority to use armed forces for a rescue operation of the type involved in that incident.”¹⁸⁶ OLC has consistently held this position starting with the 1980 *Presidential Power to Use the Armed Forces Abroad without Statutory Authorization* opinion.¹⁸⁷

When it comes to using force to further the national interest, OLC wrote in 1992—in response to the deployment of troops in Somalia, and drawing support from historical practice and OLC opinions that predate the War Powers Resolution¹⁸⁸—that the President’s “Commander in Chief and Chief Executive [authority] vests him with the constitutional authority to order United States troops abroad to further national interests.”¹⁸⁹ The “na-

183. Terrorists Memo, *supra* note 178, at 211; *accord* Bosnia Memo, *supra* note 178, at 335; Haiti Memo, *supra* note 183, at 175 (“[T]he structure of the War Powers Resolution (“WPR”) recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces [under § 1543(a)(1)].”)

184. Haiti Memo, *supra* note 182, at 175–76.

185. Bosnia Memo, *supra* note 178, at 331 (citing 494 U.S. 259, 273 (1990)).

186. Overview of the War Powers Resolution, *supra* note 177, at 277. The Mayaguez incident happened during May of 1975, and OLC describes it as follows: “Cambodian Communist forces seize[d] [an] American merchant ship—U.S. forces sent on rescue mission; 18 American troops killed or missing and 500 presumed dead.” *Id.* at 282.

187. *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185 (1980) [hereinafter *Presidential Power Memo*].

188. *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 9–10 (1992) [hereinafter *Somalia Memo*]. In particular, OLC cites *Training of British Flying Students in the United States*, written by then Attorney General Robert Jackson, who would go on to become a Supreme Court justice and author the *Youngstown* framework to analyze executive power vis-à-vis Congress under the Constitution.

189. *Somalia Memo*, *supra* note 188, at 8; *accord* *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 1, 1 (2011) [hereinafter *Libya Memo*] (asserting that “the President

tional interest” is an amorphous, catch-all concept that is not defined at any point in the opinion—or indeed, in any other—and the only prospective guidance given in regards to the concept’s substantive content is that it is broader than the protection of American citizens and property, since “[p]ast military interventions that extended to the protection of foreign nationals” were intended to defend the national interest.¹⁹⁰

Regardless, other OLC opinions suggest that the “national interest” concept may have one of three meanings, the first two that in practice often overlap, and a third one recognized only since 2014: preserving regional stability, preserving the effectiveness of the United Nations, and preventing a humanitarian catastrophe.¹⁹¹ First of all, preserving regional stability is mentioned as a factor by OLC on several occasions.¹⁹² For instance, in 2011, President Obama ordered the United States Armed Forces to strike at “the Qadhafi regime’s air defense systems, command and control structures, and other capabilities of the Qadhafi’s armed forces used to attack civilians and civilian populated areas,”¹⁹³ which in the President’s—and OLC’s—view, constituted “a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster.”¹⁹⁴ A similar argument was used by OLC in 2018 to justify President Trump’s strikes on Syria, since the Assad regime’s “use of chemical weapons in the ongoing civil war threatens to undermine further peace and security of the Near East, a region that remains critically important to our national securi-

had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest.”); Libya Memo, *supra* note 189, at 6 (quoting *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993)) (“This independent authority of the President . . . derives from the President’s ‘unique responsibility,’ as Commander in Chief and Chief Executive, for ‘foreign and military affairs,’ as well as national security.”)

190. Somalia Memo, *supra* note 188, at 11.

191. Facially, this might look like an evident example of concept creep (and it is), but the Office has characterized humanitarian considerations in this way. *See, e.g.*, Authority to Order Targeted Airstrikes Against the Islamic State of Iraq and the Levant, 42 Op. O.L.C. 1, 34, 36 (2014) [hereinafter ISIL Opinion] (“[D]espite focusing on other national interests, our opinions have often expressly noted the humanitarian purpose of those deployments. And in so doing, we have never suggested that the goal of preventing humanitarian catastrophes could not be an important national interest supporting the use of military force abroad. . . . [W]e think the President reasonably invoked a national interest in preventing humanitarian catastrophe . . .”).

192. *See, e.g.*, Haiti Memo, *supra* note 182, at 177; Bosnia Memo, *supra* note 178, at 332–33 (“The proposed deployment of a NATO force to implement the peace agreement . . . would serve significant national security interests, by preserving peace in the region and forestalling the threat of a wider conflict,” since “[i]f the war in the former Yugoslavia resumes, ‘there is a very real risk that it could spread beyond Bosnia and involve Europe’s new democracies as well as our NATO allies.’”).

193. Libya memo, *supra* note 189, at 5.

194. *Id.* at 4.

ty.”¹⁹⁵ The impact on regional stability as a result of conflict in one zone was also an explicit rationale in both cases: the flow of refugees as a response to the Qadhafi regime’s actions would destabilize the Middle East, “[w]ith dangerous consequences to the national security interests of the United States.”¹⁹⁶

Second, “[t]he continued existence of the United Nations as an effective international organization” has long been considered in the United States’ national interest.¹⁹⁷ Writing in 1992 in response to the deployment in Somalia, Assistant Attorney General Timothy E. Flannigan explicitly stated that “protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest.”¹⁹⁸ Safeguarding the effectiveness of the United Nations was also a reason cited in support of President Clinton’s deployment in Bosnia, when OLC stated that “maintaining the credibility of the United Nations Security Council decisions, protecting the security of the United Nations and related relief efforts . . . can be considered a vital national interest.”¹⁹⁹ Most recently, OLC justified in 2011 the American intervention in Libya in this way, since “[t]he writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution’s future credibility to uphold global peace and security.”²⁰⁰ Arguably, one of the three rationales given by OLC to justify the strikes on Syria—“deterring the use and proliferation of chemical weapons”²⁰¹—falls within this category, inasmuch as the prohibition and the

195. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 12 (2018) [hereinafter Syria Opinion].

196. Letter from the President Regarding the Commencement of Operations in Libya (March 21, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>. In the Syria Opinion, OLC mentioned that “[t]he instability in Syria has had a direct and marked impact upon the national security of close American allies and partners, including Iraq, Israel, Jordan, Lebanon, and Turkey, all of which border Syria and have had to deal with unrest from the conflict.” *Id.* at 13. A similar argument was used—albeit part of a broader humanitarian concern rationale—to justify airstrikes against ISIL: “the failure of either the Mosul Dam or the Haditha Dam could have unleashed flood waves capable of killing large numbers of innocent civilians and endangering or displacing hundreds of thousands of others, in cities from Mosul to Baghdad.” ISIL Opinion, *supra* note 191, at 35.

197. U.S. DEP’T OF STATE, AUTHORITY OF THE PRESIDENT TO REPEL THE ATTACK IN KOREA, 23 BULL. 173, 177 (1950).

198. Somalia Memo, *supra* note 188, at 11.

199. Bosnia Memo, *supra* note 178, at 333 (quoting Somalia Memo, *supra* note 188, at 11).

200. Libya Memo, *supra* note 189, at 5 (quoting President Barack Obama, Address on the Situation in Libya (Mar. 28, 2011)).

201. Syria Opinion, *supra* note 195, at 16. As OLC itself elaborated, “[w]hile we are unaware of prior Presidents justifying U.S. military actions based on this interest . . . we believe that is consistent with those that have justified previous uses of force. The United

use of weapons of mass destruction is a critical part of the current international legal order that has the United Nations as its linchpin, and that the United States has sought to preserve.²⁰²

Third, humanitarian concerns have also been mentioned as a rationale in OLC opinions before the Obama administration,²⁰³ but it is noticeable that since the 2014 memorandum on *Targeted Airstrikes Against the Islamic State of Iraq and the Levant* was released in November 2018,²⁰⁴ humanitarian concerns have come to be defined as part of the national interest. This expansion of the concept is not irrelevant: the two latest opinions, the 2014 ISIL Opinion and the Syria Opinion, rely on this rationale to justify the President's actions.²⁰⁵ Indeed, the language in the 2014 ISIL Opinion appears to grant this consideration the same importance as the others mentioned above.²⁰⁶ Note, however, that while it is true that humanitarian con-

States has long and consistently objected to the use and proliferation of chemical weapons.” *Id.* OLC also mentions that “Presidents have repeatedly declared the proliferation of chemical weapons to be a national emergency.” *Id.* Yet analytically speaking, the problem has been dealt with in terms of international law—with the United States ratifying the Chemical Weapons Convention in 1997, and with the invasion of Iraq being justified partly because Iraq was supposedly developing chemical weapons. *Id.* at 17.

202. Not that it makes that justification any less expansive. As Professor Deborah Pearlstein correctly notes, “it is difficult indeed to read the portion of the OLC opinion on deterrence and proliferation of chemical weapons without mentally substituting the words ‘nuclear weapons’ to see if, in OLC’s considered view, the same rationale would provide constitutional justification for a ‘preemptive’ unilateral presidential military strike against North Korea or Iran.” Deborah Pearlstein, *One More Thing About That New OLC Opinion on Syria*, BALKINIZATION (June 4, 2018), <https://balkin.blogspot.com/2018/06/one-more-thing-about-that-new-olc.html>.

203. See, e.g., Somalia Memo, *supra* note 188, at 6, 11–12 (arguing that the President can commit the Armed Forces to missions of “good will,” in this case to restore access to humanitarian relief); Libya Memo, *supra* note 189, at 11.

204. Curtis A. Bradley & Jack L. Goldsmith, *Winter 2018 Supplement for Bradley & Goldsmith, Foreign Relations Law: Cases and Materials*, LAWFARE (December 4, 2018, 11:09 AM), <https://www.lawfareblog.com/winter-2018-supplement-bradley-goldsmith-foreign-relations-law-cases-and-materials>.

205. ISIL Opinion, *supra* note 191, at 30 (“We believe it was reasonable for the President . . . to rely on this humanitarian interest,” meaning averting potential acts of genocide); Syria Opinion, *supra* note 195, at 14 (“The Syrian regime’s continued attacks on civilians have also contributed to the displacement of civilians and thus deepened the instability in the region These large-scale population movements have also added to unrest through the region.”); *Id.* at 15 (“The Syrian regime’s use of chemical weapons has contributed to the ongoing humanitarian crisis in Syria [C]ivilians fleeing from the strikes become refugees needing assistance.”).

206. Basically, humanitarian concerns may now, depending on the circumstances, be considered as a rationale by themselves as part of the ever-expanding concept of the national interest: “despite focusing on other national interests, our opinions have often expressly noted the humanitarian purpose of those deployments. And in so doing, we have never suggested that the goal of preventing humanitarian catastrophes could not be an important na-

cerns may be one (if not the) primary motivation for the use of force, OLC has taken care not to treat humanitarian concerns as a standalone rationale. Rather, this line of reasoning appears together with the other two “national interest” justifications mentioned above, to bolster the case for intervention.²⁰⁷

If one thing should be clear from the preceding pages, it is that the concept of the “national interest” provides no limitations on the Executive. No definition of what the national interest should be is articulated anywhere,²⁰⁸ only instances that can be considered to be in the national interest. Moreover, OLC frequently adds to this ever-expanding list, and there is nothing that could preclude OLC from adding even more occurrences where using the armed forces abroad would advance this nebulous, ill-defined concept—humanitarian concerns being the prime example. Simply put, this concept provides no meaningful limitation and, to the contrary, is an avenue for the unilateral external war powers of the President to expand.

The final § 1541(c)(3) issue is OLC’s interpretation of this section—granting authority to the President to use the Armed Forces to respond to “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces”—as simply recognizing the President’s power to respond to national emergencies.²⁰⁹ Since this section is read as a recognition of a power already granted to the Executive, it is not subject to either the reporting requirements or the cutoff mechanism in § 1543(c) and § 1544(b).²¹⁰ Otherwise, it would be an intrusion into the President’s Commander-in-Chief authority if “the President could find himself unable to respond to an emergency that outlasted a statutory cut-off, merely because

tional interest supporting the use of military force abroad.” ISIL Opinion, *supra* note 191, at 34.

207. *Id.* at 30 (“[I]t was reasonable for the President . . . to rely on this humanitarian interest, at least in combination with a national interest in protecting American citizens and property or supporting a strategic partner”); *id.* at 33 (“While Presidents have often stressed the humanitarian purposes underlying military actions taken abroad, this Office’s analysis of these actions has frequently emphasized other relevant national interests”).

208. See Curtis Bradley & Jack Goldsmith, *OLC’s Meaningless “National Interests” Test for the Legality of Presidential Uses of Force*, LAWFARE (June 5, 2018) <https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force> (“[The national interest] framework provides no limiting principle. Nor does OLC supply any standard for assessing how many interests must exist, or in what degree, to support unilateral presidential action.”).

209. Terrorists Memo, *supra* note 178, at 212.

210. *Id.* at 212; accord Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 161 (2002) [hereinafter Iraq Memo]. Also, note that OLC is implicitly saying that “national emergencies” do not count as hostilities—and they are able to attempt this definition because the War Powers Resolution does not define “national emergencies.”

Congress had failed . . . to enact authorizing legislation within that period.”²¹¹

2. *Sidestepping the Sixty-Day Time Limit’s Constitutionality*

OLC has said that “Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces.”²¹² Hence, there has been no need to rely on the constitutional avoidance canon, since OLC has not questioned the constitutionality of this provision. That does not mean the provision has been interpreted in a way that favors Congress, but instead it has been read as a burden-shifting provision. The logic is that since the sixty-day time limit can be extended by thirty more days if the President determines there is “unavoidable military necessity,”²¹³ which, as a matter of policy, should presumably be enough time to accomplish any objectives the President may unilaterally choose to use force to pursue. Of course, the aforementioned assumes we are talking about discrete military operations of the kind described above in Part II.D. of this article, or about a situation where the burden “shift[s] to the President to convince the Congress of the continuing need for the use of our armed forces abroad.”²¹⁴

OLC has relied heavily on construing the purpose of the War Powers Resolution—based not only on interpreting each provision separately, but also considering the structure of the resolution as a whole—in order to reach an interpretation that favors the executive. Since the War Powers Resolution’s “structure . . . recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces’ into hostilities or circumstances presenting an imminent risk of hostilities,”²¹⁵ the practical effect of the sixty-day limit provision is to place the burden on Congress, as mentioned above. Why is this reading proper according to OLC? Because, structurally, the War Powers Resolution “makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress.”²¹⁶ This interpretation came to the fore in OLC’s *Authorization for Continuing Hostilities in Kosovo* memorandum, involving a situation where the sixty-day time limit had run out.²¹⁷ The issue was ultimately sidestepped, since “[t]he WPR’s 60 day clock ran on May 25, four days after the President signed Pub. L. No. 106-31”—an ap-

211. Terrorists Memo, *supra* note 178, at 212.

212. Presidential Power Memo, *supra* note 187, at 196.

213. 50 U.S.C. § 1544(b).

214. Presidential Power Memo, *supra* note 187, at 196.

215. Libya Memo, *supra* note 189, at 8 (alteration in original) (quoting Haiti Memo, *supra* note 182, at 175).

216. Haiti Memo, *supra* note 182, at 175–76.

217. For an overview of the issue, see generally CORN, *supra* note 70.

propriations bill that the same opinion construed as specific statutory authorization.²¹⁸ Note that the statute itself, as mentioned in the preceding section, establishes that the clock only starts running after the President submits a section 1543(a)(1) report, which is not done often—in fact, only President Ford submitted a report which explicitly quoted this provision.²¹⁹

3. *The Interpretive Provision as a Statement of Policy*

The interpretive provision in § 1547(a)(1) would likely be unconstitutional were it to be read in strict adherence to the text—since it purports to be binding on Congress, and Congress cannot bind itself through legislation. OLC has not given this provision the interpretation that the plain reading of the text seems to demand, nor has it asserted it is outright unconstitutional. Instead, OLC—in reliance on the judicial construction of statutes of similar drafting to the War Powers Resolution, as well as academic commentary²²⁰—has interpreted this section as

having the effect of establishing a background principle against which Congress legislates. . . . [S]ection [1547(a)(1)] continues to have operative legal effect, but only so far as it operates to inform how an executive or judicial branch actor should interpret the intent of subsequent Congresses that enact appropriation statutes that do not specifically reference the WPR.²²¹

Why would OLC go to such lengths? Because it needs to. As Dean Morrison says, “[i]n matters implicating foreign affairs and national security . . . judicial review of executive branch statutory interpretation is extremely infrequent. In areas like these, to think about executive branch statutory interpretation is necessarily to think about that process without regard to the prospect of judicial review.”²²² Moreover, this OLC interpretation is from the year 2000—at which point there was already a clear trend in the

218. Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 352 (2000) [hereinafter Kosovo Memo]. As Professor Peter Shane notes, here OLC basically argued that “the legislative history of the emergency supplemental appropriation sustained the inference that Congress meant . . . to provide the legal authority for the operation [President Clinton] explicitly intended to pursue, even though they failed to say so explicitly,” contra the terms of the WPR. Peter Shane, *The Presidential Statutory Stretch and The Rule of Law*, 87 U. COLO. L. REV. 1231, 1240–41 (2016).

219. President Ford submitted a WPR report mentioning (“taking note of” was the specific language used) § 1547(a)(1) in May of 1975, during the Mayaguez incident. Overview of the War Powers Resolution, *supra* note 177, at 282.

220. Kosovo Memo, *supra* note 218, at 344–46.

221. *Id.* at 342–43.

222. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1197 (2006).

federal courts of refusing to decide WPR cases on the merits.²²³ Perhaps we could say that “[t]he avoidance canon . . . is understood as a statutory means of enforcing constitutional values . . . [and] the executive branch’s independent obligation to enforce the Constitution entails an obligation to use the avoidance canon.”²²⁴

Is this really persuasive, however? A standard articulation of the canon would be that “if an otherwise acceptable construction of the statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.”²²⁵ The question is then, would it be “fairly possible” to assert this alternative interpretation of § 1547(a)(1) as a simple statement of policy? The intent of Congress in passing the WPR was to place limitations on the unilateral use of force by the Executive,²²⁶ and interpreting the statute to be non-binding is plainly contrary to this intent. Also, from a structural point of view, holding that this section should be understood as an interpretive aid only contributes to lessen the resolution’s effectiveness. It follows that under this interpretation, the Executive can consider appropriation bills (among others) to be statutory authorization, regardless of whether Congress intended them to be. The end result is that OLC, as a practical matter, has read the provision out of the WPR—since if “a subsequent Congress remains free to choose in a particular instance to enact legislation that clearly authorizes hostilities” and does so by employing procedures other than the ones stipulated in the War Powers Resolution,²²⁷ this provision is merely a declaration of intent. On the other hand, this consequence appears to have been unavoidable, since the plain language of § 1547(a)(1) seems to be unconstitutional and construing it in this

223. See Morrison, *supra* note 149.

224. Morrison, *supra* note 222, at 1226.

225. *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

226. The War Powers Resolution was able to overcome President Nixon’s veto only because of the high degree of animosity Congress had toward him after Watergate and the 1970 invasion of Cambodia, among other factors. Cruden, *supra* note 13, at 61, 74–75. See also Neal Devins, *The Erosion of Congressional Checks on Presidential Power*, THE CIPHER BRIEF (January 20, 2017), <https://www.thecipherbrief.com/article/northamerica/erosioncongressionalcheckspresidentialpower109> (“In response to [Nixon], Congress—both Democrats and Republicans—stood up to the President: They enacted the War Powers Act In general, Congress sought to serve as a check on the President”). One senator is even reported to have said, “I love the Constitution, but I hate Nixon more.” THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* 220 (1974).

227. Kosovo Memo, *supra* note 218, at 343.

way allows the Executive to avoid having to state this outright²²⁸—no need to ruffle Congress’s feathers when the issue can simply be sidestepped.

4. *Consultation and Reporting Requirements*

OLC has also expressed its opinion on the consultation and reporting requirements of the War Powers Resolution. With regard to the former, OLC has not said much—only that it is meant to be “flexible,” which is the same position that is expressed in the legislative history.²²⁹ Indeed, OLC quotes the House report and has not elaborated further on what is required by consultation.²³⁰ OLC has also commented on the reporting requirement in § 1543(c), and according to OLC, the requirements expressed therein apply to all of the circumstances in § 1543(a) and not to the introduction of the United States Armed Forces into hostilities or situations where hostilities are imminent.²³¹ Regardless, as was previously mentioned, Presidents have consistently filed reports “consistent” or “pursuant” to the War Powers Resolution, without explicitly mentioning under which one of the circumstances in § 1543(a) they are acting. Since the 1984 *Overview of the War Powers Resolution* memo, OLC has not had the occasion to make any further pronouncements with regard to this practice.

C. Narrowing the Terms of the War Powers Resolution “Hostilities”

As mentioned in Part I, “[t]he word *hostilities* was substituted for the phrase *armed conflict* . . . because it was considered to be somewhat broader in scope.”²³² Perhaps, as Professor Oona Hathaway says, Congress thought the meaning of the word “hostilities” was self-evident, so there was

228. And it also would not raise the criticism that the executive branch is abusing the canon; as Dean Morrison says, “[f]aced with legislation purporting to impose limits on the executive branch, executive officials will have an incentive to resist those limits however they can. The avoidance canon is particularly attractive for those purposes, since it enables the executive branch to evade the congressional limitations in question without having to commit to a (perhaps politically costly) position that the limits are actually unconstitutional.” Morrison, *supra* note 222, at 1236. In this case, however, the constitutionality concern with § 1547(a)(1) is not marginal.

229. Presidential Power Memo, *supra* note 187, at 194.

230. *Id.* at 194–95.

231. Overview of the War Powers Resolution, *supra* note 177, at 276–77.

232. H.R. REP. NO. 93-287, at 23 (1973). The full quote from the report is as follows: “The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict.”

not much need for debate.²³³ But as it happens, the meaning was not so obvious to OLC; the term has been interpreted narrowly by OLC since its first WPR opinion back in 1980. OLC stated the term “hostilities” applies only when the armed forces are introduced into a foreign country, since § 1543 refers to “any case in which United States Armed Forces are *introduced*.”²³⁴ Thus, the term hostilities does not cover a situation when the Armed Forces are stationed in a foreign country and they come under attack, and the President would not need to engage in consultation or report any action taken in response to such a situation.²³⁵

Likewise, the term hostilities appears to entail a minimum level of engagement threshold, since to OLC it does not encompass “irregular or infrequent violence,” but rather addresses only a state of continual engagement by the United States Armed Forces.²³⁶ Thus, the term hostilities would

233. “Perhaps because the meaning was self-evident to those involved, the term was not a subject of significant debate during the many hearings on the proposed legislation” Oona Hathaway, *How to Revive Congress’ War Powers*, TEX. NAT’L SEC. REV., Nov. 14, 2019, at 41, 44.

234. Presidential Power Memo, *supra* note 187, at 194; 50 U.S.C. § 1543 (emphasis added).

235. *Id.* Note that this interpretation of the term “hostilities” would be consistent with the sole-organ theory—that the Executive is “the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). As a matter of fact, OLC has cited *Curtiss-Wright* as authority for the proposition that the President has ample foreign policy powers that allow him to deploy the armed forces abroad. See Auth. of the President Under Domestic and Int’l Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 151 (2002); President’s Constitutional Auth. to Conduct Military Operations Against Terrorists, 25 Op. O.L.C. 188, 196 (2001); Common Legis. Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 256 (1989); Presidential Power Memo, *supra* note 187, at 186 n.3. And since according to *Curtiss-Wright* that power comes not from the Constitution, but from sovereignty (“vested in the federal government as necessary concomitants of nationality,” *Curtiss-Wright*, 299 U.S. at 318), it would follow that the authority of the President to command the armed forces deployed abroad does not end after the time of deployment, more so if the President “has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.” *Curtiss-Wright*, 299 U.S. at 320 (emphasis added). Thus, it is unsurprising that OLC interprets this term to remove any legal or constitutional constraints to presidential authority.

236. Overview of the War Powers Resolution, *supra* note 177, at 275; *accord* Presidential Power Memo, *supra* note 187, at 194 (“[t]he term “hostilities” should not be read necessarily to include *sporadic* military or paramilitary attacks on our armed forces stationed abroad. Such situations do not generally involve the full military engagements with which the Resolution is primarily concerned”) (emphasis added). As an example of a situation that does not rise to the required level of hostilities, OLC mentions the interventions in Libya in August 1981, where “two Libyan jet fighters attacked aircraft of the Sixth Fleet” one time. Overview of the War Powers Resolution, *supra* note 177, at 279. Also, although it is not addressed in an OLC opinion, the dispatch to U.S. military advisers to El Salvador was never reported under the WPR, and the Reagan Administration asserted this was unnecessary, since the personnel introduced “will not act as combat advisors, and will not accompany

not cover the situation when the Armed Forces have to defend themselves from “guerrilla” attacks “unless our armed forces were assigned to ‘command, coordinate, participate in the movement of, or accompany’ the forces of the host government in operations against such guerrilla operations.”²³⁷ The issue of irregular violence was also a relevant consideration in OLC’s determination that there would be no “imminent involvement in hostilities” in the 2004 deployment into Haiti.²³⁸

OLC interpretation not only serves to expand the President’s external war powers, but it also fails to impose any substantial constraints on the President, with the Obama administration’s conception of hostilities being a prime example—and according to Professor Oona Hathaway, dealing the WPR “what was arguably a death blow in 2011.”²³⁹ The Obama Administration adopted the position that carrying out airstrikes against Libyan installations using UMVs did not constitute “hostilities” for the purpose of the War Powers Resolution due to four factors: the limited scope of the mission, the limited exposure of the armed forces to Libyan retaliation, limited risk of escalation, and limited military means being used to carry out the mission.²⁴⁰ The end result is that this theory expands the authority of the President to use force against enemy targets without triggering the WPR. Under this theory of hostilities, as Charlie Savage succinctly explains, “[i]t wasn’t ‘hostilities’ for the United States to bomb another country’s armed forces pretty much *every day*, so long as those forces could not shoot back at the Americans.”²⁴¹

While it is conceivable that OLC could have reached the same conclusion based on an extension of its precedent, perhaps by characterizing drone strikes as being “irregular violence,” this was not the view of the office during the Obama administration. Carolyn Krass, OLC’s Assistant Attorney General at the time, “made clear that if [Robert] Bauer [President Obama’s White House Counsel] asked the Office of Legal Counsel to write a formal, authoritative memo analyzing the question, she was unlikely to give the White House the answer it wanted to hear.”²⁴² Regardless, because OLC’s

Salvadoran forces in combat, on operational patrols, or in any other situation where combat is likely.” WEED, *supra* note 3, at 11.

237. Presidential Power Memo, *supra* note 187, at 194 (quoting 50 U.S.C. § 1547(c)).

238. Deployment of United States Armed Forces to Haiti, 28 Op. O.L.C. 30, 34 (2004) [hereinafter Haiti Memo II].

239. Hathaway, *supra* note 233, at 45.

240. *Testimony by Legal Adviser Harold Hongju Koh, U.S. Dep’t of State, on Libya and War Powers, Before the S. Foreign Relations Comm.*, at 7–11 (June 28, 2011), <http://www.law.uh.edu/faculty/eberman/NSL/HaroldKohTestimony-Libya-and-War-Powers-June-28-2011.pdf>.

241. CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 645 (2015).

242. *Id.* at 646.

position was not formalized in an opinion (or any other document), it does not count as an expression of the executive branch's customary understanding of the term—especially since President Obama followed the opposite approach.²⁴³ As a result of the episode, as Professor Jack Goldsmith said, “Obama was setting a precedent expanding a president’s unilateral powers to wage an open-ended war using drones and missiles from ships, since that carried no risk of American casualties.”²⁴⁴ Professor Goldsmith, as it turns out, was right on the money: the Obama administration rationale would find OLC endorsement in the 2018 Syria Opinion, where OLC concluded that the strikes on Syria fell short of being hostilities for three reasons: first, because “the United States did not plan to employ any U.S. ground troops,” or even airplanes inside Syrian territory;²⁴⁵ second, because the operation was “sharply circumscribed,” with the attack being limited to “three military targets with the aim of degrading and destroying the Syrian regime’s ability to produce and use chemical weapons.”²⁴⁶ Finally, because the duration of the operation was limited—“the entire operation lasted several hours”²⁴⁷—it couldn’t, by itself, count as a prolonged military engagement because the operation was executed in a manner where the strike would not escalate into a broader engagement against Syria or its backers.²⁴⁸

D. Narrowing the Term “War”

Analytically speaking, when OLC justifies the unilateral use of force by the executive, there are two questions that need to be answered: first, if “the President could reasonably determine that the action serves important

243. As Professor Adrian Vermeule mentions, approval by OLC helps legitimize decisions by the Executive. Going around OLC for advice by other sources, that “the White House had pressured or bypassed OLC might supply a focal point that would trigger investigations by legislators . . . or even condemnation by broad public opinion, at least in a highly salient case.” Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1210 (2013). However, as Professor Vermeule also mentions, “[w]hen President Obama more or less bypassed OLC in order to obtain legal approval from other executive branch agencies for military intervention in Libya, the political sanctions that some observers predicted failed to materialize.” *Id.* at 1210. See also Devins, *supra* note 226, at 4, and Renan, *supra* note 168, at 839–41, for accounts of how President Obama went around OLC in the Libya issue. This practice “was recurrent in reports of national security decision making under President Obama,” *id.* at 841, albeit it was not exclusive to his administration: as Professor Daphna Renan recounts, the Carter Administration consulted with White House Counsel on whether the attempt to rescue hostages from the American embassy in Tehran would be legal, and consciously chose to exclude OLC from the discussion. *See id.* at 828.

244. SAVAGE, *supra* note 241, at 647.

245. Syria Opinion, *supra* note 195, at 20.

246. *Id.*

247. *Id.* at 21.

248. *Id.*

national interests,”²⁴⁹ and second, whether this particular military engagement would constitute a “war” in the constitutional sense.²⁵⁰ This section deals with the latter question. The Declaration of War Clause in Article I, Section 8 of the Constitution gives to Congress the power to declare war. Nevertheless, the Executive has used the Armed Forces in ways that could plausibly go beyond mere “hostilities” and would require a declaration of war, pursuant to § 1541(c). The strategy OLC adopted has been to narrow the scope of the term war in the Constitution. If a particular use of the Armed Forces does not constitute “war,” it is considered to be “hostilities,” and thus the President would not need to seek a declaration of war by Congress—or even specific statutory authorization, given the way OLC has interpreted the sixty-day time limit provision in favor of the Executive. A war in the constitutional sense “does not exist where . . . the nature, scope and duration of the deployment are such that the use of force involved does not rise to the level of war.”²⁵¹ To the contrary, there will only be a war in the constitutional sense when there are “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.”²⁵² This was the position of OLC in its Haiti, Bosnia, and Libya memos.²⁵³

One factor that allows OLC to argue in favor of the proposition that congressional authorization is unnecessary under the Constitution is “the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment.”²⁵⁴ Note this does not mean the risk of resistance or casualties must be close or near zero; in elaborating on this concept on its Bosnia memo, OLC asserted that “[u]nlike the Haitian intervention, this operation

249. *Id.* at 9. The answer so far has been yes in every case.

250. *Id.* at 10. Note that according to Professors Bradley and Goldsmith, in practice—and given how shapeless the concept of the national interest is—in evaluating the constitutionality of presidential uses of force, OLC is really employing a single test . . . whether the use of force, based on its anticipated nature, scope and duration, constitutes a ‘war.’” Curtis Bradley & Jack Goldsmith, *OLC’s Meaningless ‘National Interests’ Test for the Legality of Presidential Uses of Force*, LAWFARE (June 5, 2018), <https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force>. Since this section intends to track OLC’s reasoning, however, I believe it was necessary to present and analyze both prongs of the test, even if I do agree that the concept of the national interest, in its current shape, serves as no limitation, as mentioned above.

251. Haiti Memo, *supra* note 182, at 179.

252. Libya Memo, *supra* note 189, at 8.

253. *Id.*; Haiti Memo, *supra* note 182, at 177–78; Bosnia memo, *supra* note 178, at 333–34 (“The parties to the agreement already are in substantial . . . compliance with an earlier cease-fire agreement, and have invited the deployment of NATO forces and guaranteed their safety. To send United States forces to the region, in these circumstances, does not constitute ‘war’ in any sense of the word.”)

254. Haiti Memo, *supra* note 182, at 179.

arguably is not a case where ‘the risk of sustained military conflict [is] negligible.’ . . . The deployment of 20,000 troops on the ground . . . raises the risk that the United States will incur (and inflict) casualties.”²⁵⁵ Escalation from the initial use of force into a broader conflict has also been an element considered by OLC.²⁵⁶ Of course, informed assessments are not prophecies; as OLC itself recognized with regard to the initiation of hostilities against Yugoslavia, “[o]n at least one occasion, such a unilateral deployment has constituted full-scale war,”²⁵⁷ and what starts as a one-off operation can cause the United States to be entangled into a prolonged and expensive military commitment, as happened in Libya.

Besides requiring hostilities to rise to a certain threshold, OLC has also relied on governmental consent—that the use of military power takes place “with the full consent of the legitimate government of the country involved.”²⁵⁸ This factor is heavily emphasized in OLC opinions when it is present. For instance, the office has used the existence of a foreign government’s consent in order to avoid characterizing a conflict as war, by saying that “considerable weight should be given to the consensual nature” of a particular military deployment—and in the case of Bosnia, since the intervention was in support of an agreement reached by the warring parties, Assistant Attorney General Walter Dellinger reasoned there was no need for a declaration of war.²⁵⁹ However, an invitation by a foreign government is not necessary to preclude the finding that there is no war in the constitutional sense. President Obama used airstrikes against Libya “in support of international efforts to protect civilians and prevent a humanitarian disaster,”²⁶⁰

255. Bosnia Memo, *supra* note 178, at 333 (second alteration in original) (emphasis omitted) (quoting Haiti Memo, *supra* note 182).

256. Syria Opinion, *supra* note 195, at 21.

257. Terrorists Memo, *supra* note 178, at 202.

258. Haiti Memo, *supra* note 182, at 177–78.

259. Bosnia Memo, *supra* note 178, at 333. Another example of this is President George Bush’s 2004 dispatch of troops to Haiti, where OLC drew attention to the fact President Boniface Alexandre—then Haiti’s acting president—“authorize[d] security forces to enter and operate on the territory of the Republic of Haiti for the purpose of conducting activities designed to bring about a climate of security and stability which will support the political processes underway, facilitate the furnishing of humanitarian assistance, and in general help the people of Haiti.” Haiti Memo II, *supra* note 238, at 30 (alteration original) (quoting Statement of Haitian President Boniface Alexandre (Feb. 29, 2004)). See also Bosnia Memo, *supra* note 178, at 332 (where OLC used the fact that “the mission is in support of an agreement that the warring parties have reached and is at the invitation of those parties” as an argument to justify deploying American troops abroad in 1995). A more timely example would be the United States’ use of drone strikes abroad, with the consent of the host state as a justification for why such an act would not count as an armed attack under international law. See generally Max Byrne, *Consent and the Use of Force: An Examination of “Intervention by Invitation” as a Basis for U.S. Drone Strikes in Pakistan, Somalia and Yemen*, 3 J. ON USE FORCE & INT’L L. 97 (2016).

260. Libya Memo, *supra* note 189, at 4.

and OLC agreed that the president did not need a congressional declaration of war before the intervention could take place.²⁶¹

E. Gap Filling—The Search for Statutory Authorization

The Constitution grants Congress the power to declare war. Thus, if “hostilities” rise to the level of a war in the constitutional sense, statutory authority is need. But this can take many forms. The issue of statutory authorization appears in one of two ways: either there is one bill authorizing the use of force, such as the 2001 Authorization for the Use of Military Force (AUMF), that can be construed in even broader terms; or authorization for the use of force is inferred from another statute—most commonly, one providing for appropriations. This interpretive strategy can be seen in the Authority of the President to Use Military Force Against Iraq memo, where OLC takes two legislative provisions—the 2001 AUMF and the 1991 *Authorization for Use of Military Force Against Iraq*—and combines them in such a way that could arguably constitute statutory authority for the Executive’s use of force under § 1541(c). With regard to the former, OLC simply states, in a rather brief paragraph, that “[w]ere the President to determine that Iraq provided assistance to the perpetrators of the September 11th attacks, this authorization would apply to the use of military force against Iraq.”²⁶² Extending a 1991 authorization to allow for the use of force an entire decade later is questionable, but the combination of the need to enforce Security Council Resolutions²⁶³ as well as the fact that Presidents had used military force against Iraq post Operation Desert Storm while relying on this statute,²⁶⁴ paved the way for OLC’s conclusion that “the authorization to use force in [the 1991 Authorization for Use of Military Force Against Iraq] had survived the cease-fire with Iraq.”²⁶⁵

The WPR forecloses implying authorization from other statutes absent the “magic words” it requires, but that has not stopped OLC from finding it. The Kosovo Memo serves as an example of this process. OLC, in its memorandum regarding the authorization for continuing hostilities in Kosovo, construed an emergency supplemental appropriation for military operations in Kosovo²⁶⁶ as authorization for continuing military operations after the

261. *Id.* at 1.

262. Iraq Memo, *supra* note 210, at 159.

263. *See id.* at 153–58 for the full discussion.

264. President Clinton ordered the use of military force against Iraq in 1996 and 1998 relying on Authorization for Use of Military Force Against Iraq, and President Bush “[o]rdered the 1992 participation of the United States in the enforcement of the southern no-fly zone in Iraq consistent with” this statute. *Id.* at 157.

265. *Id.*

266. Emergency Supplemental Appropriations Act, Pub. L. No. 106-31 (1999).

sixty-days clock had passed.²⁶⁷ OLC has relied on the fact that “[t]he Supreme Court has recognized that, as a general matter, appropriation statutes may ‘stand[] as confirmation and ratification of the action of the Chief Executive’”²⁶⁸ as well as confirmation in historical practice; “[p]rior to the enactment of the WPR, many enactments of Congress, especially appropriations measures, could justifiably have been regarded by the Executive as constituting implied authority to continue the deployment of our armed forces in hostilities.”²⁶⁹ The argument can be made, however, that appropriation bills “should not be interpreted to authorize continuing military operations because those appropriations could just as easily be understood as providing resources for men and women already in combat.”²⁷⁰ However, Congress does have options to avoid this interpretation of the law, and it is up to Congress to exercise those options. As John Hart Ely said, “Congress could [phrase] its funds cut-off as a phase out, providing for the protection of the troops as they [are] withdrawn” as Congress did in Somalia,²⁷¹ or alternatively, “Congress could preclude the use of funds to introduce additional troops, as it did through the 1971 Cooper-Church Amendment,” passed during the conflict in Cambodia.²⁷²

OLC further suggests that the War Powers Resolution serves as an interpretive aid “to inform how an executive or judicial branch actor should interpret the intent of subsequent Congresses that enact appropriation statutes that do not specifically reference the WPR,”²⁷³ thus allowing for a continuation of past practices which, as it so happens, tend to favor the Executive. Other examples of OLC interpretation of statutes as impliedly authorizing the use of force can be seen in the Somalia opinion, where OLC inferred such authorization from the Horn of Africa Recovery and Food Security Act, which purports to ensure safe delivery of humanitarian relief assistance to noncombatants, since due to the circumstances at the time the Ex-

267. Kosovo Memo, *supra* note 218, at 327.

268. *Id.* at 332 (alteration in original) (citing *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947)). Among other cases, OLC mentioned that “in *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937), the Court held that Congress had ratified the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce by a series of subsequent appropriation acts” and “in *Wells v. Nickles*, 104 U.S. 444, 447 (1881), the Court found that Congress had authorized the Department of the Interior to appoint agents to protect timber on government land through ‘appropriations made to pay for the services of these special timber agents.’” *Id.*

269. Overview of the War Powers Resolution, *supra* note 177, at 273, n.4. See also Kosovo Memo, *supra* note 218, at 333–39.

270. Kosovo Memo, *supra* note 218, at 338.

271. *Id.* (quoting ELY, *supra* note 81, at 29).

272. *Id.*

273. *Id.* at 342–43.

executive presumably would have to employ military forces.²⁷⁴ The Deployment of United States Armed Forces into Haiti memo is one more example, where OLC construed § 8147(b) of the 1993 Defense Appropriations Act to mean that “the President need not seek prior authorization for the deployment in Haiti provided that he made certain specific findings and reported them to Congress in advance of the deployment,” which, according to the opinion, President Clinton did.²⁷⁵ Of course, as OLC has stated in general terms, “[t]he determination of whether any particular appropriation statute that does not refer back to the WPR constitutes authorization for continuing hostilities will necessarily depend on the facts of each case.”²⁷⁶ Nevertheless, it is not hard to see how OLC precedent grants future interpreters all the tools they need to make this determination in favor of the President. OLC has failed, since the first opinion on the War Powers Resolution dating from 1980, to interpret a statute as *not* granting the President authorization to use military force or to disavow such a construction by another agency inside the executive branch. To be sure, a harder case might arise in the future—for example, where does the grant of authority for the Soleimani strike come from, given that presumably there is no Congressional authorization for an attack on Iran and that Iraq had not consented to the strike?²⁷⁷ But if history has taught us anything, it is that when there is a will, there is a way. Difficult questions will certainly not get in OLC’s way.

F. Evaluation of OLC’s Role as a Check on the Executive

Professor Martin Lederman has identified “three principal schools of thought” on the issue of whether the President can unilaterally use force: 1) the “traditional view,” that the President must always obtain Congressional authorization before using force abroad—with the exception of a limited number of cases where the President simply cannot wait; 2) the “Bybee/Yoo position,”²⁷⁸ that the President does not face any practical lim-

274. Since, as Congress found in section 2(3), “[t]he actions of the government and armed opposition groups in Somalia ‘erode[d] food security’ in that country.” Somalia Memo, *supra* note 188, at 163 (alteration in original) (quoting Horn of Africa Recovery and Food Security Act, Pub. L. No. 102-274 § 2(3) (1992)).

275. Haiti Memo, *supra* note 182, at 175.

276. Kosovo Memo, *supra* note 218, at 346. OLC also provides a framework for making said determination, although it is doubtful to be of much use in the future, given the trend of interpreting the resolution in ways that most favor the Executive.

277. See generally Ryan Goodman & Steve Vladeck, *Why the 2002 AUMF Does Not Apply to Iran*, JUST SECURITY (Jan. 9, 2020), <https://www.justsecurity.org/67993/why-the-2002-aumf-does-not-apply-to-iran/>.

278. The name refers to the position expressed by then-Deputy Assistant Attorney General John Yoo, in OLC’s Terrorists Memo, and then-Assistant Attorney General Jay Bybee, in the Iraq Memo.

its and is never required to ask Congress for permission; and 3) the “Clinton/Obama third way,” that the President can act unilaterally if the use of force serves important national interests and “the operation cannot be anticipated to be sufficiently extensive in nature, scope and duration” to constitute a war in the constitutional sense.²⁷⁹ OLC’s statutory interpretation of the War Powers Resolution can be said formally to fit within the third school of thought, albeit consistently pushing the boundaries of what the Executive is allowed under the resolution—to the point where the law in action is indistinguishable from the “Bybee/Yoo position.”

Interestingly, OLC’s interpretation of the War Powers Resolution fits within a model of dynamic statutory interpretation—that is to say, OLC has interpreted the War Powers Resolution “in light of [the] present societal, political, and legal context,”²⁸⁰ where the Executive has clear primacy in the area of foreign relations²⁸¹ and needs to use force, not to fight so-called long wars, but to address threats ever more diffuse. Professor William Eskridge developed a model of statutory interpretation that takes into account text, history, and evolution of the statute and its present context. Briefly summarized, the idea is to start with text, but in the face of “contrary legislative expectations or highly unreasonable consequences,” legislative history comes to the fore.²⁸² However, the evolution of the statute and the present context under which is being applied are “most important when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law.”²⁸³ This is exactly the case with the War Powers Resolution; the text is often (and by design) inconclusive by itself, full of drafting issues and the legislative history does little to cure the ambiguity. Since the military necessities of the United States have changed since the time of its enactment—from full-scale conventional wars to dealing with terrorist organizations, as well as limited strikes against hostile countries—under this framework the evolutionary context controls, and such a context seems to call for an expedient procedure to authorize uses of force, which would favor a pro-executive interpretation.

279. Martin Lederman, *Syria Insta-Symposium: Marty Lederman Part I—The Constitution, the Charter, and Their Intersection* (Jan. 9th, 2013), <http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection/>.

280. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987).

281. Indeed, this has been recognized by the Supreme Court on repeated occasions. See *Terrorists Memo*, *supra* note 178, at 195–96 (citing *Dep’t of Navy v. Egan*, 484 U.S. 518, 529 (1988); *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

282. Eskridge, *supra* note 280, at 1483.

283. *Id.* at 1484.

With the exception of § 1544(c),²⁸⁴ OLC has not found any provision of the War Powers Resolution to be unconstitutional, and the only time OLC has rescinded its interpretation of the War Powers Resolution was in 1983, when it retracted its opinion that military personnel detailed to the CIA were not subject to the War Powers Resolution.²⁸⁵ This has not stopped OLC from expanding executive power to the extent that nowadays it would be plausible to state that the War Powers Resolution is not a true constraint on the President, but merely of nominal importance. Even before humanitarian concerns were included in the “national interest,” OLC had come up with an incredibly wide array of justifications for executive action. But now that the concept of the “national interest” can encompass practically any situation where the Executive would want to use the armed forces, it is a powerful weapon in the hands of the President, one that only serves to widen his scope of action. Perhaps this would not be the case if OLC could actually offer neutral analysis, but we have seen how it is wont to interpret the facts in the Executive’s favor. Considering also how easily OLC finds statutory authorization and how often it fails to determine there is a “war” in the constitutional sense, it is difficult to see what limits remain to unilateral Presidential action in practice.²⁸⁶ The WPR has been interpreted into irrelevance by OLC, and it is extremely difficult to avoid the conclusion

284. See Overview of the War Powers Resolution, *supra* note 177, at 273 (“Section [1544(c)] contains an unconstitutional legislative veto device [T]his provision was implicitly invalidated by the Court’s decision in *INS v. Chadha*”).

285. See generally War Powers Resolution: Detailing of Military Personnel to the CIA, 4A Op. O.L.C. 197 (1980).

286. This is not a controversial conclusion to draw from this series of events by any means: “The executive branch is indicating the irrelevance of Congress to the warmaking process when it announces that the president’s Article II authority should be understood to include the power to initiate military force against foreign nations whenever he deems American national interests to be at stake.” Keith E. Whittington, *R.I.P. Congressional War Power*, LAWFARE (April 20, 2018), <https://www.lawfareblog.com/rip-congressional-war-power>. Speaking in the context of the Syria opinion, Professor Steve Vladeck sees this movement of expansive construction of the Executive’s War Powers as “the next step down a very, very slippery slope toward shockingly broad unilateral presidential war powers.” Steve Vladeck, *OLC’s Formal (and Remarkably Broad) Defense of the April Syria Strikes*, JUST SECURITY (June 1, 2018), <https://www.justsecurity.org/57300/olcs-formal-and-remarkably-broad-defense-april-syria-strikes/>. I would argue, however, that we are already there: OLC has come up with an ever-expansive array of justifications to unilateral use of force by the President; a finding that the President is authorized to use force in a particular situation can be justified by extending the logic and the precedent already in place. And in the unlikely event a new situation comes up where that is unfeasible, there is no reason “in the opinions to think that OLC will not recognize different interests in the future. The opinions certainly recognize no natural limits on the interests that will suffice to support Article II uses of force.” Jack Goldsmith, *The New OLC Opinion on Syria Brings Obama Legal Rationales Out of the Shadows*, LAWFARE (June 1, 2018), <https://www.lawfareblog.com/new-olc-opinion-syria-brings-obama-legal-rationales-out-shadows>.

that there is no law that regulates the President's use of the external war powers. Eric Posner and Adrian Vermeule have called OLC the "Keeper of the Presidential Fig Leaf."²⁸⁷ Whether their position is accurate as a general matter is outside the scope of this article; suffice to say, it is an accurate description of OLC's role when it comes to interpreting the War Powers Resolution.

V. CONCLUSION

The WPR has been nothing short of a failure, and its most salient feature is how strikingly useless it has been in constraining the President's power. Presidents defy the resolution with impunity, and OLC's interpretation of it has only served to increase the scope of presidential action. This is because the WPR fails on two levels: on the dimension of "law on the books," because as Part III of this essay has shown, the text of the Resolution is filled with statutory drafting issues, which in some cases rise to the level of unconstitutionality. Even if faithfully applied, the Resolution is full of statutory drafting issues that compromise its effectiveness. From the perspective of the "law in action," the WPR fares no better: courts have been reticent to decide War Powers cases on the merits. The one source of interpretation—which dovetails quite nicely with how the Resolution operates in actual practice—has been OLC opinions, and the Office misses no opportunity to interpret the text of the resolution into irrelevance.

But could this process have been any different? Did the WPR ever have any hope of constraining the President? It is doubtful, since the resolution was drafted without considering the political realities of how Congress and the President relate to each other. For the Presidency, three primary considerations seem to guide foreign policy decisions: to generate a popular image of the President,²⁸⁸ to deny opponents a key issue,²⁸⁹ and to appeal to particular interest groups.²⁹⁰ Nowhere does this raise the implication that Presidents care only about domestic policies when deciding to take military action, only that domestic politics are a consideration. It is necessary then to keep in mind, that at least in the short-term, even an ill-advised use of force

287. See generally Posner & Vermeule, *supra* note 172.

288.

In general, presidential popularity appears to go up—at least in the short run—when the president is seen as acting vigorously on almost any issue . . . Presidential initiatives in foreign policy are frequently seen as desirable because they show that the president is in command and seeking solutions to problems.

HALPERIN ET AL., *supra* note 4, at 67.

289. Halperin and Clapp give the example of the concern during the cold war of allowing countries to "go communist." *Id.* at 68.

290. *Id.* at 70.

can generate *positive returns* for the President: “[p]residential initiatives in foreign policy are frequently seen as desirable because they show that the president is in command and seeking solutions to problems.”²⁹¹ The problem is compounded because “[t]he Presidency is so singular and visible a political target, there will be a built-in tendency not to rethink key commitments, lest the President, as an individual, appear to be weak, indecisive, irresolute or unprincipled.”²⁹²

Proposals to correct the operation of the War Powers Resolution usually focus on amending the resolution, in the hopes that Congress will finally exercise its constitutional prerogatives.²⁹³ However, Congress also has its own internal dynamics that the Resolution ignores, a striking omission, since starting with the Korean War, “Congress assumed the role of bystander or junior partner rather than responsible participant.”²⁹⁴ Congress has long played second fiddle to the President in foreign policy and national security matters, and deference to the Executive only increased with the end of the Cold War.²⁹⁵ Note how President Obama was able to intervene in Libya while Congress “[m]ade no attempts to participate in the policymaking.”²⁹⁶ The reasons for Congress’s inability to play a substantial role are structural. Briefly, reelection is critical to members of Congress²⁹⁷ and unlike most foreign affairs issues, “[v]otes on whether to go to war or to con-

291. *Id.* at 67. See also how George W. Bush ran for reelection on the premise that the war was necessary. *Id.* at 68. For another perspective on why Presidents benefit from uses of force abroad, one based on the personal glory the Executive accrues after the conduct of a successful foreign intervention, see generally William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

292. PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 77 (2009).

293. An example of this is Professor Oona Hathaway’s latest article in the *Texas National Security Review*, where she proposes three amendments to the War Powers Resolution: 1) to define hostilities; 2) to include sunset clauses in all future authorizations for the use of force and 3) to reaffirm that any uses of force must be in accordance to international law. Hathaway, *supra* note 233, at 43–57. Professor Hathaway correctly states that “[n]o institutional reform can fix a dearth of political courage,” *id.* at 43, but I believe the problem is structural more than anything else; that is, Congress’s role is defined in a way that strongly encourages Congresspersons to avoid responsibility.

294. Griffin, *supra* note 2, at 74; *accord*, Ely, *supra* note 12, at 1379.

295. Griffin, *supra* note 2, at 31–32.

296. Stephen R. Weissman, *Congress and War: How the House and the Senate Can Reclaim Their Role*, 96 FOREIGN AFF. 132, 135 (2017). For a complete description of the episode, see *id.* at 135–138. The same episode gave rise to Representative Dennis Kucinich’s War Powers Resolution suit in *Kucinich v. Obama*, discussed *supra* note 147.

297. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 442 (2012), for cites to the relevant political science literature. See also HALPERIN ET AL., *supra* note 4, at 333 (“With few exceptions, members of Congress are interested in getting reelected . . . [O]ne face of any issue that they see is whether how they vote on the issue might affect their chances of reelection.”).

tinue to support a particular military operation are often seen as having a significant impact on reelection prospects.”²⁹⁸ Even when Congress has the tools to rein in the Executive—for example, it could prevent military operations by cutting short appropriations—experience has shown it is not wont to use them.²⁹⁹ Given how little they will benefit from the outcome, “each individual member has relatively little incentive to expend resources trying to increase or defend congressional power, since he or she will not be able to capture most of the gains,”³⁰⁰ so criticizing the President if he fails and joining in praise if he succeeds appears as the optimal strategy for Congresspersons.³⁰¹ Moreover, even assuming the WPR were amended in a way that significantly increases Congress’s ability to act as a check on the President, and Congress were indeed willing to exercise these new attributions, it

298. HALPERIN ET AL., *supra* note 4, at 334; *see also* Michael Glennon, *The Gulf War and the Constitution*, 70 FOREIGN AFF. 84, 96 (1991) (“Members of Congress have much to gain politically, and little to lose, by avoiding controversial issues. No vote is more career-threatening than a vote for or against war.”); Turner, *supra* note 71, at 703 (“A greater congressional role in this vital area will not only increase the demands on a member’s time, it will also increase the likelihood that he will be held accountable by the American people for foreign policy failures. This is a serious risk, but it comes with the partnership role.”); Rostow, *supra* note 46, at 16 (arguing that the WPR was “misconceived”; “most Congressmen and Senators prefer not to take responsibility for the President’s use of the armed forces. It is a political risk they are happy to leave to the President.”).

299. Albeit as Jane Stromseth points out, the tools at Congress’s disposal “are often blunter than those ideally suited to the situation . . . [R]estricting funds . . . is often not an optimal response because it can harm the President’s ability to carry out effective diplomacy. On the other hand, cutting off funds after a deployment has just taken place can be problematic as well because it undercuts both the troops in the field and American credibility with allies.” Stromseth, *supra* note 13, at 910.

300. Bradley & Morrison, *supra* note 297, at 440.

301. Glennon, *supra* note 298, at 96. There is also the ever-present uncertainty that proposals to rein in the Executive would even come to the fore, considering the rules under which Congress operates, and if they do, they may just happen to put the spotlight onto certain members of Congress, tying them with a position in contrast with the Executive, something that entails so little electoral gain that Congresspersons normally would try to avoid the situation. Stephen R. Weissman gives an account of how this process would operate and also which procedural maneuvers other members of Congress could take to counter it: “The House . . . failed to act on Libya, but at least it finally debated the war, for more than six hours, in June and July. It did so, however, only after Dennis Kucinich, an Ohio Democrat, invoked a procedure under the War Powers Act to force John Boehner, the Republican Speaker of the House . . . to take up the issue. Boehner arranged votes on three very different resolutions: one that would authorize the use of force in Libya, one that would defund U.S. drones’ participation in the operation while leaving other U.S. air assets in place, and one (Kucinich’s) that would mandate an immediate U.S. withdrawal. None passed . . .” Stephen R. Weissman, *Congress and War: How the House and the Senate Can Reclaim Their Role*, 96 FOREIGN AFF. 132, 138 (2017). And even if Congress manages to pass a resolution—as we saw with the case of Yemen, discussed above, or in what might happen as a result of the Soleimani strike—it will likely lead nowhere, given how high of a hurdle it is to overcome the President’s veto.

is not clear at the outset that Congresspersons would be less inclined to resort to force than whoever sits in the office of the President.³⁰²

The system prescribed by the Constitution is “an invitation to struggle for the privilege of directing foreign policy.”³⁰³ It could not be any other way, considering how the War Powers are divided (and overlap) between Articles I and II. However, “split[ting] the atom of sovereignty”³⁰⁴ when it comes to the external war powers was far from a stroke of genius by the Framers. It does not result in better outcomes—to the contrary, it is the branch with the power of initiative that gets to dictate the terms of the game, even in the presence of a statute that does exactly that. And if one thing is clear when looking at the actions of the United States in the latter half of the twentieth century, it is that the Executive has the power of initiative. Hence, any amendments to the WPR—or even a new statutory framework that would replace it—need to consider the political realities of how uses of force abroad are determined and take those realities as a starting point. If there is one lesson actual practice teaches us, it is that pitting the two political branches against each other has proven ineffectual, both because it has not allowed for effective congressional involvement in these decisions and because it has not constrained the President in any respect.

302. “Often forgotten is the fact that Congress has mostly supported the United States’ wars, usually with great enthusiasm.” Gunar Olsen, *It Will Take More Than Congress to Cure America’s War Addiction*, THE NEW REPUBLIC (Feb. 6, 2019), <https://newrepublic.com/article/153073/will-take-congress-cure-americas-war-addiction>. While Olsen’s article is by no means an exhaustive study of Congress’s attitude toward presidential wars, it is important to recognize that the case against Congress serving as a check on the President’s use of his War Powers is, at least, fairly plausible.

303. EDWIN S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957* 171 (4th ed. 1957); see also Terrorists Memo, *supra* note 178, at 193: “In foreign affairs, however, the Constitution does not establish a mandatory, detailed, Congress-driven procedure for taking action. Rather, the Constitution vests the two branches with different powers—the President as Commander in Chief, Congress with control over funding and declaring war—without requiring that they follow a specific process in making war.”

304. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).