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A Paper Tiger with Bite: A Defense of the War Powers Resolution

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A Paper Tiger with Bite: A Defense of the War Powers Resolution

ABSTRACT

The War Powers Resolution (WPR) has led a beleaguered existence. Since its enactment in 1973, it has been labeled ineffectual and useless. This Note proves, however, that to review presidential unilateral uses of force since 1973 is to find a spirit of compliance with the WPR, as these uses of force have been characterized by their brevity and their lack of spilled U.S. blood. While minor departures from the WPR's black-letter requirements are conceded, none of these uses of force have developed into, or even resembled, Vietnam-esque quagmires. As a result, this Note contends that the WPR has had a positive practical effect on the implementation of presidential unilateral uses of force. The Note concludes by asserting that the welfare of the United States is endangered, not by the unilateral uses of force that the WPR seeks to remedy, but by the congressionally sanctioned uses of force that, in reality, place no limit on Executive power.

TABLE OF CONTENTS

I.	INTRODUCTION	862
II.	THE WAR POWERS RESOLUTION.....	864
	A. <i>The War Powers Debate</i>	865
	B. <i>War Powers in Practice</i>	866
	C. <i>The WPR: Congress's Embattled Response</i>	868
III.	THE WPR IN ACTION: A PAPER TIGER WITH BITE.....	870
	A. <i>Grenada</i>	872
	B. <i>Lebanon</i>	876
	C. <i>Libya</i>	878
	D. <i>The Persian Gulf</i>	880
	E. <i>Panama</i>	883
	F. <i>Somalia</i>	884
	G. <i>Kosovo</i>	886
IV.	CONCLUSION: THE EXONERATED WPR AND THE WOLF IN SHEEP'S CLOTHING	892
	A. <i>Congressional Authorizations for the Use of Force: The Wolf in Sheep's Clothing</i>	892

B. Recommendations for Containing the Man-Made Wolf	895
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I. INTRODUCTION

The War Powers Resolution (WPR) has led a beleaguered existence. Since its enactment in 1973, it has been deemed ineffectual and useless.¹ Such criticism can be found in the annals of the legal academy,² as well as at the highest levels of U.S. government, where no President has ever acknowledged the WPR's constitutionality.³ This Note, however, asks the reader to look at the WPR with fresh, almost non-legal eyes. In a sense, think of *Youngstown Sheet & Tube Co. v. Sawyer*⁴ and be less like Justice Black⁵ and more like Justices Frankfurter, Jackson, and even Chief Justice Vinson.⁶ Stated in a different fashion, this Note takes a

1. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 39–40 (1990); see also John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 181 (1996) [hereinafter Yoo, *The Continuation of Politics*].

Most commentators would agree that the [WPR] has not proven to be a resounding success. No President has ever acknowledged its constitutionality, and no President has ever formally complied with its terms. The high watermark of presidential recognition of the [WPR] was President Ford's messages to Congress in which he took "note" of the [WPR] [during various unilateral uses of force].

John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 879 (1990) ("In fact the [WPR] has become a major embarrassment for Congress—an x-ray machine suggesting the absence of a spine . . .").

2. See, e.g., sources cited *supra* note 1.

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

4. 343 U.S. 579 (1952).

5. Justice Black's majority opinion was, as can be expected, rather formalistic, explicitly focusing on whether President Truman had either statutory or constitutional authority to seize the steel mills. See *id.* at 585.

6. Justices Frankfurter and Jackson, in their respective concurrences, acknowledged the efficacy of Justice Black's approach but stated that the search for authority can be aided by sources other than positivist law. For example, Justice Frankfurter relied on historical practice, see *id.* at 610–11 (Frankfurter, J., concurring), while Justice Jackson conceived of his famous tripartite framework to aid in the analysis of separation of powers issues that could not be resolved by reference to "isolated clauses or even single Articles torn from context." *Id.* at 635 (Jackson, J., concurring). Chief Justice Vinson's dissent, which contained the most functional analysis, stressed that the case was brought in "extraordinary times." *Id.* at 668 (Vinson, J., dissenting). After making out an argument that the President was merely executing existing legislative programs, *id.* at 672–73, the Chief Justice argued that President Truman's pledge to abide by the future will of Congress on the subject

functional rather than formalistic approach. Thus, with reference to the post-1973 presidential unilateral uses of force, consider what was happening in a grand sense: Was the Executive galloping around on a white horse with his hand inside his breast pocket or was he furthering his policy objectives while taking pains to avoid another Vietnam?

If one judges post-1973 presidential unilateral uses of force to be the latter, instead of the former, one should ask another series of questions: Did the piece of legislation explicitly requiring the Executive to receive authorization for the use of force spur the Executive to act differently? Did that piece of legislation spur Congress to speak on the subject? Did the sixty-day "blank check" window have an effect on the Executive's plans? Finally, was there more communication between the political branches with reference to any such uses of force than before that legislation's enactment?

Since the answers to these questions must be answered affirmatively, this Note concludes that the WPR has had a meaningful effect on the implementation of presidential unilateral uses of force. As this Note demonstrates, to review the presidential unilateral uses of force since 1973 is to find a spirit of compliance with the WPR, as these uses of force have been characterized by their brevity and their lack of spilled U.S. blood.⁷ In sum, none of these uses of force have developed into, or even resembled, Vietnam-esque quagmires.⁸

With the exoneration of the WPR complete, this Note concludes by asserting that the nation's welfare is endangered, not by the unilateral uses of force that the WPR seeks to remedy, but by the congressionally sanctioned uses of force that place no limit on Executive power. To recall *Youngstown*, this Note stresses that there is much to gain from keeping a warring Executive in what Justice Jackson would call a Category III situation, where the Executive is solely dependent on his own inherent authority, as opposed to allowing the Executive to function in a legal realm where his actions enjoy the highest amount of deference, which is Jackson's Category I.⁹ For when Congress abdicates its power to the Executive, it is Congress that creates a de facto monarchy that ties the nation's prosperity to the wisdom of one person.

showed that there was no practical danger of tyranny. Therefore, this instance fell into a category of consistently approved series of presidential initiatives taken to avert disaster in times of crisis. *See id.* at 709–10.

7. *See* discussion *infra* Part II.

8. It should be noted that the Iraq War of 2003 is not a unilateral use of force by the President, but rather a congressionally sanctioned war that complies with the Declare War Clause. *See infra* note 206. As such, it remains outside the purview of this Note.

9. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

Part II of this Note includes a brief description of the war powers debate, an overview of how that debate has translated into reality, and a description of how Congress tried to reshape the debate with the WPR. In Part III, this Note observes how the WPR has performed in practice by surveying and analyzing presidential unilateral uses of force since 1973. Finally, Part IV draws attention to the true danger posed by the U.S. constitutional arrangement of war powers and concludes with a series of recommendations to remedy the problem.

II. THE WAR POWERS RESOLUTION

“War is hell.”¹⁰ No one doubts the veracity of General Sherman’s well-known adage. Cognizant of this reality, the Framers sought to move away from a monarchial decisionmaking model when allocating war powers in the Constitution.¹¹ Instead of giving strategic *and* tactical control, namely the powers to declare war and to act as Commander in Chief, to one individual, the Framers apportioned these powers between two elected branches of government.¹² This was a deliberate shift from the Articles of Confederation, which vested all such power in the Legislature.¹³ Accordingly, the Constitution provides Congress with the “Power . . . To declare War . . . To raise and support Armies . . . To provide and maintain a Navy . . . [and] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”¹⁴ The Executive, on the other hand, is entitled to be the “Commander in Chief of the Army and Navy of the United States . . . [and] shall

10. This statement is widely attributed to General William Tecumseh Sherman. For an expert and well-reasoned explanation why, in the face of this reality, the human race has been unable to avoid armed conflict, see MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* 142–43 (1991), explaining that war is “the supreme manifestation of existence as well as a celebration of it.”

11. See *THE FEDERALIST* NO. 69 (Alexander Hamilton); see also *THE FEDERALIST* NO. 75 (Alexander Hamilton).

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests . . . which concern its intercourse with the rest of the world to the sole disposal of . . . a President of the United States.

THE FEDERALIST NO. 75 (Alexander Hamilton).

12. See *supra* note 11; see also *THE FEDERALIST* NO. 51 (James Madison) (“[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other”). Compare U.S. CONST. art I, § 8, with U.S. CONST. art II, § 2 (conferring the power to declare war to Congress and the power as Commander in Chief to the President, respectively).

13. See Yoo, *The Continuation of Politics*, *supra* note 1, at 235–36.

14. U.S. CONST. art. I, § 8.

have Power, by and with the Advice and Consent of the Senate, to make Treaties."¹⁵

A. *The War Powers Debate*

The deeper meaning of these enumerated powers has been contested since the nation's infancy.¹⁶ The debate is framed by supporters of two dialectic positions: those who believe that the Constitution empowers Congress to be a major player in the foreign affairs realm, and those who argue the opposite, that the Constitution clearly favors the Executive.

This debate, which has been thoroughly covered elsewhere,¹⁷ is eloquently captured in the vigorous clash¹⁸ between Alexander Hamilton and James Madison over the constitutionality of George Washington's unilateral issuance of the 1793 Neutrality Proclamation.¹⁹ Hamilton, writing under the pen name Pacificus, defended Washington's action by stating that:

[The Proclamation] serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. [It] deserves to be remarked, that as the participation of the senate in the making of treaties, and the power of the legislature to declare war, are exceptions out of the general 'executive power' vested in the president; they are to be construed

15. U.S. CONST. art. II, § 2.

16. After George Washington issued the Neutrality Proclamation in 1793 without congressional authority, the constitutionality of this Proclamation became a contentious topic. Alexander Hamilton (writing under the pen name Pacificus) regarded the Proclamation as constitutional, while James Madison (writing under the pen name Helvidius) disagreed. See *LETTERS OF PACIFICUS AND HELVIDIUS*, at v-x (Scholars' Facsimiles & Reprints 1976) [hereinafter *LETTERS*].

17. See generally MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 17 (1990) (discussing the existence of a debate over how much congressional input in foreign affairs is provided by the Constitution); JOHN LEHMAN, *MAKING WAR: THE 200-YEAR-OLD BATTLE BETWEEN THE PRESIDENT AND CONGRESS OVER HOW AMERICA GOES TO WAR* (1992) (reviewing the history of presidential and congressional relations during important foreign policy and war-making decisions).

18. As evidence of the fierceness of their debate, Madison began his retort by writing:

Several pieces with the signature of Pacificus were lately published, which have been read with singular pleasure and applause, by the foreigners and degenerate citizens among us, who hate our republican government, and the French revolution; whilst the publication seems to have been too little regarded, or too much despised by the steady friends of both.

LETTERS, *supra* note 16, at 53.

19. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 39 (2d ed. 1996); KOH, *supra* note 1, at 79-80.

strictly, and ought to be extended no further than is essential to their execution.²⁰

Madison, on the other hand, writing under the name Helvidius, responded²¹ by saying:

[I]t must be evident, that although the executive may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war; and the proper agent for carrying into execution the final determinations of the competent authority; yet it can have no pretensions, from the nature of the powers in question compared with the nature of the executive trust, to that essential agency which gives validity to such determinations.²²

To Madison and his followers, disregarding such a distinction would be “in theory . . . an absurdity—in practice a tyranny.”²³

B. War Powers in Practice

Washington’s issuance of the Neutrality Proclamation²⁴ started the trend of Executive domination over the decisionmaking process as to whether the nation should use military force to further its political objectives.²⁵ It also set the stage for more brazen presidential initiatives: John Adams soon after brought the nation into its first undeclared war in 1798,²⁶ and Thomas Jefferson initially took unilateral action in extending the Navy to confront the Barbary Pirates in 1801.²⁷ Indeed, these initiatives lent considerable support to John Marshall’s statement, “The President is the sole organ of the nation in its external relations.”²⁸

This trend can be explained by the practical advantage the Executive branch has over the Legislative branch: It is more efficient for a small, relatively homogenous group to reach a decision than it is

20. LETTERS, *supra* note 16, at 13–14.

21. *But see* JOHN C. YOO, THE POWERS OF WAR AND PEACE 203–04 (2005) [hereinafter YOO, THE POWERS OF WAR AND PEACE] (arguing that Madison was actually a proponent of a strong executive branch and that his response to Hamilton was only the product of Jefferson’s pleas to do so); *see also* John C. Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 800 (2004) (arguing that Madison’s statements at the Virginia ratifying convention demonstrated his belief that the check on presidential war power would come in the form of Congress’s appropriation power and not the Declare War Clause).

22. LETTERS, *supra* note 16, at 58.

23. *Id.* at 57.

24. *See* KOH, *supra* note 1, at 79–80.

25. *See* HENKIN, *supra* note 19, at 40.

26. *See* KOH, *supra* note 1, at 80. *But see* Dean Alfange, Jr., *The Quasi-War and Presidential Warmaking*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 274, 280 (David Gray Adler & Larry N. George eds. 1996) (arguing that President Adams’s arming of merchant ships was constitutional because it was premised on genuinely defensive concerns).

27. *See* HENKIN, *supra* note 19, at 48.

28. 10 ANNALS OF CONG. 613 (1800).

for a large, diverse group to reach one²⁹—a principle required to address the urgent questions that are necessary in foreign affairs.³⁰ One commentator explained the institutional relationship between the branches by noting that, while Congress can announce foreign affairs policy, it lacks the institutional framework to implement that policy.³¹ Thus, in practice Executives mainly have been the actors and Congresses the reactors. As a result, it should be no surprise that in the nation's brief history "presidents have in fact deployed U.S. armed forces beyond the U.S. borders hundreds of times without authorization or subsequent ratification by Congress, and in many of these cases they engaged in 'hostilities' of varying significance, intensity, and duration."³²

Allowing one person to steer the course of U.S. foreign policy is, however, a risky proposition. That the United States has historically condoned such presidential initiative may just be a testament to the country's good fortune in having had wise leaders. But while the de facto foreign policy monarchy has led to well-received leaders such as Theodore Roosevelt³³ and James K. Polk,³⁴ it has also allowed Executives to lead the country to less successful results.³⁵ It was the greatest of the military failures, however—the Big Muddy itself³⁶—

29. CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 135 (4th ed. 2003).

30. See GLENNON, *supra* note 17, at 27–30.

31. See JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 306 (1981).

32. HENKIN, *supra* note 19, at 100; see also Office of the Legal Advisor, U.S. Dept't of State, *The Legality of the United States Participation in the Defense of Vietnam*, 75 YALE L.J. 1085, 1101 (1966) (stating that by 1966 there had already been 125 presidential unilateral uses of forces).

33. Theodore Roosevelt wrote:

I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.

THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 372 (1913). This attitude no doubt contributed to his decisions to introduce U.S. forces in Latin America and to send the Great White Fleet around the world as a demonstration of U.S. military might. See KOH, *supra* note 1, at 89.

34. James K. Polk, whose administration is known for the doctrine of Manifest Destiny, unilaterally dispatched U.S. forces to the area between the Nueces River and the Rio Grande after Texas had become part of the Union and Mexico still laid claim to the area. See Alfange, Jr., *supra* note 26, at 283.

35. Examples include the Iran hostage extrication, see HENKIN, *supra* note 20, at 49, and the failed attempt to restore order in Somalia, see *id.* at 100.

36. While Vietnam will forever be known as the U.S. Waterloo, this Note would be remiss if it did not mention Vietnam's ugly precursor, Korea. President Truman's intervention into South Korea is particularly relevant as President Truman committed U.S. air and ground forces without congressional authorization. See JOHN H. ELY, WAR AND RESPONSIBILITY 10 (1993). While some contend that President Truman had the

that led Congress to try to reclaim its place in the foreign policy debate by sacking the Executive's de facto throne.³⁷

C. The WPR: Congress's Embattled Response

The centerpiece of Congress's effort to claim a role in foreign policy was the WPR,³⁸ the stated purpose of which is "to fulfill the intent of the framers . . . and to insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."³⁹ Enacted over President Nixon's veto,⁴⁰ the WPR requires the Executive to consult with Congress prior to the use of military force and to report to Congress within forty-eight hours of the start of hostilities.⁴¹ More importantly, the WPR requires the Executive to terminate the use of force (1) after sixty days if Congress has not subsequently ratified that use of force, or (2) even earlier if Congress passes a resolution requiring termination.⁴²

For all its efforts, the WPR has received mostly criticism.⁴³ From concerns over the constitutionality of the legislative veto provisions,⁴⁴ concerns that have proven to be warranted,⁴⁵ to the

authority to unilaterally support this UN "police action" by virtue of his authority to faithfully execute the UN Charter (implemented by the UN Participation Act), see Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. J. L. & PUB. POL'Y 533, 534-47 (1996), this point of view is in the minority of those on the subject. See e.g., KOH, *supra* note 1, at 106. Regardless, the Korean conflict, which resulted in over 33,000 U.S. combat deaths but no significant policy advances, must have stirred congressional concerns over the extent of executive war power, concerns that reached their zenith after the Vietnam War. See DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED, U.S. MILITARY PERSONNEL SERVING AND CASUALTIES 2, <http://siadapp.dior.whs.mil/personnel/CASUALTY/WCPRINCIPAL.pdf> (last visited Mar. 25, 2007).

37. See KOH, *supra* note 1, at 73 ("Vietnam triggered a congressional reaction against the imperial presidency that led to the enactment of framework statutes in virtually every field of foreign affairs."); HENKIN, *supra* note 19, at 105 ("Unhappiness about the Vietnam War led Congress to seek remedies for what some thought to be the constitutional problems the war had revealed.")

38. See KOH, *supra* note 1, at 73.

39. 50 U.S.C. § 1541(a) (2000).

40. See HENKIN, *supra* note 19, at 107.

41. See 50 U.S.C. §§ 1542-43 (2000).

42. See 50 U.S.C. § 1544 (2000).

43. See, e.g., GLENNON, *supra* note 17, at 102-03 (detailing specific criticisms of the WPR).

44. See HENKIN, *supra* note 19, at 107; GLENNON, *supra* note 18, at 98; RICHARD F. GRIMMETT, THE WAR POWERS RESOLUTION 11 (2002).

45. It is generally accepted that legislative vetoes of the type contained in the WPR were indeed deemed unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). See *Lowry v. Reagan*, 676 F. Supp. 333, 335 (D.D.C. 1987) ("In the aftermath of the Supreme Court's decision . . . it is conceded that this provision does not have the force and effect of law."). It should be noted that the WPR, perhaps in anticipation of such a judicial result, included a severability provision stating that, "[i]f any provision of this

vagueness of the statutory text⁴⁶ and the WPR's lack of practical effect,⁴⁷ the WPR has been regarded as a failure. The WPR has also been criticized for applying only to actions involving U.S. armed forces, leaving operations involving U.S. intelligence agencies conspicuously unregulated.⁴⁸ Thus, even if the WPR were to be interpreted as being consistent with the Constitution, opponents of the WPR would still likely consider it to be nothing but a sixty-day "blank check" for the Executive.⁴⁹

This Note contends, however, that the WPR is undeserving of such criticism. To review presidential unilateral uses of force since 1973 is to find a spirit of compliance with the WPR. This success is the result of the Executive heeding the U.S. public's distaste for bloody and protracted conflict—a public sentiment that the WPR codifies.

The WPR is interesting because its success has come in an unorthodox fashion: Of its four main provisions, two are easily avoidable and two are unconstitutional.⁵⁰ The fact that the WPR has still affected presidential decisionmaking makes it a fascinating legislative accomplishment. Some have argued, however, that the great difference in conflicts since Vietnam is related solely to political constraints on the Executive and not the WPR.⁵¹ This argument fails for two reasons. The first is its inability to explain the Executive's historical compliance with the WPR's consulting and reporting requirements.⁵² The second is more subtle: opponents of the WPR fail to recognize that, because of the WPR's impotency, it *is* only a political constraint. The WPR's normative force thus exceeds its bare textual requirements.

chapter . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby." 50 U.S.C. § 1548 (2000).

46. For example, as will become apparent in Part III, what level of "consultation" did Congress desire the Executive to have with them prior to the introduction of U.S. forces? *See, e.g.*, KOH, *supra* note 1, at 39 (reviewing multiple situations in which the level of "consultation" differed prior to a presidential use of force).

47. *See* GLENNON, *supra* note 17, at 102–03.

That the Resolution is mostly constitutional, however, does not mean that it is either wise or effective. Fifteen years after its enactment . . . it has become clear that whatever congressional intent underlay the War Powers Resolution, any expectation that its procedures would actually lead to collective Legislative-Executive judgment in the war-making process was mistaken.

HENKIN, *supra* note 19, at 110 ("In fact, the War Powers Resolution appears not to have figured significantly in Executive planning.")

48. *See* KOH, *supra* note 1, at 39.

49. *See id.*; HENKIN, *supra* note 19, at 107.

50. *See supra* note 45.

51. *See, e.g.*, MICHAEL R. GORDON & GEN. BERNARD E. TRAINOR, *THE GENERALS' WAR: THE INSIDE STORY OF THE CONFLICT IN THE GULF 469–70* (1995).

52. *See discussion infra* Part II.

Indeed, it is the WPR's cognizance of a broad public sentiment that fuels its strength. One cannot downplay its significance as a product of the nation's legislature. As Justice Holmes so eloquently and so forcefully stated:

What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power. [Be it] wise or not, the proximate test of a good government is that the dominant power has its way.⁵³

This concept is especially salient given that the WPR was passed over President Nixon's veto.⁵⁴ In sum, an outrageous unilateral presidential use of force may prompt a legislator to cite the WPR and argue that to flout the will of the legislature is to flout the will of the people, and that to flout the will of the people is to ignore a central tenet of representative government. Thus, even if the Executive can defy the WPR in a court of law, it cannot avoid losing to the WPR in a court of public opinion.

III. THE WPR IN ACTION: A PAPER TIGER WITH BITE

Vietnam spurred not only the creation of new laws to restrain the Executive, but a revolution within the defense establishment. In a war that never had clear policy objectives, unfettered military tactical control, or strong public support, suffering prolonged casualties had a significant effect on the mid-level officers who fought in Vietnam.⁵⁵ A young Colin Powell wrote:

Many of my generation, the career captains, majors and lieutenant colonels seasoned in that war vowed that when our turn came to call the shots, we would not quietly acquiesce in halfhearted warfare for

53. JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 250 (H.C. Shriver ed. 1936); *see also* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) (Holmes, J.) ("The greatest weight is given to the judgment of the legislature. . . ."); *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

I think that the word liberty, in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.) ("The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.")

54. *See* HENKIN, *supra* note 19, at 107.

55. *See* MAX BOOT, *THE SAVAGE WARS OF PEACE* 318 (2002).

half-baked reasons that the American people could not understand or support.⁵⁶

In Powell's view, the United States should no longer enter combat unless it has amassed overwhelming force at the point of attack, has clearly defined political and military objectives, and has a reasonable expectation of having a galvanized public to support the war effort.⁵⁷ This point of view, which found an audience when Powell became the senior military aide to Secretary of Defense Caspar Weinberger,⁵⁸ became entrenched in U.S. strategic philosophy and was called the Weinberger/Powell Doctrine, or the Powell Doctrine for short.⁵⁹

The Powell Doctrine, which bears a striking resemblance to the classical master of war Carl von Clausewitz's remarkable trinity of warfare,⁶⁰ is notable in a WPR discussion because of its cognizance of the importance of the national will. Under the Powell Doctrine, governments would no longer "behave . . . as if they were themselves the state."⁶¹ Thus, the U.S. public's expected reaction to a use of force was already becoming a stronger factor in the decision to commit U.S. forces into action immediately after Vietnam.⁶² The WPR, then, which explicitly requires the Executive to receive approval of the people's agents before entering a prolonged conflict,⁶³ can be seen as a formal declaration of a desire for the people to be a more influential factor in deciding when their military will be placed in harm's way.

In practice the WPR limits presidents' outrageous unilateral uses of force. While critics of the WPR seem likely to oppose any legislation that stops short of emasculating the Executive into

56. See *id.* (quoting Colin Powell).

57. See PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 297-98 (2002).

58. See *id.*

59. This philosophy was in place at least until President George W. Bush appointed Donald Rumsfeld to become Secretary of Defense. Secretary Rumsfeld's "do more with less" philosophy, which relies on technological superiority as opposed to numerical superiority, is dialectically opposed to the Powell Doctrine. See Interview with Gen. Thomas White (U.S. Army-ret., former Sec. of the Army), <http://www.pbs.org/wgbh/pages/frontline/shows/pentagon/interviews/white.html> (last visited Mar. 26, 2007).

60. See CARL VON CLAUSEWITZ, *ON WAR* 89 (Michael Howard & Peter Paret eds., 1832). In the "remarkable trinity," which consists of the civilian political leadership, the military leadership, and the public will, the warring process should proceed as follows: First, the civilian leadership will resort to war to continue "politics by other means" only when it can point to an objective that the public will support and that the military can achieve. The civilian leadership then hands this likeable objective over to the military leadership, who will enjoy both strategic and tactical control. *Id.* As Clausewitz stated, "A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone would be totally useless." *Id.*

61. *Id.* at 589.

62. See HARRY G. SUMMERS, *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* 5 (1982).

63. See 50 U.S.C. § 1541 (2000).

becoming the “messenger-boy”⁶⁴ of Congress, they must remember that the foundation for the law of war lies in practice.⁶⁵ Again, recall this Note’s suggestion that the WPR, and the law of war in general, should be viewed from a functionalist perspective. Any law that purports to control the actions of those involved in warfare will only be followed if it allows the actor the chance to preserve his own interests. Thus, while a soldier is interested in staying alive, and a commander is interested in preserving the lives of those under his command, the Executive is interested in both of these things as well as ensuring the national security of the entire nation. A law that does not afford the Executive sufficient flexibility to satisfy these interests is bound to be a dead-letter.

The WPR allows such flexibility, because while its requirements are clear black-letter law, its enforcement structure owes its strength to behavioral norms rather than law. The Executive has an incentive to abide by the WPR to avoid showing disrespect for Congress or the will of the U.S. public. However, he retains the legal freedom to function outside the WPR when he judges it to be manifestly clear (1) that the Nation’s interests require it, or (2) when he perceives that the will of the people is behind him.⁶⁶ The WPR’s effectiveness can only be evaluated by its effect in practice. For this reason, this Note now surveys post-1973 presidential unilateral uses of force.

A. Grenada

The WPR was first applied in the invasion of Grenada.⁶⁷ In this instance, President Reagan unilaterally ordered the island to be

64. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 708–09 (1952) (Vinson, C.J., dissenting).

65. See Mike Newton, *Humanitarian Protection in Future Wars*, in 8 INTERNATIONAL PEACEKEEPING: THE YEARBOOK OF INTERNATIONAL PEACE OPERATIONS 349, 356–58 (Harvey Langholtz, Boris Kondoch & Alan Wells eds., 2002) (“If [the law of war] becomes separated from the everyday experience and practice of professional military forces around the world, it is in danger of being relegated to a remote pursuit of ethereal goals.”). Cf. *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905) (Holmes, J.) (“[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.”).

66. See, e.g., *infra* Part III(F).

67. It is true that the United States was involved in several military engagements prior to the invasion of Grenada. See Cyrus R. Vance, *Striking the Balance: Congress and the President under the War Powers Resolution*, 133 U. PA. L. REV. 79, 92 (1984). Most notably, these uses of force included the firing on the Cambodian forces that seized the merchant ship *Mayaguez* and the Iran hostage rescue operation. See *id.* at 88–89. In terms of WPR compliance, both operations saw President Carter use “perfunctory [means of] notification,” as well as submit reports to Congress within forty-eight hours. See *id.* at 88. Thus, there is a prima facie case that both of these operations complied with the WPR. But instead of analyzing these uses of force in the main text, this Note keeps this initial series of “trial and error” with the

invaded after a coup by communist rebels seemed to provide Cuba and Soviet Russia with another strategically located ally.⁶⁸ Significantly, for terms of the U.S. pretext for invasion, Grenada was also home to hundreds of U.S. medical students.⁶⁹ While many dispute the veracity of the request for military assistance from interested parties in the region,⁷⁰ as well as the level of danger that the medical students actually faced,⁷¹ it is undisputed that once the invasion took place it “was considered an unmitigated military success.”⁷² The invasion, as the Powell Doctrine commanded, also enjoyed immense public support.⁷³ Nevertheless, many consider the Grenada invasion to be emblematic of the WPR’s impotence; for WPR opponents, the invasion was just another example of an Executive waging a war at his own prerogative.⁷⁴ As the facts are examined, however, it becomes clear not only that the WPR was abided by, but that its spirit was heeded and its goals achieved.

To begin, the Grenada invasion complied with the WPR. Despite the WPR’s lack of strength, President Reagan opted to follow its prescribed guidelines. To satisfy § 1542’s consultation requirement, President Reagan met with bipartisan leaders of Congress the night before the invasion began.⁷⁵ While it is true that the invasion was green-lighted two hours before the meeting took place and that the invasion commenced early the next morning,⁷⁶ it is also true that President Reagan could have cancelled the invasion after the meeting occurred. Thus, when referenced in conjunction with the WPR’s command that “[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities,”⁷⁷ it appears that President Reagan adhered to the plain meaning of the statutory term “consult,” which is “to ask the advice or opinion of.”⁷⁸ This, along with President Reagan’s explanation for the dearth of time between the consultation and the commencement of the invasion (protecting the secrecy of the

WPR as a footnote and begins the analysis with a more significant presidential unilateral use of force, the invasion of Grenada.

68. See FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOGS OF WAR* 255–59 (1986).

69. See *id.* at 257–58.

70. See RICHARD GABRIEL, *MILITARY INCOMPETENCE: WHY THE AMERICAN MILITARY DOESN’T WIN* 149–50 (1985) (stating that regional requests were not one of President Reagan’s reasons for the invasion).

71. See WORMUTH & FIRMAGE, *supra* note 68, at 257–58.

72. *Id.* at 258.

73. See GLENNON, *supra* note 17, at 29.

74. See, e.g., KOH, *supra* note 1, at 39.

75. See WORMUTH & FIRMAGE, *supra* note 68, at 259.

76. See *id.*

77. 50 U.S.C. § 1542 (2000).

78. Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/> consult (last visited Mar. 21, 2007).

invasion),⁷⁹ necessitates the conclusion there is at least a *prima facie* case that the consultation requirement was met.

Thus, it seems strange that some scholars claim that the congressional consultation requirement was not met.⁸⁰ While it would be hard to argue that the level of consultation offered by President Reagan was anything but sparse, it is one thing to criticize the level of consultation and quite another to claim that there was none. For this reason, it is difficult to imagine what would satiate opponents of the WPR. The WPR requires the Executive only to consult and report, not abandon unilateral uses of force altogether.⁸¹ Opponents of the WPR apparently would prefer that the Executive “psychoanalyze . . . Congress rather than read . . . its laws.”⁸² A more reasonable position is the one advanced by former Secretary of State Cyrus R. Vance, who contended that while the meaning of “consult” was clear to him, it should be replaced with the requirement that the Executive “‘discuss fully and seek the advice and counsel’ of a defined group of congressional leaders.”⁸³

President Reagan also abided by the reporting requirement during the Grenada invasion by submitting a report to Congress on October 25, 1983, the day military actions began.⁸⁴ While some contend that President Reagan did not meet this requirement, this complaint seems to be grounded more on the substance of the report than lack of a report, as President Reagan’s report did not refer to U.S. armed forces being engaged in “hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”⁸⁵ An explicit reference to “hostilities” is significant in terms of the WPR, because such a reference is what begins the sixty-day countdown of the automatic termination clause.⁸⁶ Thus, while

79. WORMUTH & FIRMAGE, *supra* note 68, at 259.

80. See, e.g., KOH, *supra* note 1, at 126 (noting that President Reagan failed to consult with “Congress” when he “consulted with only fifteen congressional leaders” before sending warplanes to bomb Libya in April 1986).

81. 50 U.S.C. § 1542 (2000).

82. Chisom v. Roemer, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting).

83. Vance, *supra* note 67, at 92.

84. *Id.* at 89 (stating that Reagan submitted a report to Congress on October 25, 1983); PETER HUCHTHAUSEN, AMERICA’S SPLENDID LITTLE WARS 79 (2003) (noting that military actions began October 25, 1983).

85. 50 U.S.C. § 1543(a)(1) (2000).

86. With regard to the sixty-day clock, the WPR reads:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1) [50 USCS § 1543(a)(1)], whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.

complying with the WPR, President Reagan allowed Congress to decide whether the WPR would actually be a legal constraint on Executive power. Congress did begin to create a resolution exercising its power under the WPR to put the Executive "on the clock" when deemed necessary.⁸⁷ In the end, however, while the House of Representatives passed a resolution deeming the automatic countdown to have started, there was not sufficient support for such a resolution in the Senate.⁸⁸

The WPR's legislative failure, however, did not result in the kind of extended conflict that the WPR's framers, and indeed the nation, hoped to avoid. The Grenada invasion enjoyed astounding success through reliance on the Powell Doctrine (using overwhelming forces to achieve clear objectives).⁸⁹ The large U.S. invasion force compelled the capitulation of joint Cuban and Grenadian forces in under a week, with minimal U.S. casualties.⁹⁰ In the end, the U.S. Marines employed in the fighting were off the island by October 30, 1983, and elements of the Army 82nd Airborne unit were also off the island well before the theoretical sixty-day time limit.⁹¹

The invasion of Grenada, then, represented a departure from previous presidential unilateral uses of force. Although President Reagan likely irritated members of Congress through his interpretation of the consultation and reporting clauses, he did heed the ultimate purpose of the WPR. The unilateral use of force in Grenada was short in duration and not bloody by any standard.⁹² Even though Congress had not achieved dominance over the Executive branch in the decision to use military force, the WPR did spur President Reagan, at least to some extent, to involve Congress in the decision.

Further, the WPR spurred Congress to discuss amongst itself whether it should take a greater role. That congressional support was insufficient to put the WPR into play says more about the lack of congressional will than it does about the ability of the WPR to constrain Executive action. The invasion of Grenada thus serves as a good start for proving that the WPR, despite its imperfect nature as a legal document, has led to increased participation between the

50 U.S.C. § 1544(b) (2000).

87. *See id.*

88. *See* WORMUTH & FIRMAGE, *supra* note 68, at 260 ("[T]he impeachment resolution never really had a chance to pass.").

89. *See* BOOT, *supra* note 55, at 318.

90. *See* HUCHTHAUSEN, *supra* note 84, at 79, 83–84 (noting that the assault began on October 25, that by October 30 the marines turned over their areas or responsibility to the Eighty-second Airborne Division, that the fighting was "mostly over" by October 27, and that twenty casualties resulted from the invasion).

91. *Id.*

92. *Id.*

Executive and Legislative branches in the decision to use military force.

B. Lebanon

In 1982, President Reagan relied on his authority as Commander in Chief in sending 800 marines to join a multinational force with the task of keeping the peace "in an internecine struggle among the many ethnic and religious groups that have been warring in Lebanon from time out of memory."⁹³ Unfortunately, the intervention in Lebanon is notoriously remembered for the suicide bombing of a marine barracks, which caused the deaths of 241 U.S. servicemen (an act that accounted for 94% of all U.S. casualties in the conflict).⁹⁴ Despite this event, the intervention in Lebanon teaches much about the effectiveness of the WPR. This is so even though President Reagan arguably failed to abide by the consultation requirement in the WPR (since it appears that no member of Congress was consulted before the marines went ashore).⁹⁵ While President Reagan may have believed that the marines would not encounter "hostilities or . . . situations where imminent involvement in hostilities is clearly indicated by the circumstances,"⁹⁶ thus making the WPR inapplicable to the event, it is hard to argue that when one orders a ground combat force into a war-torn area the WPR will not apply.

Nevertheless, President Reagan did comply with the WPR's reporting requirement. After the marines entered Lebanon, President Reagan sent a report to Congress.⁹⁷ Interestingly, President Reagan's letter proclaimed that the report was "consistent" with the WPR rather than in "compliance" with it.⁹⁸ Former Secretary of State Vance interpreted this language as the President's implicit statement that he was complying with the WPR out of respect for Congress, rather than because of a legal obligation.⁹⁹ Whatever the motivation, President Reagan did continue to send

93. Vance, *supra* note 67, at 94.

94. A total of 260 servicemen died in the Lebanon intervention. GlobalSecurity.org, U.S. Military Operations: Casualty Breakdown, <http://www.globalsecurity.org/military/ops/casualties.htm> (last visited Mar. 21, 2007).

95. See Vance, *supra* note 67, at 94.

96. 50 U.S.C. § 1543(a)(1) (2000).

97. See Letter from President Ronald Reagan to Hon. Thomas P. O'Neill, Speaker of the House of Representatives (Aug. 24, 1982), in I PUB. PAPERS 1078 (1982) ("In accordance with my desire that the Congress be fully informed on this matter, and consistent with the War Powers Resolution, I am hereby providing a report on the deployment and mission of these members of the United States Armed Forces.").

98. *Id.*

99. See Vance, *supra* note 67, at 94 ("The deployments in Lebanon were ordered by the President on his authority as Commander-in-Chief. They were not the subject of meaningful consultation with Congress under section 3 of the War Powers Resolution.").

reports to Congress after he ordered 1200 additional troops to be sent to Lebanon and again after the United States suffered its first casualties.¹⁰⁰

The last of these reports was significant because Congress acted on the basis of this information to invoke the WPR and begin the sixty-day countdown.¹⁰¹ Opponents of the WPR were then presented with what amounts to their utopian situation: a President tries to statutorily interpret his way around the WPR, but Congress stands fast and invokes the WPR itself. If nothing else, the Lebanese intervention is at least incontrovertible evidence that the WPR is not legally impotent in all instances.

The events occurring after Congress's invocation of the WPR are profoundly important for the purposes of this Note. First, despite President Reagan's contentions that the WPR could not constrain his powers as Commander in Chief,¹⁰² his administration actually sought explicit congressional authorization for "continued participation of United States Armed Forces in the Multinational Force in Lebanon."¹⁰³ Thus, in the end, while there was implicit posturing about the WPR's legality, the Executive chose to respect its, and Congress's, authority.

As such, the WPR contributed to the restoration of some semblance of balanced participation between the political branches on the question of continuing to use force in Lebanon. While the discussion preferably would have occurred before the insertion of U.S. forces, it is true that in Lebanon "the War Powers Resolution . . . belatedly achieved its purpose [of] bringing the President and the Congress together to discuss a critically important foreign policy issue."¹⁰⁴ While some scholars may disapprove of Congress's policy decision to follow the President's lead, such a policy decision is not the fault of the WPR. The WPR should instead be lauded for prodding President Reagan into obtaining congressional approval for what began as a unilateral use of his Commander in Chief power.

The second profound event following the invocation of the WPR comes from Congress's authorization itself. Secretary Vance said that the time extension given to President Reagan was "subject to a

100. *Id.* at 94–95.

101. *See* Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 2(b), 97 Stat. 805, 805 (1983) (noting the beginning of the sixty-day countdown).

102. *See* President's Statement on Signing the Multinational Force in Lebanon Resolution, in 2 PUB. PAPERS 1444–45 (Oct. 12, 1983) (stating executive disagreement with section 5(b) of the War Powers Resolution, requiring "termination of the use of United States Armed Forces in actual hostilities or situations in which imminent involvement in hostilities is clearly indicated by the circumstances unless Congress, within 60 days, enacts a specific authorization for that use or otherwise extends the 60-day period").

103. Multinational Force in Lebanon Resolution § 2(b).

104. Vance, *supra* note 67, at 95.

variety of important conditions and restrictions designed to define and limit the scope of our involvement in the Lebanese conflict."¹⁰⁵ For example, while Congress's Resolution provided the President with eighteen months of leeway, it also provided that this leeway would cease to exist if the United Nations or the government of Lebanon assumed the U.S. peacekeeping role, if the U.S. partners in the venture abandoned the cause, or if any other competent security arrangement for Lebanon was put forward.¹⁰⁶

Congress thus created enforcement measures to substantiate its policy goals of ensuring a timely U.S. withdrawal from Lebanon. Such a pointed articulation of policy stands in direct contrast to the broad "take any and all appropriate means" delegation that embodied the Tonkin Gulf Resolution.¹⁰⁷ The WPR contributed to a high level of interaction between the Executive and Congress, notwithstanding the regrettable loss of life involved with the barracks attack. This point will be revisited again in this Note's conclusion, as the Multinational Force in Lebanon Resolution remains a model for Congress to emulate.

C. Libya

The Libyan air strike, which occurred on April 14, 1986,¹⁰⁸ serves as another example of the WPR's positive effect on the implementation of U.S. foreign policy. The air strike also illustrates one of the WPR's weaknesses, because an air strike, which can certainly be referred to as "surgical" in nature, is sure to be over within the WPR's sixty-day limit.¹⁰⁹ For this reason, an Executive could hypothetically order unrelated air strikes around the clock, without consulting with or reporting to Congress, and have no fear of running afoul of the WPR. Despite this reality, President Reagan chose not to take this route, and instead complied with the WPR.¹¹⁰ Thus, the Libyan air strike is a prime example of how the WPR, even if legally impotent, consistently affects and constrains presidential unilateral uses of force.

105. *Id.*

106. See Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 6, 97 Stat. 805, 807 (1983).

107. See Tonkin Gulf Resolution, H.R.J. Res. 1145, 88th Cong. §1, 78 Stat. 384 (1964) (allowing the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent future aggression").

108. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 766 n.111 (2004).

109. KOH, *supra* note 1, at 39.

110. See HUCHTHAUSEN, *supra* note 84, at 94-95 (noting that the President consulted with Congress on April 14, the day of the strike).

The pretext for the air strike was what President Reagan called “irrefutable”¹¹¹ evidence of Libyan involvement in not only the Lockerbie Scotland Pan Am disaster but also in terrorist attacks that killed U.S. citizens in airports in Vienna and Rome, and in the bombing of a West Berlin nightclub frequented by U.S. servicemen (killing one Army sergeant and wounding others).¹¹²

It is at least arguable that President Reagan complied with the WPR. He consulted with fifteen members of Congress, a group larger than he met with before the Grenada operation, before the air strikes took place.¹¹³ However, just as the manner of consultation in the Grenada invasion surely irritated some members of Congress, this instance must have been no different; the consultation did not take place until the planes responsible for the air strike were in the air.¹¹⁴ Again, while President Reagan could have responded by noting his ability to call off the air strikes while the planes were en route, this is surely not the manner of consultation desired by parties in the mold of Secretary Vance.¹¹⁵ However, when the plain meaning of the statutory text is as weak as it is in the WPR (an interpretation even accepted by some of its opponents¹¹⁶), it is a large step to maintain that Reagan failed the consultation requirement altogether.

President Reagan also satisfied the reporting requirement, submitting a report to Congress on April 16, 1986. While some scholars claim that the reporting requirement was evaded because the report was vague and made no reference to “hostilities,” a necessity for the implementation of the sixty-day countdown, this is not the correct conclusion.¹¹⁷ Although President Reagan may have had bad intentions in not referring to “hostilities,” this does not mean the reporting requirement was not met. It simply means that the Executive took advantage of a legislative loophole to place the ball back into Congress’s court. However, the reporting requirement was made moot by the use of an air strike; as soon as the planes conducting the strikes returned to their respective bases the attack

111. President Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya (Apr. 14, 1986), available at <http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm>.

112. See *id.* (“[F]or us to ignore by inaction the slaughter of American civilians and American soldiers, whether in nightclubs or airline terminals, is simply not in the American tradition.”).

113. See KOH, *supra* note 1, at 126.

114. See *id.*

115. See Vance, *supra* note 67, at 95 (noting that with respect to the Lebanese conflict, “the War Powers Resolution . . . belatedly achieved its purpose by bringing the President and the Congress together to discuss a critically important foreign policy issue that in my judgment should have been thrashed out before the deployments were made.”).

116. See KOH, *supra* note 1, at 126 (characterizing Reagan’s actions as consulting).

117. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 164 (2d ed. 2004).

was over, and this was well before the sixty-day clock could have struck zero. So while the WPR had no formal influence over President Reagan's decision to use military force, its existence likely provided the Executive with the impetus to favor a strategy that would not give Congress a chance to implement it. The WPR, therefore, deterred the Executive's preference for undertaking foreign policy initiatives that could have become the next Korea or Vietnam.

Furthermore, one must only look to the popularity of the Libyan air strike¹¹⁸ to accentuate the difference between this conflict and one such as Vietnam. With popularity in one hand and narrow objectives (retribution for supporting terrorism¹¹⁹) achieved by a discrete use of force in the other, the Libyan air strike constitutes the Powell Doctrine taken airborne. Given the Libyan air strike's strong compliance with the principles of the Powell Doctrine, it must be said that this unilateral use of force was at least a responsible one.

D. *The Persian Gulf*

Prior to the 1991 Gulf War (which will not be discussed in this Note since it was not a unilateral use of force on the part of the Executive),¹²⁰ but after the Iran-Iraq war made the strategic Persian Gulf un-navigable, Kuwait requested U.S. protection for merchant oil tankers using Kuwaiti ports.¹²¹ Responding favorably, the United States re-flagged the merchant ships and escorted the tankers through the Gulf with U.S. warships.¹²² Believing that the WPR did not apply to this use of the Navy, President Reagan did not consult with or report to Congress before ordering the naval escorts into service.¹²³ Following this action and an incident in which a U.S. helicopter opened fire on an Iranian minelayer, 110 members of the

118. See HENKIN, *supra* note 19, at 109 ("Quick success and the popularity of the action . . . discouraged criticism of the bombing in Libya in 1986.").

119. See *supra* note 111.

120. See James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 433 n.49 (1998).

[I]n the case of the Gulf War, President Bush initially claimed that he did not need congressional authorization to carry out Security Council resolutions authorizing the use of force against Iraq but decided to obtain Congressional authorization. Ultimately Congress passed a joint resolution authorizing the President to take steps to implement Security Council Resolution 687.

Id.

121. See *Lowry v. Reagan*, 676 F. Supp. 333, 336 (D.D.C. 1988) ("In response to an increase in attacks on commercial shipping during 1986, Kuwait requested the United States to provide protection for Kuwaiti petroleum tankers passing through the Persian Gulf.").

122. *Id.*

123. *Id.*

House of Representatives sued the President to compel him to report to Congress pursuant to the WPR (and thus initiate the automatic sixty-day countdown).¹²⁴ The district court's opinion, which relied on the doctrines of equitable discretion and nonjusticiability to dismiss the suit,¹²⁵ amply illustrates how the WPR has increased Congress's participation in the prosecution of foreign policy.

As seen in the Lebanon intervention, it does not take much to make out a case that the U.S. forces engaged in the Gulf were involved in "hostilities or in . . . situations where imminent involvement in hostilities [wa]s clearly indicated by the circumstances."¹²⁶ Beyond the fact that U.S. warships were going to be conducting escort operations in the Gulf during the vicious Iran-Iraq war and the imminent destruction of the Iranian minelayer (which killed three and led to the capture of twenty-six more),¹²⁷ there were multiple reasons for President Reagan to conclude that the WPR was applicable to the escort operation. During the time of the operation there were multiple examples of hostilities, such as when the U.S. frigate the *Samuel B. Roberts* struck two mines or when Iranian missile boats fired on the U.S. cruiser the *Wainwright* as well as U.S. aircraft.¹²⁸ Other naval clashes occurred as well, including the downing of an Iranian airliner by the U.S. cruiser *Vincennes*, providing President Reagan and later President Bush with a reason to report to Congress.¹²⁹ Neither President Reagan nor President Bush, however, actually chose to report to Congress.¹³⁰ On these facts, it is easy to criticize the WPR as failing to constrain the Executive. In fact, one could even say that the WPR significantly empowered the Executive in this case, because without the triggering of the WPR, there was not even a sixty-day limit with which the Executive had to contend.

A closer look, however, tells a different story. While it is true that Congress was not able to muster enough support to trigger the WPR by itself, and that the courts refused to do the same, the Persian Gulf situation is marked by a high level of congressional involvement. For example, the district court in *Lowry v. Reagan* noted that "[b]efore the filing of this lawsuit, several bills to compel the President to invoke section 4(a)(1) of the [WPR] were introduced in Congress. Bills also were introduced to alternately repeal and to strengthen the [WPR]."¹³¹ The WPR therefore led Congress to

124. *Id.* at 337.

125. *Id.* at 338, 340-41.

126. 50 U.S.C. § 1543(a)(1) (2000).

127. GLENNON, *supra* note 18, at 107.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Lowry v. Reagan*, 676 F. Supp. 333, 338-39 (D.D.C. 1988).

discuss not only the constitutional and legislative authority involved in the Persian Gulf incident, but the merits of the entire constitutional and legislative war powers system.

Furthermore, the court's handling of *Lowry* also implicitly contributed to reaching the utopia of balanced participation in the prosecution of U.S. foreign policy. By refusing to adjudicate the WPR claims and sending the substantive questions back to Congress, the courts allowed Congress to decide "a question for the executive and legislative branches."¹³² Rather than "impose a consensus on Congress,"¹³³ the court gave Congress a chance to use the legislation that it wrote and rein in the Executive. Again, it is not the fault of the WPR that the Senate enacted a bill that would restrain the Executive, but that the House, in the words of former majority leader Senator John Warner, "s[at there] and d[id] nothing" with it.¹³⁴ Rather, the WPR led to political discussion, and almost action, over a presidential unilateral use of force. Given the strong success that the Executive has enjoyed throughout U.S. history in the foreign affairs arena,¹³⁵ it is impractical to expect that the WPR would have transformed the Executive into a figurative dog that follows obediently after the heels of Congress. As such, the discussion and votes spurred by the WPR should not be derided as insignificant. Indeed, this Note contends that such political discourse is significant—it is the practical result of a reasonable piece of legislation.

Remembering Justice Holmes's adage on representational government,¹³⁶ the prospect of Congress being on the edge of invoking the WPR must have had some normative effect on the Executive. Perhaps this explains why the escort action was relatively safe, despite the *Vincennes* calamity. For example, of the 10,000 Navy personnel sent to support the escort effort, there were only thirty-nine casualties (with thirty-seven of those coming in one instance, the attack on the *Stark*).¹³⁷ Thus, this illustrates another post-1973 unilateral use of force that was not protracted, bloody, or based on murky objectives.¹³⁸ The conflict was, again, the antithesis of Vietnam.

132. *Id.* at 339.

133. *Id.* at 338.

134. See GLENNON, *supra* note 17, at 109 n.207.

135. See HENKIN, *supra* note 19, at 40–41.

136. See *supra* text accompanying note 53.

137. See Center for Defense Information, U.S. Military Deployments/Engagements 1975-2001, <http://www.cdi.org/issues/USForces/deployments.html> (last visited Mar. 23, 2007).

138. See Ted Koppel, *Will Fight for Oil*, N.Y. TIMES, Feb. 24, 2006, at A23 (arguing that maintaining a steady oil flow has been the main foreign policy objective of the United States for the last fifty years, an objective that Koppel agrees is necessary to ensure national security). On the other hand, for an alarmingly

E. Panama

The 1989 Panamanian invasion is an interesting case study with which to test the effectiveness of the WPR. The intrigue stems from President H.W. Bush's choice to comply with the consultation requirement of the WPR in only the most barebones fashion.¹³⁹ Much like President Reagan's actions in the Libyan air strikes, President Bush only consulted with a small group of congressional leaders, hours before deposing Dictator Manuel Noriega.¹⁴⁰ While President Bush defended his actions by arguing that Congress was not in session at the time of the invasion¹⁴¹ and that he needed to protect the secrecy of the invasion, Secretary Vance is quick to point out the logical response to these arguments:

[A] group of leaders such as I have suggested [Majority and Minority Leaders of both houses and the Chairpersons and ranking minority members of the Armed Forces and Foreign Affairs committees of both houses, among others] will almost always be within reach of the President and will keep confidences.¹⁴²

Thus, President Bush can cite no bulletproof reason for choosing to test the WPR's consultation requirement. President Bush, however, did report to Congress within forty-eight hours of introducing U.S. forces into "hostilities."¹⁴³

What makes the Panamanian invasion an interesting case for judging the WPR's effectiveness, however, is that even though President Bush almost flouted the consultation requirement, the House of Representatives still chose to enact a resolution praising President Bush for his actions as Commander in Chief.¹⁴⁴ Even more striking is that the resolution passed the House by the margin of 389 to 26.¹⁴⁵ This extreme margin is even more interesting when it is noted that the House of Representatives was the chamber of Congress that tried to invoke the WPR to limit President Reagan's invasion of Grenada just six years earlier.¹⁴⁶

The House of Representative's behavior can be explained by President Bush's adherence to the spirit of the WPR. Although

commonsense series of unheeded recommendations that promise to drastically reduce the U.S. dependence on oil, one should become acquainted with the writings of Amory Lovins. See, e.g., Amory Lovins, *The Energizer*, DISCOVER, Feb. 2006, at 52.

139. See KOH, *supra* note 1, at 39 (noting that President Bush avoided full compliance with the WPR when he sent U.S. troops to Panama).

140. See Richard F. Grimmett, *Appendix: Reports Under the War Powers Resolution*, 2 U. MISS. J. NAT'L SECURITY L. 179, 183 (1998).

141. FISHER, *supra* note 117, at 165.

142. Vance, *supra* note 67, at 92.

143. Grimmett, *supra* note 140, at 183.

144. FISHER, *supra* note 117, at 166-67.

145. *Id.*

146. WORMUTH & FIRMAGE, *supra* note 68, at 260.

President Bush's failure to consult with Congress until seven hours before the invasion took place seems to contradict this conclusion,¹⁴⁷ the Panamanian invasion satisfied the purpose of the WPR, because unlike Vietnam and as the Powell Doctrine commanded, the invasion had the support of the U.S. public.¹⁴⁸ This support (likely stemming from Noriega's federal indictment for engaging in narcotics dealings,¹⁴⁹ the Panamanian Defense Forces slaying of a U.S. marine, and the assault of a Navy Lieutenant and the threat of sexual assault made toward his wife¹⁵⁰) is a probable reason why neither branch of Congress mounted a formal challenge to President Bush and why the House went so far as to praise the President.

A second reason why the Panamanian invasion illustrates the relevance of the WPR was the brevity and the relative safety of the conflict. While U.S. forces were already based in Panama prior to the action to unseat Noriega (due to the Panama Canal), the additional U.S. troops sent to bolster the existing 13,000 were for the most part removed from the area within the sixty-day period specified by the WPR.¹⁵¹ Again, the success and speed of this operation can be credited to the use of the Powell Doctrine, the strategy designed to win conflicts quickly and safely.¹⁵² The intervention was indeed safe by the standards of conventional war, with only twenty-three U.S. citizens losing their lives in an operation involving over 4,000 combat troops.¹⁵³ Thus, the safety, brevity, and recognition of the public will is what made the intervention in Panama another example of a post-1973 unilateral use of force that was positively influenced by the "paper tiger" itself, the WPR.

F. Somalia

The U.S. experience in Somalia does more to illustrate the pragmatic constraints on the use of force in the modern era than it does to show the legal effect of the WPR. In fact, with the intervention having been predicated on humanitarian reasons—feeding starving Somalis¹⁵⁴—and not on enforcing law and order,

147. Grimmett, *supra* note 140, at 183.

148. See FISHER, *supra* note 117, at 166–67 (noting that Congress, representing the U.S. public, supported Bush).

149. See HUCHTHAUSEN, *supra* note 90, at 117–18.

150. See BOB WOODWARD, *THE COMMANDERS* 156–58 (1991) (explaining the slaying and the assaults).

151. See FISHER, *supra* note 117, at 165–66 (stating that Bush ordered the troops to be deployed in December and later announced that "the American troops sent to Panama would be out by the end of February").

152. See BOOT, *supra* note 55, at 319.

153. See WOODWARD, *supra* note 150, at 164, 195.

154. Professor Samantha Power contends that President George H. W. Bush used the Somalia intervention (which included the use of 28,000 U.S. ground troops) as

there is little reason why the WPR, which applies to the "introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,"¹⁵⁵ would even be relevant to the operation.¹⁵⁶ Indeed, if not for the UN Security Council's expansion of the humanitarian forces mandate from combating starvation to enforcement of order and the disarming of the militias that effectively controlled the country,¹⁵⁷ the intervention in Somalia would not even belong in this Note.¹⁵⁸ However, as subsequent events made painfully clear, the expansion of the mandate did take place, and a chain of events was set into motion that culminated in the disaster that became known as *Black Hawk Down*.¹⁵⁹

This tragedy, which President Clinton inherited from the previous administration, stemmed from a U.S. Special Forces effort to kill Somali warlord Mohammed Farrah Aidid.¹⁶⁰ In terms of WPR compliance, it appears that Congress was not consulted prior to the Aidid raid. This breach of the WPR is conceded, as it is not difficult to conclude that trying to kill or capture a heavily armed and defended *warlord* is just the type of event that will involve hostilities. President Clinton, however, had kept Congress informed with reports prior to this point, even though before the contemplation of raids the WPR was reasonably inapposite.¹⁶¹ Also relevant to a WPR compliance discussion is the fact that the Senate and the House of Representatives had passed similar resolutions lending some support to the humanitarian operation prior to the raid.¹⁶²

a way to divert attention from his lack of action in combating the ethnic-cleansing occurring in Bosnia. See SAMANTHA POWER, *A PROBLEM FROM HELL* 285–86, 293 (2002). This interpretation is seconded by David Halberstam, who wrote:

with the administration under attack on Bosnia and with the images from Somalia growing more haunting, the pressure to do something *somewhere* was forcing the Pentagon's hand. For a variety of reasons Somalia was the better choice, and the mission, though in a more distant country, appeared to be more containable and offer the easiest possibility of extraction.

DAVID HALBERSTAM, *WAR IN A TIME OF PEACE* 251 (2002).

155. 50 U.S.C. § 1541(a) (2000).

156. See Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58, 64 (1995).

157. See POWER, *supra* note 154, at 317.

158. See Damrosch, *supra* note 156, at 65 (noting that while the WPR was irrelevant for most of the Somalia intervention that the escalation of the situation brought the WPR back into play).

159. The book, written by Mark Bowden, was later turned into a widely-seen film. See *Black Hawk Down*—Official Site, <http://www.sonypictures.com/homevideo/blackhawkdown/> (last visited Mar. 1, 2006).

160. See POWER, *supra* note 154, at 317.

161. See Peter Raven-Hansen, *The War Powers Resolution: Origin, History, Criticism and Reform*, 2 U. MISS. J. NAT'L SECURITY L. 23, 32 (1998).

162. See *id.* at 31.

The legal implications of this fact pattern, such as whether President Clinton was on the sixty-day clock or whether he should have been, were rendered moot when he announced the day after the servicemen were killed that "all U.S. forces would be home within six months."¹⁶³ At the first sight of blood, there was really no need for the WPR to constrain the Executive; in this instance, the constant television footage of the bodies of U.S. troops being dragged through the streets of Mogadishu was more than enough to do the job.¹⁶⁴

The Somalia intervention, therefore, does not offer much in terms of WPR compliance. Rather, the intervention simply fits into the pattern of post-1973 presidential unilateral uses of force that do offer much about the WPR. This is so since the intervention was just another presidential unilateral use of force that had the potential to, but did not, end up like Korea or Vietnam. With this foray complete, it is now time to return to a discussion that is more relevant to the WPR's effect on U.S. foreign policy.

G. Kosovo

In a Note defending the WPR, perhaps the most difficult presidential unilateral use of force to address is the "air war"¹⁶⁵ over Kosovo.¹⁶⁶ Because the use of force lasted seventy-nine days,¹⁶⁷

163. See POWER, *supra* note 154, at 317. In fact, the withdrawal from Somalia was so hurried that the government even called on the State University of New York Maritime College's 565-foot training ship, the *Empire VI*, to help with the operation. See Manny Fernandez, *Training Ship Returns to Its Campus, a Bronx Pier*, N.Y. TIMES, Mar. 9, 2006, at B3.

164. See Verity Murphy, *Images from Iraq Haunt U.S.*, BBC NEWS ONLINE, Apr. 1, 2004, http://news.bbc.co.uk/2/hi/middle_east/3588751.stm (comparing "gruesome" images from the Battle of Falluja with those from Somalia and Vietnam).

165. While some may take issue with describing Kosovo as an "air war" given that U.S. ground forces did contribute to the NATO peacekeeping force introduced following the Serbian surrender, the peacekeeping action can be logically excluded from the current discussion. Indeed, the group of congressmen filing suit against President Clinton asserting a WPR violation did not consider the peacekeeping action to be a part of their claim. See *Campbell v. Clinton*, 203 F.3d 19, 20 n.1 (D.C. Cir. 2000).

166. An astute observer of U.S. foreign policy may note that U.S. involvement in the Balkans did not begin in Kosovo but in Bosnia. This is of course absolutely correct. After years of U.S. non-action (the blame for which Samantha Power expertly and methodically places on the shoulders of Presidents George H. W. Bush and Clinton, see POWER, *supra* note 154, at 273, 304), President Clinton authorized three weeks of NATO bombing following the fall of the UN-declared "safe area" of Srebrenica (which resulted in the execution of 7,000 Bosnians). See *id.* at 392, 422. While this use of force could be analyzed in the main text, for the sake of brevity and the following reasons it is not. First, the use of force lasted only three weeks, well under the sixty-day limit and much less time than the Kosovo intervention. Second, Clinton's failure to do something to stop the ethnic-cleansing was so criticized that even former House of Representatives Speaker Newt Gingrich stated that Bosnia was "the worst humiliation for the western democracies since the 1930s." See *id.* at 433 (quoting Newt Gingrich). Demonstrating the bipartisan fury over the U.S. course of action (or lack thereof), it

nineteen over the sixty-day blank check window, and because Congress failed to pass a resolution explicitly ratifying the Executive's actions,¹⁶⁸ Kosovo is, at first glance, a unilateral presidential use of force that stands in defiance of the WPR. Perhaps this is true in a legal sense, but this Note will show Kosovo to be nothing of the sort. While it is a tougher case to argue, the protracted air war over Kosovo still fulfilled the spirit of the WPR.

The Kosovo conflict was the byproduct of the Dayton Accords, a U.S.-led negotiated ceasefire to the ethnic cleansing in Bosnia, which as a concession to the Serbs made no mention of the Serbian province that was populated almost entirely by non-Serbs.¹⁶⁹ Thus, when Serbia eventually began implementing a genocidal campaign against the Albanian citizens of Kosovo that became so fierce and televised that it became "politically untenable" for the United States to remain uninvolved,¹⁷⁰ President Clinton ordered U.S. forces to join the NATO air war against Serbia.¹⁷¹ Unfortunately for WPR compliance, there seems to be little evidence of President Clinton consulting with members of Congress before the attacks began. Thus, it must be conceded that in the case of the Kosovo Intervention, the Executive failed to meet the initial consultation requirement in the WPR.

President Clinton, however, did submit an informative report to Congress within forty-eight hours of the beginning of the intervention in a manner that he labeled "consistent with the [WPR]."¹⁷² Like many of the reports of his predecessors, President Clinton's report did not concede that U.S. forces were "introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly

was Republican Senators Bob Dole and John McCain who ensured the passage of congressional resolutions that (1) lifted the U.S.-enforced arms embargo on the Bosnians and (2) authorized U.S. ground troops to be deployed as part of a peacekeeping force. *See id.* at 429, 437, 441. Thus, when President Clinton acted, he was not acting as an imperial president, but as a president coerced into taking action. For these reasons, the WPR faced a much tougher test in Kosovo. Accordingly, this Note focuses on Kosovo.

167. *See Campbell*, 203 F.3d at 20.

168. *See id.*

[C]ongress voted on four resolutions related to the Yugoslav conflict: It voted down a declaration of war 427 to 2 and an "authorization" of the air strikes 213 to 213, but it also voted against requiring the President to immediately end U.S. participation in the NATO operation and voted to fund that involvement.

Id.

169. *See POWER*, *supra* note 154, at 443-45.

170. *See id.* at 393. It should be noted that this language was used to refer to President Clinton's drawn-out decision to authorize air strikes in Bosnia. It is equally applicable to the decision to use force in Kosovo.

171. *See Campbell v. Clinton*, 52 F. Supp. 2d 34, 35 (D.D.C. 1999); *POWER*, *supra* note 154, at 449.

172. *Campbell*, 203 F.3d at 20.

indicated by the circumstances.”¹⁷³ Accordingly, the sixty-day countdown provision was never triggered, and Congressmen critical of President Clinton’s actions were spurred to file a suit similar to the one brought in *Lowry*.¹⁷⁴

The plaintiff congressmen were wrong to assert that the evasive report submitted by President Clinton violated the WPR. Perhaps President Clinton was guilty of taking advantage of a legislative loophole or perhaps he simply had a different interpretation of what the Kosovo intervention would entail. Regardless, the twenty-six members of Congress that sued the President were still unable to muster enough support to either close that loophole or call the President on his bluff.¹⁷⁵ The WPR calls for the Executive to submit a report in certain circumstances—it does not require the Executive to submit a report that satisfies the subjective demands of Congress.¹⁷⁶ Thus, even the district court noted, “The Court does not understand . . . why plaintiffs believe the President did not comply with [the reporting requirement] by virtue of the letters he sent to Speaker Hastert and Senator Thurmond on March 26, 1999.”¹⁷⁷

Regardless of the consultation or reporting issues, the courts refused, to take the baton from the congressmen in their race against the Executive. Affirming the district court’s dismissal on the grounds of standing, the D.C. Circuit reasoned that the multiplicity of self-help measures available to the congressmen, such as passing a law proscribing the President from continuing the campaign, or decreasing funding for the venture, took the group out of the *Coleman v. Miller* exception¹⁷⁸ to the *Raines v. Byrd* ban¹⁷⁹ on standing to assert a legislative institutional injury.¹⁸⁰ As a result, the D.C. Circuit sent the WPR battle back to the political branches.

Again, as noted in the Persian Gulf discussion, Congress’s inability to pass an act or resolution condemning the Executive is not

173. See *id.* (quoting 50 U.S.C. § 1541).

174. Compare *Campbell*, 52 F. Supp. 2d at 39, with *Lowry v. Reagan*, 676 F. Supp. 333, 334–37 (D.D.C. 1987).

175. See *Campbell*, 52 F. Supp. 2d at 44 (highlighting Congress’s inability to present a clear message to the President as undermining plaintiffs’ claims of “a direct conflict between the branches”).

176. See 50 U.S.C. §§ 1542–43 (2000).

177. *Campbell*, 52 F. Supp. 2d at 39 n.4.

178. See *Coleman v. Miller*, 307 U.S. 433 (1939) (holding members of the Kansas legislature were entitled to assert an institutional injury when their votes were “nullified”).

179. See *Raines v. Byrd*, 521 U.S. 811 (1997) (holding members of Congress did not have standing to assert an institutional injury as a result of the Line Item Veto Act).

180. See *Campbell*, 203 F.3d 19, 20 (D.C. Cir. 2000) (finding that the thirty-one congressmen opposed to U.S. involvement in the Kosovo intervention lacked standing to get a declaratory judgment against President Clinton).

the fault of the WPR.¹⁸¹ In this instance, Congress had numerous chances to impose its will upon President Clinton.¹⁸² While a declaration of war failed the House by the extreme margin of 427 to two, and a ratification of the air strikes failed by the tied vote of 213 to 213, a concurrent resolution ordering the President to end the conflict failed by a vote of 290 to 139, and an emergency appropriations bill providing funding for military operations in Kosovo even passed.¹⁸³ It should also be noted that the House, which failed to adopt the Senate's concurrent resolution authorizing the intervention, passed a resolution by the margin of 424 to one, praising participating U.S. servicemen for their courage and service.¹⁸⁴ Thus, while Congress failed to rebuke the President and even relinquished its trump card, the power of the purse,¹⁸⁵ it cannot be said that Congress was shut out of the Kosovo debate.

While at an irreducible minimum there was no *ex ante* or *ex post facto* authorization for President Clinton's use of force,¹⁸⁶ Congress was nothing like the paralyzed and incompetent actor that many of its critics argued it to be.¹⁸⁷ In the Kosovo intervention, Congress was a player—albeit a player who lost. This Note suggests that the WPR had something to do with this greater assertion of power and more specifically with how the intervention played out. Even if it did not legally constrain the Executive, the WPR framed the debate between the two political branches and led to numerous congressional votes. Thus, while Professor Yoo may be right to state that the Kosovo intervention displayed the WPR's "impotence"¹⁸⁸ as a *legal* document, one may still recognize the effect of the WPR as a document of *practicality*.

While the Kosovo intervention lasted much longer than other presidential unilateral uses of force, the intervention was nothing like

181. See discussion *supra* Part II-D.

182. See *Campbell*, 203 F.3d at 20–22 (emphasizing that Congress could have terminated the contested program if "a sufficient number in each House so inclined").

183. See *id.* at 20, 23 (detailing the congressional vote for resolutions related to the Yugoslav conflict).

184. See John C. Yoo, *UN Wars, US War Powers*, 1 CHI. J. INT'L L. 355, 356–57 (2000) [hereinafter Yoo, *UN Wars, US War Powers*].

185. See Yoo, *The Continuation of Politics*, *supra* note 1, at 279–87 (discussing the arguments regarding the power of the purse as a primary congressional tool).

186. See Yoo, *UN Wars, US War Powers*, *supra* note 184, at 356.

187. See STEPHEN R. WEISSMAN, *A CULTURE OF DEFERENCE: CONGRESS' FAILURE OF LEADERSHIP IN FOREIGN POLICY* 2 (1995) (stating that "[t]he truth, as I discovered in my twelve years with the staff of the House of Representatives' Foreign Affairs Committee, is that Congress—Democrats and Republicans alike—has largely lost its will to co-determine American foreign policy with the president"); see also KOH, *supra* note 1, at 117 ("[T]he president has won because, for all of its institutional activity, Congress has usually complied with or acquiesced in what the president has done, through legislative myopia, inadequate drafting, ineffective tools, or sheer lack of political will.").

188. Yoo, *UN Wars, US War Powers*, *supra* note 184, at 357.

Korea or Vietnam.¹⁸⁹ Even Professor Yoo, an opponent of the intervention, acknowledged that “the war for the most part had a limited, controlled, even antiseptic quality to it that called for little fighting on the ground by U.S. troops.”¹⁹⁰ The “safe” quality of the intervention can be attributed to the use of air strikes, which as Professor Kurth poignantly points out, allows the pilots to remain fifteen-thousand feet away from the real carnage.¹⁹¹ In fact, of 34,000 sorties flown by NATO, only two planes were shot down, and more importantly, no U.S. servicemen were killed,¹⁹² substantiating Professor Kurth’s claim that Kosovo was “a completely bloodless victory.”¹⁹³ The use of ground troops in the peacekeeping action notwithstanding, Professor Yoo’s and Professor Kurth’s descriptions of the intervention make any comparison with Korea or Vietnam unlikely.

Moreover, Professor Yoo, when trying to reason why (in stark contrast to the other uses of force referenced in this Note) there was no outcry from legal scholars over the shaky constitutional ground that the Kosovo intervention rested upon,¹⁹⁴ speculated that the members of the academy were silent, “because they believed the conflict served higher ends, that of promoting a normative vision of international justice in which each individual is guaranteed a certain minimum of liberty and freedom.”¹⁹⁵ Regardless of this statement’s veracity, it must be at the very least self-evident that this conflict stands irreconcilable with, for example, Vietnam, a savage conflict that unequivocally served no “higher end.”¹⁹⁶

189. President Clinton maintained the same attitude towards Kosovo as he did to Bosnia: U.S. ground troops would only enter the conflict if there was “a genuine peace with no shooting and no fighting.” See POWER, *supra* note 154, at 423 (quoting President Clinton).

190. John C. Yoo, *What's Wrong With International Law Scholarship?: The Dogs That Didn't Bark: Why Were International Legal Scholars MIA on Kosovo?*, 1 CHI. J. INT'L L. 149, 155 (2000) [hereinafter Yoo, *The Dogs That Didn't Bark*].

191. Interview by Alisa Giardinelli with James Kurth, Professor, Swarthmore College, in Swarthmore, PA (2005), available at <http://www.swarthmore.edu/news/kurth/> (last visited Mar. 23, 2007).

192. POWER, *supra* note 154, at 459.

193. James Kurth, *First War of the Global Era: Kosovo and U.S. Grand Strategy*, in WAR OVER KOSOVO: POLITICS AND STRATEGY IN A GLOBAL AGE 63, 63 (Andrew J. Bacevich & Eliot A. Cohen eds., 2001).

194. See Yoo, *UN Wars, US War Powers*, *supra* note 184, at 363.

195. Yoo, *The Dogs That Didn't Bark*, *supra* note 190, at 155. Professor Yoo satirized these scholars’ positions by quipping: “If other notions of international law, such as the principles of non-intervention and state sovereignty get in the way, so be it.” *Id.*

196. Watching a documentary on the History Channel about the Army’s elite Study and Observations Group (SOG), a former member who was recounting on a daring raid to retrieve downed pilots, summed up the Vietnam conflict perfectly: “We weren’t fighting to contain communism; we were fighting for the guy next to us.”

While the causal link may be less than perfect, this Note contends that the WPR, which codified the nation's distaste for spilled blood, played a noticeable role in President Clinton's actions. After all, President Clinton did submit constant reports to Congress informing it of the state of the conflict,¹⁹⁷ as § 1543(c) requires, even though he, like all the post-WPR Executives, chafed at the WPR as an unconstitutional restriction on the Executive's Commander in Chief powers.¹⁹⁸ While the length of the conflict, seventy-nine days, screams a breach of the WPR, if President Clinton, at the end of the first sixty-day window, exercised the § 1544(b) option to take thirty more days to help with the withdrawal of U.S. forces, he would have ended the Kosovo intervention with time to spare.¹⁹⁹ While this option was not exercised and President Clinton did violate the sixty-day window, the existence of the sixty-day limit at the very least provided a framework for discussion with a standard that does not favor the Executive.

Though the consultation requirement seems to have been violated in this context, it is worthwhile to ask if that truly matters. While it is true that the WPR itself states that its purpose is to ensure intertwined decisionmaking between the Executive and Congress when it comes to introducing U.S. forces into hostilities,²⁰⁰ it should be asked if this goal is realistically achievable. Considering that in over 200 years of history, there have been well over one-hundred presidential unilateral uses of force,²⁰¹ could Congress (and legal scholars) actually have thought that from 1973 on the "sole organ"²⁰² of U.S. foreign policy would now sit down and reach a consensus with over 500 people before using the military to achieve short-term policy objectives? In this respect this Note asks the reader to consider whether the purpose of the consultation requirement was achieved. Did evasion of the consultation requirement lead to a foreign policy train wreck? Certainly in the Kosovo Intervention, the answer is an emphatic no. For these reasons, then, the Kosovo intervention should be viewed as evidence that the WPR has had a positive effect on the implementation of presidential unilateral uses of force.

197. See *Campbell v. Clinton*, 52 F. Supp. 2d 34, 38 (D.D.C. 1999).

198. See Lori Fidler Damrosch, *The Constitution Under Clinton: A Critical Assessment: The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125, 127-32 (2000).

199. See 50 U.S.C. § 1544(b) (2000).

200. See *id.* § 1541(a).

201. See *supra* note 32.

202. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

IV. CONCLUSION: THE EXONERATED WPR AND THE WOLF IN SHEEP'S CLOTHING

The WPR is an effective piece of war powers legislation. As Part III made clear, no presidential unilateral use of force since 1973 has developed into a conflict that in any way resembles the WPR's impetus, Vietnam. Rather, the great majority of these conflicts have been characterized by their brevity, safety, and downright success. Yes, there have been tragic outcomes in Lebanon and Somalia; but what happened in response to those tragedies? In Lebanon, President Reagan actually submitted to being Congress's "messenger-boy,"²⁰³ asking for its permission, per the WPR, to continue the operation. And in Somalia, at the first sight of a looming disaster, it was President Clinton who cut short the operation. Thus, from 1973 on, it is easy to argue that sitting Executives have made responsible use of their power to act unilaterally in the foreign affairs realm.

The WPR has even contributed to a congressional resurgence in the foreign affairs arena. In many of these conflicts, we have seen Congress conducting numerous votes on whether and how it should respond to a unilaterally warring Executive. In some of the conflicts, Congress has come close to invoking the WPR against rather impetuous Executives.²⁰⁴ In Lebanon, Congress actually succeeded in the task.²⁰⁵ It is this Note's contention, though, that even when Congress failed to legally invoke the WPR, these votes had normative effects on the Executives in power. Such votes demonstrate that Congress desires to be, and will try to be, a player in foreign affairs decisions. So, perhaps the enactment of the WPR, the rise of Congress (at least in the normative sense) and the successful string of unilateral presidential uses of force are just a series of coincidences. This Note, however, with common sense as its companion, contends that they are not. Rather, it is self-evident that the WPR has played a significant role in improving the implementation of presidential unilateral uses of force.

A. Congressional Authorizations for the Use of Force: The Wolf in Sheep's Clothing

While on the topic of congressional participation, it is worth noting that authoritative votes on the use of military force are an interesting matter. If there is an impending military conflict on the near horizon, and Congress authorizes the Executive to take military

203. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 708 (1952) (Vinson, C.J., dissenting).

204. See discussion *supra* Parts II-A, D, G.

205. See discussion *supra* Part II-B.

action, notice what happens: While Congress may be following through on its constitutional prerogative, such a constitutional victory may pose a practical risk. For when Congress delegates its war power to the Executive, then the Executive becomes the party in control—and when the Executive is in control, the Nation's prosperity becomes tied to the judgment of one person. Thus, there may be much to gain from Congress purposefully pigeonholing the Executive in Justice Jackson's Category III, where he is solely dependent on his own inherent authority, rather than allowing the Executive to enter Category I, where he enjoys his own power in addition to whatever Congress delegates to him.²⁰⁶

To illustrate this point, let us look to Vietnam, a use of force that Congress authorized with the Tonkin Gulf Resolution.²⁰⁷ Even Senator Jacob Javits commented that “[t]he power of decision . . . had not been stolen. It had been surrendered.”²⁰⁸ Thus, the initial insertion of “military advisors” under Presidents Eisenhower and Kennedy notwithstanding, Vietnam was not a presidential unilateral use of force.²⁰⁹ Further, the Tonkin Gulf Resolution, passed in reaction to two attacks on U.S. warships,²¹⁰ authorized President Johnson to take “all necessary measures to repel any armed attack against the . . . United States and to prevent further aggression,”²¹¹ about as broad a delegation of power that Congress can issue.²¹² It should also be noted that this broad delegation of power passed through Congress with flying colors: the vote was eighty-eight to two in the Senate and 416 to zero in the House.²¹³

As a result, this Note contends that the nation's welfare is endangered not by the unilateral uses of force that the WPR constrains, but rather by congressionally sanctioned uses of force that disengage the WPR and place little or no limit on the Executive's power. It is the latter uses of force, and not the former, that transform the Executive into the unconstrained monarch that the Framers so rightly feared,²¹⁴ for “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at

206. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

207. See Tonkin Gulf Resolution, H.R.J. Res. 1145, 88th Cong., 78 Stat. 384 (1964).

208. JACOB K. JAVITS, WHO MAKES WAR: THE PRESIDENT VERSUS CONGRESS 261 (1973).

209. See FISHER, *supra* note 117, at 128–29.

210. The verity of the attacks, the second one in particular, has been questioned in recent years. For an excellent account of the debate and a primary account from U.S. Navy personnel who were a part of the “attack,” see Mike McLaughlin, *Anatomy of a Crisis*, AM. HERITAGE MAG., Feb./Mar. 2004, at 45.

211. H.R.J. Res. 1145.

212. See HENKIN, *supra* note 19, at 47.

213. See FISHER, *supra* note 117, at 130–31.

214. See THE FEDERALIST NO. 69 (Alexander Hamilton).

its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”²¹⁵

This prospect is made markedly worse when one realizes and contemplates that the U.S. constitutional framework is willing to anoint a person with no military or defense policy experience as the Commander-in-Chief solely because he was elected President by an electorate that itself has no general military or defense policy experience. Indeed, the constitutional framework is not only willing to carry out this process, but it requires it. In this respect, the Constitution’s treatment of war powers can be succinctly summed up by the equation:

Congressional Authorization to Use Military Force =
A Gamble that the Executive Will Use that Power Wisely

Sometimes, that gamble produces a winner, as it did for George H.W. Bush in the Gulf War.²¹⁶ In that conflict, President Bush set out a modest objective, Kuwait’s liberation, and ended the campaign as soon as that objective was achieved.²¹⁷ For this reason, President Bush has been praised for limiting himself to a political objective that ensured broad multinational and domestic support,²¹⁸ as well as for only asking the military to concentrate on tasks it performed well.²¹⁹ However, sometimes the war powers gamble can yield less favorable results, as the current Iraq situation illustrates. As to the war in Iraq, Congress’s authorization for the Executive “to use the [military] as he determines to be necessary”²²⁰ was a gamble that, in trying to

215. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

216. See generally HARRY G. SUMMERS, JR., ON STRATEGY II: A CRITICAL ANALYSIS OF THE GULF WAR (1992) (contrasting the Vietnam and Gulf War experiences).

217. See *id.* at 162–76 (arguing in support of the role and importance of objectives in the Gulf War).

218. Domestic support for the Gulf War was so widespread and popular that the Music Industry’s biggest stars even came together to record a song (“Voices that Care”) to espouse support for those in the field. See Jon Pareles, *Caution: Now Entering the War Zone*, N.Y. TIMES, Feb. 24, 1991, at A25. This is easily contrasted with the public reaction with the Iraq War has been made painfully clear. See, e.g., Eugene Volokh, *Deterring Speech: When is it “McCarthyism”? When is it Proper?*, 93 CAL. L. REV. 1413, 1423–24 (2005).

219. See SUMMERS, *supra* note 216, at 153–99 (covering the changes in military planning and doctrine ushered in by the Gulf War).

220. Authorization for Use of Military Force against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3, 116 Stat. 1498 (2002); see also Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001) (authorizing the Executive to “use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any

build a democracy in Iraq as apart to *only* ridding it of alleged weapons of mass destruction, has resulted in arguably “one of the greatest errors in American foreign policy”²²¹ As a result, President George W. Bush enjoys nowhere near the domestic support that his father did for his actions as Commander in Chief.²²² and his conflict is noticeably bloodier and indeterminate.²²³

B. Recommendations for Containing the Man-Made Wolf

Fortunately, the equation above can be affected by the insertion of two variables. The first variable pertains to the passage rate of a congressional authorization to use military force. If the authorization passes above a super-majority level it confers an element of normative power to the Executive. To take the current Iraq situation as an example, with the Authorization to Use Military Force (AUMF) passing at a rate that went beyond that required by a super-majority,²²⁴ it was not unreasonable for President Bush to infer that he had a broad mandate to use the “all necessary means” the document afforded him.²²⁵ The super-majority passage rate also meant that the many legislators who became disenchanted with President Bush’s use of these powers would have to, in a sense, go back on their word if they were to eventually chide the Executive. The preminent example of how voting for the AUMF hamstrung

future acts of international terrorism against the United States”) (emphasis added).

221. See Michael Scherer, *Why the U.S. Must Leave Iraq*, SALON.COM, Oct. 10, 2005, <http://dir.salon.com/story/news/feature/2005/10/10/feingold/index.html?pn=2> (quoting Senator Russell Feingold). The strategic error in deciding to provide al Qaeda with a protracted multi-front war in the Middle East is expertly explained by the book *Through Our Enemies’ Eyes*. See ANONYMOUS, *THROUGH OUR ENEMIES’ EYES: OSAMA BIN LADEN, RADICAL ISLAM, AND THE FUTURE OF AMERICA* xix, 255, 262 (2002) (the author has subsequently revealed himself to be CIA-veteran Michael Scheuer). See generally James Fallows, *Blind into Baghdad*, THE ATLANTIC MONTHLY, Jan./Feb. 2004, at 52 (providing a great account of the gross tactical errors in the conduct of the war).

222. Compare Peter Applebome, *Prospects Looking Up for 7 Southern Senators*, N.Y. TIMES, Sept. 27, 1992, at A28 (discussing how the “Republican high tide” following the Gulf War would likely lead to a Republican takeover of the Senate), with David E. Sanger, *Bold Visions Have Given Way to New Reality*, N.Y. TIMES, Feb. 1, 2006, at A1 (noting how President George W. Bush’s 2006 State of the Union address lacked ambition as a result of lost political capital).

223. Compare GORDON & TRAINOR, *supra* note 51, at 469–70 (1995) (stating the low-cost of the Gulf War and predicting that because only low-cost wars will be politically feasible in the future, the image of U.S. resolve will falter among the world’s “troublemakers”), with Erik Eckholm, *The Wounded: Legions of Doctors; A New Kind of Care in a New Era of Casualties*, N.Y. TIMES, Jan. 31, 2006, at A1 (analyzing the complex nature of dealing with the “poly-trauma[ti]c” injuries of the Iraq war’s wounded troops).

224. See YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 21, at 803 n.41.

225. H.R.J. Res. 114; S.J. Res. 23.

potential Iraq War dissidents is of course, John Kerry, the Democratic challenger to President Bush in 2004, who consistently found himself being labeled as unprincipled for criticizing a war that he had a hand in implementing.²²⁶ Thus, while it is a truism, members of the legislature should be careful what they vote for.

The second variable refers to the wording of such authorizations. It is this variable where legislators, even if they do empower an Executive, can retain control of how much power the Executive receives. For example, legislators can choose from a spectrum of delegation. On one side, legislators can afford the Executive maximum discretion by allowing them to take "all necessary means" to achieve a large-scale objective such as preventing future aggression or terrorist attacks. Such broad delegations are so powerful that they can even have unexpected consequences. For example, it is not likely that all legislators who voted for the AUMF could ever have imagined that President Bush would use that broad delegation as authority to allow the National Security Agency to institute a wiretapping operation with domestic reaches.²²⁷

On the other hand, legislators can condition their delegation of power on a variety of factors to allow the Executive to accomplish a limited objective. A prime example of this can be seen in Congress's extension of President Reagan's authority to maintain military operations in Lebanon. It is easily inferable that Vietnam-era Senator Javits would have preferred, with hindsight as a guide, to have given such a conditioned grant of power to President Johnson, as it was Senator Javits, while lamenting on Congress's complicity in the Vietnam disaster, who wrote that "Congress had an obligation to make an institutional judgment as to the wisdom and the propriety of giving such a large grant of its own power to the Chief Executive,"²²⁸ a task that Congress was obviously derelict in fulfilling.

While it can be said that the benefits of increased congressional participation in the lead up to war are not necessarily clear and that narrowly tailored congressional authorizations may be prone to claims of infringing on the Executive's Commander-in-Chief power, it is also clear that broad delegations of power only further the risks associated with the war powers gamble. As a result, out of concern

226. See Katherine Q. Seelye & Jodi Wilgoren, *Democratic Candidates Fix on Clark in Phoenix Debate*, N.Y. TIMES, Oct. 10, 2003, at A27 ("The problem is that [the Democrats] empowered the president to run roughshod over us in the last election because nobody stood up to him on the October vote."); see also Richard W. Stevenson & Janet Elder, *Poll Finds Kerry Assured Voters in Initial Debate*, N.Y. TIMES, Oct. 5, 2004, at A1 ("Mr. Bush's strategy of portraying Mr. Kerry as an unprincipled flip-flopper appears to have stuck in the national consciousness.").

227. See Sheryl Gay Stolberg, *Republican Speaks Up, Others to Challenge Wiretaps*, N.Y. TIMES, Feb. 10, 2006, at A1.

228. JAVITS, *supra* note 208, at 259.

for the Framers's foremost goal²²⁹ when it came to allocating war powers—avoiding a monarchical Executive—this Note urges Congress to err on the side of caution and adopt a more limited style of military authorizations.

As a final remedy, this Note offers the following suggestion, which is aimed at making the war powers gamble one with better odds of success. Executives who have been given extravagant power by Congress should heed the wise words of Professor Kurth, who answered the question of what he would do if he were in a position to control the military by stating:

I would give the benefit of the doubt to and take advice from the uniformed officers, particularly the advice of the ground combat services—the army and the marines. They know what it means to have boots on the ground and to spill their blood in the mud, unlike the Air Force, which can fly over a battle at 15,000 feet and have no idea of face-to-face combat.²³⁰

If anyone understands the capabilities and limitations of the military, it is those who have spent their lives experiencing them in action. So although this Note does not call for a constitutional amendment, it appeals instead to common sense, as it seems intuitive that a more responsible allocation of war powers should take such first-hand experience and knowledge into account. Thus, while the decision to resort to arms should remain a political determination, the direction of those arms should depend more noticeably on the judgment of professionals who understand what combat is and how it works.

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229. See THE FEDERALIST NO. 69 (Alexander Hamilton). Certain scholars have recognized that there is a difference between the Framers' goals and how the Framers expressed those goals in the Constitution. See, e.g., Larry Kramer, *We the Court*, 115 HARV. L. REV. 140, 157–69 (2001). Thus, it is not inconsistent to assert that the Framers simply erred when they chose the war powers allocation that they did when trying to avoid a monarchical decisionmaking model.

230. Interview by Alisa Giardinelli with James Kurth, *supra* note 191.

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