

*United States Marine Corps
Command and Staff College
Marine Corps University
2076 South Street
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Quantico, Virginia 22134-5068*

MASTER OF MILITARY STUDIES

U. S. War Powers in the 21st Century:

***Do Post Cold War Conditions Facilitate Abuse of
Executive Prerogative in Foreign Affairs?***

Submitted in Partial Fulfillment
of the Requirements for the Degree of
Master of Military Studies

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Abstract The U.S. Constitution allocates responsibility and authority in Foreign Affairs between the Executive and Legislative Branches, granting the Legislative Branch the power to declare war. Through the first 150 years of the United States existence, war powers were generally executed in a Constitutionally. Consistent manner: The Legislative Branch declared, or at least authorized and funded, military intervention. The Cold War led directly to an expedient shift of War Powers towards the Executive Branch, during this period to restore balance. Three case studies (Desert Shield/Storm, Haiti, and the Balkans) and other research indicate that Global conditions in the Unipolar Post Cold War Era generally exacerbate this trend towards Presidential War Powers: While International factors for the next two decades will tend to induce the United States into Limited Warfare, domestic factors remain mixed, indicating a delicate balance of power and continued tension between the Executive and Legislative Branches in the upcoming decades.		
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*To every thing there is a reason, and a time to every purpose under heaven:
...a time for war, and a time for peace...*

Ecclesiastes 3:1, 8

War is a matter of vital importance to the State; the province of life or death; the road to survival or ruin.

Sun Tzu, *The Art of War* (c. 340)

[Warfare may only lawfully be waged] ...after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made.

Cicero (106-43 BC)

...if one citizen has a right to go to war of his own authority, every citizen has the same...But this is not true either on the general principles of society, or by the Constitution, which gives that power to Congress alone...

Thomas Jefferson, *Letter to Governor Morris* (1793)

In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war and peace to the legislature, and not to the executive department...War is in fact the true nurse of executive aggrandizement...Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.

James Madison ("Helvidius"), *Essay* (1793)

The respective powers of the President and Congress of the United States in the case of war with foreign powers are yet undetermined. Perhaps they can never be defined.

John Quincy Adams, *Eulogy on Madison* (1836)

Allow the president to invade a neighboring nation, whenever he shall deem it necessary...and you allow him to make war at pleasure...This, our convention understood to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing the oppression upon us.

Abraham Lincoln (1848)

This thesis is dedicated to my sons, Jay and Giles, in the hopes that, in their generation, if peace cannot be maintained, our country uses its military force in a just and wise manner

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I. INTRODUCTION AND BACKGROUND

Perhaps the fundamental—and most critical—question to be answered by a society and its government is whether to wage war against another government and its people. War making is the supreme and ultimate expression of the power of the sovereign state. The political entity endowed with this power holds unparalleled authority over a nation's might as well as a grave responsibility to its citizens for its just and proper use. Perhaps recognizing this, in 1787 the Constitutional Convention explicitly stated in the first article of the new nation's seminal document that the power to declare war resides in the legislative branch of government, that branch most responsive to, and representative of, the people. At the genesis of the 21st century, however, as it emerges as the sole global superpower, the United States has followed no such established procedures to address these fundamental issues—whether, and when, to wage war, or more broadly, to employ military force. In fact, the war-making authority (hereafter, war powers) as decreed by the US Constitution is not, in practice, applied.

The United States has declared war in the constitutionally mandated manner five times in its history: the War of 1812, the Mexican War (1846), the Spanish-American War (1898), the First World War (1918), and World War II (1941). By the start of the 21st century, however, the US had employed forces abroad in “situations of conflict or potential conflict or for other than normal peacetime purposes,” on average, more than once a year over the course of its history.¹ Some of the two hundred-plus non-declared interventions include minor law enforcement-type activities, small-scale reprisals, and

¹ Ellen C. Collier, “Instances of Use of United States Forces Abroad”, *Congressional Research Service Issue Brief*, (Washington DC: Congressional Research Service, Library of Congress, 1993). 234 interventions are listed through 1993; even conservative tabulations for the period 1993-2001 will bring the total to approximately 250 interventions abroad to date.

legitimate acts of self-defense that would not, even in the original intent of the Constitution, have required a legislative declaration or even Congressional authorization. Increasingly in the post-Cold War era, however, the United States conducts even major acts of war without significant participation by Congress. The unilateral exercise of war power by the President in the absence of a Congressional declaration has become known as *executive prerogative* in foreign affairs.

How did this situation arise, and what factors contributed to the current condition? Do post-Cold War conditions facilitate the abuse of executive prerogative at the expense of constitutionally mandated legislative war powers? Are there any potential adverse consequences related to this extra-constitutional use of force? This thesis will review the constitutional basis for the executive-legislative authority to employ military force into imminent hostilities and provide a brief summary of the evolution of US war powers from 1787-1945. For background, it will trace the emergence of executive prerogative in the Cold War era, the War Powers Resolution, and discuss the resurgence of presidential war powers in the 1980s. Finally, focusing on the post-Cold War era, this thesis will seek to determine whether current conditions fundamentally facilitate extra-constitutional intervention on Presidential initiative abroad, seek to identify these conditions, and postulate whether these conditions might threaten an imminent Constitutional crisis. The research will examine in detail three cases of post-Cold War era intervention in which the executive branch invoked war powers, whether explicitly or implicitly, discuss circumstances relevant to war powers, and identify any emerging trends. Case studies will include political background and discussion of the Persian Gulf War (1991); intervention in Haiti (1994); and the Balkan Crisis (Bosnia, 1993- present and Kosovo,

1999), thereby representing a major intervention undertaken in each of the last three presidential administrations² to identify and describe factors that facilitate or inhibit Presidential War Powers.

The United States were in fact conceived in the course of a congressional declaration of war: the Declaration of Independence was not only a statement of dissolution of the colonies' political ties with Great Britain but a legislative resolution stating hostile intent toward Great Britain.³ The Constitution divided foreign policy authority and responsibility between the branches of government and unambiguously granted the legislative branch the following:

the Power to collect taxes, ...to pay the debts and provide for the common defense... define and punish piracies and felonies committed on the high seas; to declare War, grant letters of Marque and Reprisal...raise and support armies, ...To provide and maintain a Navy; ...To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel invasions;To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof...⁴

Note that these powers are granted independent of the executive branch and without reliance on the President, without qualification. Letters of marque and reprisal, a

² Additional factors regarding case study selection methodology must be addressed. First, due to the requirement of this thesis to identify and isolate political factors, selection of case studies required examples of interventions which were discrete events during a presidential administration; though described in other contexts, the Somalia intervention, though major, was not selected for analysis as a case study because President Bush initiated intervention as a lame-duck President, with a lame duck Congress that was in recess. The first Clinton Administration therefore inherited the intervention as a *fait accompli*. It is therefore more difficult to isolate and analyze factors related to national decision making and the powers of the executive and legislative branches whether to intervene. The invasion of Panama is described in some detail due to its impact on later decision making prior to Desert Storm, but is not included as a case study because it occurred prior to the actual fall of the USSR and thus during the Cold War.

³ Thomas Jefferson, *The Declaration of Independence*, volume 43 of *Great Books of the Western World* (Chicago, IL: University of Chicago, 1952) Robert Maynard Hutchins, Editor-in-Chief, 1-3.

⁴ *U. S. Constitution*. Art I.

relatively obscure and essentially obsolete 18th century practice, eventually “came to signify any intermediate or low-intensity hostility short of declared war.”⁵

The President’s authority, on the other hand, is contingent upon his consultation with the Congress. Under the Constitution, the President shares foreign policy authority with the Congress, requiring its participation such as an approving vote or “advice and consent”:

...executive Power shall be vested in the President ...(who) shall be the Commander-in-Chief of the Army and Navy ...(h)e shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public ministers and consuls...⁶

The framers of the Constitution addressed responsibility for resolution of any disputes among branches of the U. S. government in Article III, Section II:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ...⁷

Regardless of compelling and occasionally cogent arguments to the contrary,⁸ it is clear both from notes from the Constitutional debates and the *Federalist Papers* that the original understanding of the framers was that the Constitutional authority to undertake

⁵ Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. (1986), 1044-1045 quoted in Peter Raven-Hansen, “Constitutional Constraints: The War Clause”, *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives* (Westport, Connecticut: Greenwood Press, 1994) edited by Gary M. Stern and Morton Halperin, 30-31.

⁶ *U.S. Constitution*, article II. *The Constitution* enumerates executive powers *after* legislative powers and they are discussed less prominently in *The Federalist Papers* than those of the legislative branch. The obvious implication is that the framers envisioned the Congress to be the most important or powerful branch of the Federal Government, even in formulation of foreign policy.

⁷ *U.S. Constitution*, article III.

⁸ The vast preponderance of constitutional and legal scholarship favors legislative war powers over executive prerogative. In addition to most Presidential Administrations of the late 20th century, there is one vocal exception, in University of California/Berkeley Law Professor John C. Yoo, especially in his treatise, “The Continuation of Politics by Other Means: The Original Understanding of War Powers”, *California Law Review*, March 1996 (<http://www.law.berkeley.edu/faculty/yooj/articles/warpowers.html>) accessed 12 September 2000.

offensive military action overseas rests within the Legislature.⁹ The record of the debate within the Constitutional Congress in 1787 confirms that, in fact, this very question was directly addressed by the founding fathers (see Appendix A).¹⁰ As the legislature would assume responsibility for declaring war and the President would be responsible for executing it, there was a certain flexibility granted if the President were, hypothetically, required to “repel sudden attacks.”¹¹ This flexibility would become significantly greater, though not for nearly two centuries.

The first exercise of the Constitution’s allocation of war powers occurred in 1789 when Congress authorized President Washington to activate militias “for the purpose of protecting the inhabitants of the frontiers...from the hostile incursions of the Indians.” Even in a defensive role, the militias were employed cautiously out of respect for the Constitution. In a 1792 letter, Secretary of War Henry Knox warned Territorial Governor William Blount that “the Congress which possesses the powers of declaring War will assemble on the 5th of next month—Until their judgments shall be made known it seems essential to confine all your operations to defensive measures.” A month later, Knox directly related the President’s opinion on war powers: “(Washington) does not conceive himself authorized to direct offensive operations...If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.” The Whiskey Rebellion (1794) likewise resulted in consultation and cooperation

⁹ “Publius”, *The Federalist Papers*, #24-28, 74 (Alexander Hamilton); #47 (James Madison); #51 (Hamilton or Madison); *Great Books of the Western World*, vol. 43, 87-96, 153-156, 162-165, 221-222.

¹⁰ Ferrand, Max, ed., *The Records of the Federal Convention of 1787*, vol. 2, (New Haven, CT: Yale University Press, 1937), 318-319.

¹¹ Letter from Alexander Hamilton to James McHenry (May 17, 1798) reprinted in 21 *The Papers of Alexander Hamilton* 461-462 (Harold Syrett ed., 1974) quoted in Peter Raven-Hansen, “Constitutional Constraints: The War Clause”, *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives* (Westport, Connecticut: Greenwood Press, 1994) edited by Gary M. Stern and Morton Halperin, 35.

between the President and Congress based on the strictest constitutional interpretation of war powers.¹²

The fledgling nation's first overseas intervention—and the first test of warmaking authority for limited purposes outside US territory--occurred in 1798 when President John Adams requested funding through Congress to prepare for war with France. A series of legislative actions enabled procurement for naval and standing land forces, coastal defenses, and materiel; seizure of French shipping was authorized; and trade with France was halted. Small-scale naval clashes began as Congressional debate on the war raged, with one Congressman stating that “(we are) now in a state of war; and let no man flatter himself that the vote which has been given is not a declaration of war.”¹³ Thus scarcely a decade into its existence, the Republic faced not only its first experience in conducting war, but also its first Constitutional crisis related to the division of war powers. The precedent was set: as a result of the questions related to war powers raised by the Quasi-War with France, the Supreme Court found in 1800 and in 1801 that, in addition to a formal declaration of war by Congress, the United States could wage “limited” or “imperfect” war on the President's initiative provided that he specifically consulted with the legislative branch and received funding by vote.¹⁴

¹² The Territorial Papers of the United States 195 (Clarence Edwin Carter ed. 1936) cited in Louis Fisher, *Presidential War Power* (Lawrence, Kansas: University Press of Kansas, 1995), 14-15.

¹³ Louis Fisher, “War Powers and the Use of Force”, *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives* (Westport, Connecticut: Greenwood Press, 1994) edited by Gary M. Stern and Morton Halperin, 14.

¹⁴ *Talbot v. Seeman*, 5 US at 28, from Fisher, 15. Regarding the Quasi-War, Chief Justice Marshall wrote for the Court in 1801, “the whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted as guides in this inquiry.” Supreme Court decisions regarding war powers during the 18th and 19th centuries were rare because, for the most part, Federal courts were more concerned with the vertical separation of powers (*i.e.*, between the Federal and state governments) than horizontal (between branches at the same level of government).

With few exceptions, this Constitutionally consistent model remained in effect through the end of the Second World War. Major wars, in which national survival was at stake or which involved large forces against a major foreign power, were Constitutionally declared by Congress (see Figure I).¹⁵ Defensive and pseudo-defensive actions (such as small naval engagements), campaigns on the western frontier, and even imperial interventions in Latin American and the Caribbean were authorized and/or funded by Congress. Military action against nonsovereign elements (including such disparate groups as pirates, Indians or rebels) were customarily approved and funded by Congress after Presidential consultation. However, never during the first century and a half—through the end of the Second World War, was a Presidential claim to inherent constitutional authority to employ forces unilaterally made, much less accepted.¹⁶

¹⁵ For example, Congress formally declared war on Mexico in 1846; the intervention required relatively large quantities of forces and was directed at a sovereign nation. Initiated under questionable circumstances and fought essentially for the sake of territorial expansion, the war was begun as an act of executive prerogative. President Polk did not, however, claim to be acting under his *constitutional authority*. After the war, the House of Representatives formally censured Polk for his role: the war was “unnecessarily and unconstitutionally begun by the President of the United States.” (Fisher, “War Powers and the Use of Force,” 18.)

¹⁶ Peter Raven-Hansen, “Constitutional Constraints: The War Clause”, *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives* (Westport, Connecticut: Greenwood Press, 1994) Edited by Gary M. Stern and Morton Halperin, 38-39. Whether the US Civil War constitutes an example of unbridled executive prerogative, or a legitimate repulse of a “sudden attack” in the context of domestic insurgency as per Hamilton’s writings, is a compelling discussion but beyond the scope of this thesis.

II. THE COLD WAR AND PRESIDENTIAL WAR POWERS

Following the defeat of the Axis, the Cold War and a bipolar era of dual global superpowers emerged. Thrust (arguably, involuntarily) into a world leadership role, the US national decision-making dynamic changed simultaneously as the result of a series of world events and through domestic legislation. Soviet hegemony in Eastern Europe, detonation of a Soviet atomic device, and Communist victory in the Chinese Civil War led directly to unprecedented US global alliances and commitments, while the National Security Act of 1947, the formation of NATO (as well as later alliances) and NSC-68 codified the United States' need for global reach and commitment. Accordingly, the Executive branch increasingly claimed preeminence in national security affairs. Perhaps ironically, these claims were, in most cases, made on a Constitutional basis.¹⁷

The national security establishment's urgency in waging the Cold War seemed to justify a new set of rules.¹⁸ The Cold War context provided the first clear-cut and large-scale example of executive prerogative *using the Constitution as justification*. In 1950 President Truman ordered US forces into imminent hostilities in the Republic of Korea without prior congressional consent, citing the United Nations Security Council's request for UN members to "render every assistance to the United Nations" in compelling North Korean forces to withdraw north of the 38th parallel. His order was based not only on unprecedented executive power under the Constitution but also, erroneously, on the

¹⁷ Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford University Press, 1997), 65. The definitive work regarding the broadening of presidential war powers during this period is Arthur Schlesinger's *The Imperial Presidency* (New York: Simon & Schuster, 1970).

¹⁸ The 1954 Hoover Commission on Government Organization perhaps best reflects the attitude of this era: "We are facing an implacable enemy whose avowed objective is world domination by whatever means at whatever cost. There are no rules to such a game. Hitherto acceptable norms of human conduct no longer apply." Quoted in Senate Report No. 94-755, 94th Congress, 1st session, at 9 (Church Committee Interim

United Nations Charter. In fact, the UN Charter and the UN Participation Act unequivocally mandate that military employment of forces to UN operations are subject to the approval of the appropriate national legislatures pursuant to national law.¹⁹ Nevertheless, Congress and the courts acquiesced to Truman's actions; only Senator Robert Taft of Ohio objected, and even this objection--based on legal principle--was diminished by his support of the operation in general. While Taft objected that "(t)he President has simply usurped authority in violation of the laws and the Constitution", Senator Paul H. Douglas of Illinois voiced what was to be virtually established as a precedent for much of the next fifty years: "... the power of Congress being limited to a declaration of war, the President can take steps to resist aggression (without congressional authorization)."²⁰ More than any other factor, there emerged a perception that, as a superpower, the United States would be required to act decisively, and even swiftly, in foreign affairs. Increasingly, both branches viewed the legal requirement for congressional debate on the merits of intervention and legislative authority for employment of forces into imminent hostilities as an archaic luxury of a bygone era. The international security environment led to congressional acquiescence to executive prerogative at the start of the Cold War.

President Eisenhower, who was a vocal supporter of executive-legislative participation and cooperation in foreign affairs, nevertheless advanced executive prerogative through his opposition to the Bricker Amendment, which would have given the legislature a greater role in approval and execution of treaties and agreements with

Report on Alleged Assassination Plots Involving Foreign Leaders, 20 November 1975) from Jules Lobel, "International Law Constraints" in *The US Constitution and the Power To Go To War*, 116-117.

¹⁹ Under the UN Participation Act of 1945, US participation is "subject to the approval Congress by an appropriate act or joint resolution."

foreign nations and international organizations.²¹ Another feature of this new era of undeclared war involved covert and clandestine operations by the intelligence services of the superpowers which began in earnest in Eastern Europe in 1945-1950 for the USSR and subsequently in the mid-1950s under President Eisenhower. Under Eisenhower, the CIA significantly expanded its function into clandestine intervention overseas. This method later developed into another means for intervention facilitating executive initiative without full participation by Congress: warfare through surrogate nations and organizations. Further, by requesting and receiving prior authorization for potential interventions in the Formosa Straights in 1955 and the Middle East in 1957, Eisenhower established a formula for open-ended authorization by Congress for limited warfare. President Kennedy employed this mechanism during the Cuban Missile Crisis and President Johnson used this type of authorization prior to the Vietnam War in the 1964 Tonkin Gulf Resolution.²²

While the Cold War spawned American commitment, and with it global intervention, another feature of the Cold War, atomic weapons, hindered—or perhaps even rendered obsolete—Congressional war powers. The bipolar nature of the Cold War and the presence of a deterrent to unlimited war in the form of mutually assured destruction precluded intervention which could be perceived as too provocative, which would imperil international security by risking direct superpower conflict. Frequently, interventions by both superpowers during the period were primarily distinguished by an

²⁰ Silverstein, 70.

²¹ Frank E. Holman, *The Story of the Bricker Amendment* (New York: Committee for Constitutional Government, 1954) inside front cover, 1-5; 18-30; 73-78; 130). See Appendix B for the full text of the Bricker Amendment.

²² Gary W. Reichard, “The Domestic Policies of National Security,” in *The National Security: Its Theory and Practice, 1945-1960* (New York: Oxford University Press, 1986) edited by Norman A. Graebner 243-263; Silverstein, 78-85.

overriding sense of caution regarding the opposing superpower's reaction. The bipolar world structure and the presence of nuclear deterrence rendered the constitutional process that enabled the employment of armed forces through a declaration of war a practical impossibility. Thus, the early Cold War years established a new paradigm in international security: an era of limited, undeclared war, featuring great power involvement on the peripheries of respective spheres of influence (e.g., Korea and Vietnam for the US, Hungary and Czechoslovakia for the USSR).

While executive prerogative had reached its zenith under Truman and moderated somewhat under Eisenhower, Congress increasingly acquiesced to Presidential initiatives in foreign policy until the late 1960s, when domestic unrest over the course of the Vietnam War caused Senator William Fulbright to initiate legislation aimed at restoring legislative authority to influence foreign affairs. Momentum behind Fulbright accelerated following the invasion of Cambodia in 1970.²³ As the relationship between Congress and the President reached an all-time low during the Nixon Administration, the House and Senate passed the War Powers Resolution (overriding a Nixon veto) in 1973, a watershed measure with the intent of readdressing the balance between executive and legislative power. This joint resolution restates that the constitutional powers of the President to

...introduce Armed Forces into hostilities, or into situations where imminent involvement is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories, or its armed forces.

²³ Ellen C. Collier, "Statutory Constraints: The War Powers Resolution", *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives* (Westport, Connecticut: Greenwood Press, 1994) Edited by Gary M. Stern and Morton Halperin, 57.

The War Powers Resolution further formalizes consultation and reporting of the deployment of armed forces and mandates termination of the deployment within sixty days of the initial report unless (1) war is declared; (2) Congress approves a one-time, thirty-day extension of the time limit; or (3) armed attack on the United States prevents Congress from meeting.²⁴

The Ford Administration carefully adhered to the letter and spirit of the War Powers Resolution, filing three reports during the evacuation of Saigon and specifically citing section 4(a)(1) when responding with force to the seizure of the merchant vessel *Mayaguez* in 1975. In the quarter-century since, over fifty reports have been made which did not specifically acknowledge the resolution's authority, but were essentially made consistent with the resolution's reporting requirements.²⁵ Over the next two decades the resolution achieved a marginal ability to influence executive action and provide a basis for legislation and even, in some cases, litigation. For example, in 1982, the Multinational Force in Lebanon Resolution authorized a force deployment of 18 months, referencing the War Powers Resolution. In 1983, following the invasion of Grenada by US forces, both the House and Senate overwhelmingly approved legislation stating that the time-limits of the War Powers Resolution applied to the intervention.²⁶ In addition to terminating funding for US participation for the UN operation in Somalia, in November 1993 the House of Representatives invoked the resolution to declare that US forces there should be withdrawn no later than March 31, 1994.

²⁴ Silverstein, 89-97; Collier, "Statutory Constraints", 61. See Appendix C for excerpts from the War Powers Resolution.

²⁵ Richard F. Grimmett, "War Powers Resolution: Presidential Compliance," *CRS Issue Brief 81050* (Washington, DC: Congressional Research Service, Library of Congress, 25 November 1996), 2.

²⁶ The Senate later removed the War Powers enforcement provision from the unrelated bill to which it had been attached; US forces were removed within 60 days of the invasion, rendering the time limit irrelevant. (Collier, "Statutory Constraints", 68-69.)

The relative increase in congressional authority in foreign policy relative to the executive branch, as symbolized by the War Powers Resolution, lasted approximately through the Ford and Carter Administrations. Haunted by a perception of US impotence in the wake of the Iran hostage situation and failed rescue attempt--as well as the Soviet invasion of Afghanistan--a second reconcentration of executive power in the 1980s distinguished the Reagan and Bush Administrations. Interventions during this period exposed flaws in the War Powers Resolution, namely legal ambiguity and a lack of enforcement mechanism. Congress responded, in the case of covert assistance to Central American surrogates, in a perfectly constitutional manner—by outlawing US funding in the various Boland Amendments. Yet another check on presidential war powers reemerged in the 1980s: legal challenges made by Congress through the judicial system. Lawsuits by private citizens directly and indirectly challenging presidential authority were relatively common during the Nixon presidency, but only in the latter era of executive prerogative did litigation on behalf of Congress become increasingly common (for example, *Conyers v. Reagan*; *Dellums v. Bush*; *Campbell v. Clinton*.)

Variables in the war-power dynamic present during this period which were absent in the earlier (Truman through Nixon) era of executive prerogative included the legislative context of the War Powers Resolution, the waning of superpower deterrence to large-scale conventional conflict and, increasingly, a general decline in the relative military power and political influence of the Soviet Union.

Executive prerogative was therefore mostly reestablished as the disintegration of the USSR effectively marked the end of the Cold War. The pragmatism with which the legislative branch abrogated authority for foreign policy in 1950 enjoyed a partial

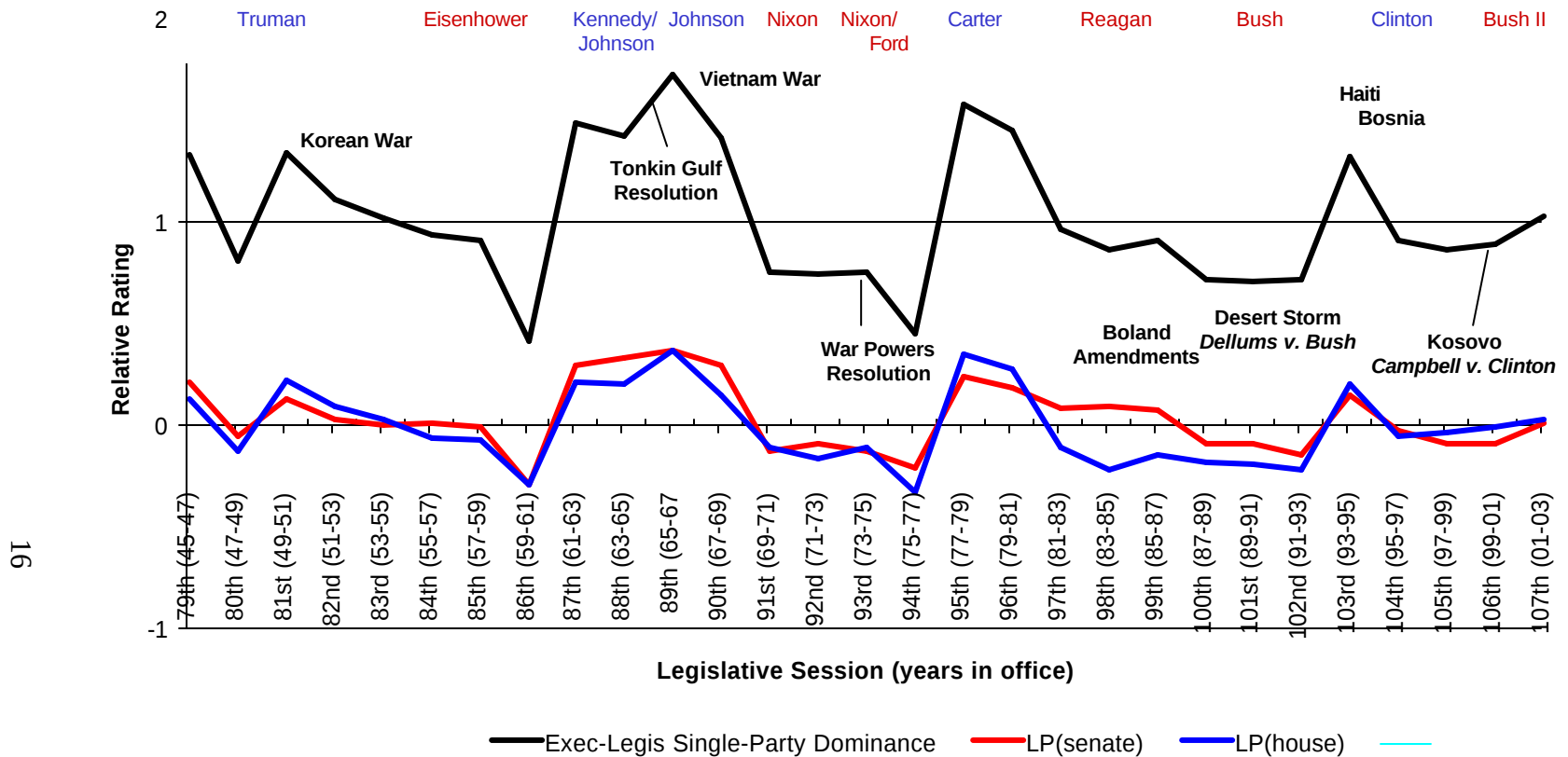
resurgence in the 1980s despite constant tension between the Reagan-Bush Administrations and opponents armed with the War Powers Resolution. When the Soviet Union altogether ceased to provide one additional restraint to intervention—superpower deterrence—the path to unbridled intervention appeared clear, although the Cold War impetus for intervention—containment—simultaneously faded. The new international dynamic—“World Order”, according to President Bush—portended interventions of a different nature with a US-led United Nations enforcing a new era of world peace (see Figure I, next page, for a graphic depiction of the changing nature of US interventions from 1776-1999.) The new world order shifted the international security paradigm once again, with implications for the inherent tension between the executive and legislative branches for preeminence in foreign policy and intervention.

The Bush Administration, like the Reagan Administration before it, functioned with strong Democratic control of the House and Senate. Obviously, legislative opposition to executive initiative tends to be greatest when the executive and legislative branches are divided along partisan lines, such as during the second Nixon Administration, when Congress passed the War Powers Resolution over Nixon’s veto, and the Reagan Administration, when Congress checked the executive’s ability to wage surrogate warfare in Central America through the various Boland Amendments. Figure II (page 16) depicts the relative degree of party dominance or parity in the executive and legislative branches by legislative session since 1945. Legal action to limit executive prerogative, such as *Dellums v. Bush* and, later, *Campbell v. Clinton*, also tend to occur during periods of executive-legislative partisan tension. Within this context the case studies portraying three examples of post Cold War intervention will be analyzed.

Figure I. Causes of US Wars and Selected Interventions, 1776-1999

	National survival Territorial expansion/regional hegemony US territory or property attacked US property/lives endangered Alliance and/or world order threatened Law/UN resolution enforcement Humanitarian or other							Comments
Conflict								
American Revolution	X*							
War of 1812	X							
Indian Wars		X						
Mexican War		X						
US Civil War	X*		X*					Undeclared due to anomaly or executive prerogative?
Caribbean Interventions		X						
Latin American Interventions		X						
Spanish-American War		X	X					
World War I			X	X	X			
World War II			X	X	X			
Korean War					X	X		
Vietnam War			X	X	X			Holtzman v. Schlesinger
Invasion of Grenada				X				Conyers v. Reagan
Invasion of Panama				X		X		
Desert Storm					X	X		Dellums v. Bush
Haiti						X	X	
Kosovo					X		X	Campbell v. Clinton

Figure II. Executive-Legislative Party Dominance by Legislative Session, 1945-2003



Legislative values = Proportional difference between political party occupying Presidency's relative strength in the House of Representatives and the Senate and opposition party's relative strength (at the beginning of each Congressional term; figures rounded to .01; independents, party changeovers, and vacant seats not included in data as statistically insignificant)

i.e., $LP_H = \frac{\text{Presidential party's House representation}}{\text{Total two-party House composition}}$; $LP_S = \frac{\text{Presidential party's Senate representation}}{\text{Total two-party Senate Representation}}$

Figures above 0 indicate respective legislative branch in relative partisan unity with the President

Executive-Legislative Single-Party Dominance Rating = $1.0 - [LP_H + LP_S]$

Figures above 1.0 indicate single party dominance, hypothetically facilitating unchecked executive prerogative; figures below 1.0 indicate Executive-Legislative bipolarity; potentially indicating foreign policy conflict between the President and the Congress

Sources of Data:

Office of the Clerk of the House of Representatives(web site), Political Divisions of the House of Representatives (1789 to Present) [<http://clerkweb.house.histrecs/househis/lists/divisionh.htm>]; United States Senate (web site); Senate Statistics: Majority and Minority Parties [http://www.senate.gov/learning/stat_13.html] accessed 12 January 2001.

III. CASE STUDIES

Case I: Desert Shield and Desert Storm

Background. On August 2, 1990, Iraqi forces invaded Kuwait. By a vote of 97-0, the Senate adopted on that same day a resolution pressing the President to “act immediately, using unilateral and multilateral measures, to seek the unconditional withdrawal of all Iraqi forces from Kuwaiti territory.” The Bush Administration reacted at once by rallying international consensus to isolate Saddam Hussein politically and unite potential allies, pursuing extensive consultations with congressional leadership. The Administration further planned deployment of military forces to Saudi Arabia and the Persian Gulf to deter further offensive action by Iraq into Saudi Arabia. On August 9, President Bush informed the House and Senate “consistent with the War Powers Resolution” of the deployment of forces to the Persian Gulf region to deter further Iraqi aggression.²⁷

Through September and October, both the House and Senate passed legislation supporting the President’s deployment of forces. They authorized expenditures and appropriated additional funds for the defense of the Persian Gulf region. At the same time, these measures cited, without specifically invoking, the War Powers Resolution. One Representative opined, “A congressional decision of the issue of war or peace would have to be made through joint consultation.” The Senate Majority leader and Speaker of the House formed an *ad hoc* group of congressmen for the specific purpose of consulting with the Administration regarding the Gulf Crisis, with whom he met on October 30th. When the 101st Congress adjourned, Bush ordered 150,000 additional forces to the Gulf

²⁷ Timothy S. Boylan and Glenn A. Phelps, “The War Powers Resolution: A Rationale for Congressional Inaction,” *Parameters* vol. XXXI, No. 1, Spring 2001, 114-124.

region, doubling the US presence there, *without informing Congress or the consultation group*.²⁸

The Administration was actively planning a military campaign to eject Iraqi forces from Kuwait. On November 20, Representative Ronald Dellums of California and 53 fellow Democrats in Congress filed a lawsuit in Federal Court seeking to prevent the President from commencing military action absent congressional authorization. Although it concurred with the congressmen that the President is prohibited from initiating war without authorization from congress, the court ruled that the issue was not “ripe” for decision, thus remedy, because 1) a majority of Congress had not participated as plaintiffs in the lawsuit and 2) the Administration had not yet committed forces to offensive action.²⁹

On November 29, the United Nations approved Security Council Resolution 678, which authorized “all necessary means”, including the use of force, to eject Iraqi forces from Kuwait.³⁰ Although Congress held hearings on the use of force against Iraq in the intervening months, no resolutions on behalf of these deployments were introduced in Congress to authorize the use of force, and no specific initiatives were undertaken by the Bush Administration to win Congressional approval until December 1990.

On December 3, 1990 Secretary of Defense Dick Cheney testified before the Senate Armed Forces Committee that, in fact, the President did not “require any additional authorization from the Congress” prior to the initiation of offensive action against Iraqi forces occupying Kuwait. The Administration intended to act unilaterally,

²⁸ Collier, 73.

²⁹ Collier, 73-74.

³⁰ UN Security Council Resolution 678, 29 November 1990 (<http://www.access.ch/tuerkei/GRUPI/UNSecurity/1990/678.htm>).

based on UN resolutions and previous resolutions encouraging deterrence and authorizing the deployment of forces.³¹ On January 4, Congress announced that debates regarding offensive action against Iraq would begin in six days. Four days later, President Bush proposed to Congress a resolution authorizing him to employ US forces to fulfill UN Security Council Resolution 678, which passed both houses.

Discussion. The events precipitating the Gulf War occurred as the Warsaw Pact (and the USSR itself) was in the midst of disintegration—in effect, in the midst of the Cold War’s end. It is unlikely that in the context of the Cold War, the invasion itself would have occurred. By invading Kuwait, a nominal US ally but more importantly, a critical trade partner with the capitalist world in general, Iraq could have initiated a superpower conflict. In previous years, a strong and credible Soviet Union almost certainly would have been able (or at least would have attempted) to restrain its ally. Likewise, a Soviet Union capable of expressing strong support for Iraq might have prompted a more cautious western response. There is credible evidence that Saddam Hussein misread US intentions *vis a vis* reaction to his adventurism. In a stark Cold War setting, US intentions might have been clear, even to Saddam. The aggressive, unified international response to the invasion would have been less likely, because the veto authority of the five permanent Security Council members would have ensured virtual gridlock in any attempt to employ force.

During preparations for Desert Storm, the Bush Administration operated under the Cold War paradigm of presidential war powers, perhaps influenced by its success in

³¹ Fisher, 25.

employing force in Panama without Congressional resistance or political consequence.³²

Although the Administration conducted consultations with Congress, the Bush Administration did not recognize the requirement for Congressional authorization until a week prior to the expiration of the UN deadline for Iraqi withdrawal from Kuwait (perhaps after having been compelled to do so by Congressional legal and legislative action.)

Desert Storm represents a sort of historical anomaly, a war fought under some Cold War understandings and preconceptions yet in a proto-post Cold War environment: the USSR was still in existence, but weakened to virtual impotence as a superpower, hence the formation of the requisite conditions for a genuinely international coalition. Unmistakably, this action represented a post-Cold War phenomenon, and absent Cold War influences, the events leading to the Gulf War could not have occurred in the manner in which they did.

³² Although not qualified as a case study of post Cold War interventions because it technically occurred during the Cold War, the invasion of Panama *could* be considered the first U.S. intervention of the post Cold War era. In December 1989 the Soviet Empire, though intact, was by necessity inwardly focused and intervention thus did not present the risk of superpower conflict present in earlier years. Further, the USSR could not rally international condemnation of the invasion in the manner that did had, for example, six years earlier following the invasion of Grenada.

It would be impossible to understand the attitudes regarding presidential war power within the Bush Administration in the period preceding the Gulf War without first considering the Administration's approach to intervention in Panama. In *Just Cause*, the Bush Administration conducted a swift invasion of a sovereign nation without consultation with (not to mention, authorization from) Congress or any reference to the War Powers Resolution. Congress was, in fact, in recess, although some members were notified a few hours before the operation. The Senate had ambiguously approved a bill supporting efforts, including military efforts, "to restore constitutional government to Panama and to remove General Noriega from his illegal control of the Republic of Panama" but had defeated an amendment specifically authorizing military force to oust Noriega "notwithstanding any other provision of law." The Panama intervention as a study in executive prerogative contained several traditional mitigating factors: it was a short, successful operation, with a degree of law enforcement rationale as well as the presence of endangered U.S. citizens and property. The invasion was undertaken in a region where US hegemony had been exerted for over a century. The invasion was, further, generally popular among the American people. Nevertheless, the lesson the Administration almost certainly gained from Congress' acquiescence was one of executive primacy in employing the armed forces abroad.

Case II: Intervention in Haiti

Background. On July 3, 1993, ousted Haitian President Jean-Bertrand Aristide and military junta commander Raoul Cedras agreed to the Governor's Island Accord which pledged the reinstatement of the democratically-elected President the following October. President Clinton obligated US forces to the UN for enforcement of the agreement. The second detachment of American service members aboard *USS Harlan County* arrived in Haiti to help ensure the peaceful transition of power but were physically prevented from disembarking the ship at Port au Prince by civilians (presumably at Cedras' direction) and the following day the vessel was ordered to depart Haitian waters.

The prevention of the *Harlan County* offload caused the UN Security Council on the following day to reinstate an economic embargo on Haiti previously suspended as a result of the Governor's Island Accord. One week later, the President reported "consistent with the War Powers Resolution" that US ships had begun to assist in the enforcement of sanctions. No formal consultations with congress had taken place, but attempts in congress to make appropriations for the intervention contingent upon congressional authorization failed.

As economic and political conditions in Haiti worsened, on July 31st 1994 the UN Security Council passed Resolution 940, a US-initiated authorization for the use of "all necessary means" to restore Aristide to power. Four days later the Senate voted unanimously that UNSCR 940 did not represent legitimate authority, under the Constitution and the War Powers Resolution, to invade Haiti using US forces. The House then introduced legislation calling for congressional authorization prior to an

invasion. The President stated that in executing US foreign policy he was not required to seek congressional authority.

Following the peaceful political resolution of the crisis on September 16-18, 1994, President Clinton reported “consistent with the War Powers Resolution” that 1,500 US troops had been deployed to Haiti as peacekeepers, a number which grew to approximately 21,000 by the end of the month. In October, Congress passed Joint Resolution 229, which stated that the President should have received authorization for the intervention, and pressed for a prompt withdrawal of U.S. peacekeepers.³³

Discussion. The Haitian intervention initiated the Clinton Administration’s practice of conscientiously reporting consistent with the War Powers Resolution, then categorically ignoring the remainder of its requirements. Further executive-legislative behavior which would become trends in the 1990s include a curious sequence of mixed signals to the President regarding war powers: legislative support for executive adventurism abroad in funding; repeated resolutions claiming that the president has no unilateral authority to intervene, yet no grant of intervention authority; and ultimate congressional acquiescence to the respective actions as a *fait accompli*.

The 103rd Congress (1993-1995) served during the only period in post Cold War US history of clear executive-legislative single-party dominance, as the Democratic Party held both the White House and both houses of congress. Congressional acquiescence with presidential action abroad was initially a significant factor in allowing not only the unilateral Haiti intervention but also mission creep in the Somalia intervention and the initial forms of US support for UN and NATO operations in the Balkans (case III,

³³ Grimmett, “War Powers Resolution: Presidential Compliance,” 3-4; “Foreign Policy Roles of the President and Congress,” 4.

below). Foreign policy matters played an identifiable, albeit subtle and secondary, role in the dramatic shift in legislative power to the Republican Party which occurred as a result of the 1994 election (104th Congress; see also figure I).³⁴

Case III: Balkan Interventions

Overview. The history of US intervention in the Balkans reflects an incrementally increasing commitment that began with innocuous humanitarian assistance in 1993 and climaxed with the massive bombing of the Former Republic of Yugoslavia (FRY) from March to June 1999, known as Operation Allied Force. The willingness of President Clinton to wage war in Allied Force without congressional approval reflects both his administration's increasing commitment to the region as well as the increasing partisan tension between the executive and legislative branches.

Background: Bosnia. UN Security Council Resolution 770, approved on August 13, 1992, requested members to take "all measures necessary" to ensure humanitarian assistance to besieged Muslim enclaves in Bosnia. The US Senate had approved appropriations for the operation but specifically forbade employment of US forces into potentially hostile areas without "clearly defined objectives." American intervention in the Balkans commenced with humanitarian airdrops on February 28, 1993. In April, President Clinton reported "consistent with the War Powers Resolution" that fighter aircraft were being employed to defend the airlifts. The following July, Clinton reported "consistent with section 4 of the War Powers Resolution" that US Army forces would participate in a peacekeeping force in the Former Yugoslav Republic of Macedonia

³⁴ Though the Somalia intervention began—unilaterally, and again without significant congressional participation--during the Bush Administration, unintended or gradual expansion of the force's roles beyond that which it was capable (mission creep) occurred during the Clinton Administration. The operation was initially popular. Popularity began to fade as the humanitarian mission became increasingly nonpermissive.

(FYROM) in accordance with UN Security Council Resolution 795 as “directed in accordance with Section 7 of the UN Participation Act.”³⁵

Amid UN and NATO planning for the employment of 50,000 NATO troops—half of them American—for peacekeeping in Bosnia, the Clinton Administration pledged on October 5, 1993 to consult with the Congress and receive its support prior to introducing US ground forces. Two weeks later the Senate approved an amendment to the defense appropriations bill stating that funding for peacekeeping in Bosnia would not be appropriated without congress’ specific prior approval.

In February of the following year, President Clinton again reported to Congress “consistent with the War Powers Resolution” that 60 US aircraft were participating in NATO operations over Bosnia. Within the month, US aircraft were engaged in air-to-air combat against Serb aircraft. In May 1994 the Senate voted to authorize and approve the use of US aircraft to carry out NATO orders to strike specific targets under narrowly focused guidelines. On four occasions over the next seven months, US aircraft attacked Serb or Bosnian Serb ground targets in the FRY.³⁶

The FY-1995 Defense Appropriations Act declared that funds could not be appropriated to support a potential deployment of US peacekeepers in Bosnia unless specifically authorized in advance. Congress approved funding for the Bosnia peacekeeping operations individually, in *ad hoc* measures, over the next several years, as costs mounted incrementally.³⁷ In 1995, following the Dayton Peace Accords, President Clinton ordered 20,00 US troops to Bosnia for one year to participate in IFOR, the

³⁵ Grimm, “Presidential War Powers,” 4-5

³⁶ Grimm, 4-5.

NATO-led peacekeeping mission. The seemingly open-ended commitment of US forces to Bosnia surfaced as an issue, albeit one of secondary importance, in the 1996 Presidential campaign. President Clinton responded to this criticism by promising to limit the presence of US ground troops to one year. In December 1996, the President offered to contribute 8,500 US troops to the follow-on SFOR for a period of 18 months.³⁸ A significant US peacekeeping presence in Bosnia continues to the present day.

Background: Kosovo. Serb military retaliation against the increasingly violent Kosovo Liberation Army (KLA) in early 1998 caused the United States to reintroduce economic measures against the FRY that had been suspended following the Dayton Agreements. In June, NATO ministers authorized the preparation of a military option for coercing the FRY government to cease its forays into Kosovo. Hostilities waned until the following fall, when the KLA insurgency strengthened, prompting further counterinsurgent operations. In October 1998 the FRY assented to a unilateral ceasefire, withdrawal, and international monitoring from the region following a threat of NATO air strikes. Aggressive KLA operations against local authorities and Serb civilians in the wake of the withdrawal prompted the FRY to renege, launching another offensive in January 1999.³⁹

An ambitious US and western European-sponsored peace conference held in Rambouillet, France collapsed on March 23. The Senate voted 58-41 that day to authorize “military air operations and missile strikes in cooperation with our NATO allies” against the FRY. NATO air strikes (Operation Allied Force) began the following

³⁷ Steven J. Woehrel and Julie Kim, “Bosnia—Former Yugoslavia and U.S. Policy”, *CRS Issue Brief 01089* (Washington, DC: Congressional Research Service, Library of Congress, 20 December 1996), 14-16.

³⁸ Woehrel and Kim, 2.

³⁹ Christopher Layne, “Miscalculations and Blunders Lead to War,” *NATO’s Empty Victory: A Postmortem on the Balkan War* (Washington, DC: Cato Institute, 2000), 13-17.

day, March 24. Later that day the House of Representatives voted 424-1 in approval of a simple statement of support for US forces engaged in the conflict without authorizing, funding, or otherwise implicitly or explicitly legitimizing American participation in the conflict. The President on March 26 explained the decision to use military force by accusing the FRY government of violating the UN charter, UN Security Council Resolutions, NATO resolutions, and “pursuant to [his] constitutional authority to conduct US foreign relations and as Commander-in-Chief and Chief Executive” and further stressed that the operation would not be restricted to a self-imposed time limitation.⁴⁰

After over a month of aerial attacks, the House of Representatives on April 28 voted in an inconsistent and contradictory manner on four issues critical to establishing the constitutional and legal status of the intervention. Overwhelmingly voting not to declare war on the FRY, 427-2, the House then split 213-213 on the previously Senate-approved authorization of Allied Force, thus effectively defeating the resolution. Another resolution that would have terminated all US participation in Allied Force was rejected by greater than a 2:1 margin. Finally, the House approved a resolution forbidding US funding for the deployment of forces to operating area without specific prior authorization (which the Senate later refused to approve).⁴¹

Following 57 days of air strikes, without any joint legislative action authorizing or permitting the a time-limit extension of the operation pursuant to the War Powers Act,

⁴⁰ *Campbell v. Clinton* U.S District Court for the District of Columbia Civil Action No. 99 CV 01072, Statement of Facts, 2-3; Yoo, “U.N. Wars, U.S. War Powers,” speech presented to the American Enterprise Institute, Washington, DC, April 4, 2000 (http://www.aei.org/past_event/conf0404f.htm) accessed 10 January 2001, 2.

⁴¹ *Campbell v. Clinton*, 2.

the House and Senate approved \$11.8 billion in emergency funding for Allied Force on May 20, twice the amount the Administration had previously requested.

On June 10, 1999, after 79 days of air attacks, the FRY government agreed to a modified peace proposal including its removal of all military forces from Kosovo. Seven thousand US troops were then deployed to participate in the 50,000-member NATO peacekeeping force without any specific authorization, although once again Congress agreed to provide the necessary funding for the peacekeeping mission.⁴²

On May 20, 1999, Representative Tom Campbell of California and 25 other members of Congress filed an injunction in Federal Court pursuant to the Constitution's War Powers clause and the War Powers Resolution. Unlike in *Dellums v. Bush*, the legal question had ripened, as the war in the former Yugoslavia was a both *fait accompli* and Congress had effectively voted on, and failed to authorize, the war. This time, however, the court found that as the Congress delivered a mixed signal to the President as detailed above, and a majority of Congress had not participated as plaintiffs in the lawsuit, the Congressmen had no legal standing to seek relief (see Appendix D).

Discussion. As in the case of Operation Desert Storm, the US involvement in the Balkans that began with airdropped humanitarian assistance to Bosnian Muslims and culminated with attacks throughout the former Yugoslavia indisputably could not have occurred in a Cold War setting. The controversial metamorphosis of NATO from a defensive, Cold War collective security alliance to post Cold War regional stabilization force and, ultimately, offensive deterrent to regional instability is a direct result of the disintegration of the USSR. Finally, both Desert Storm and Allied Force were aimed at

⁴² John C. Yoo, "U.N. Wars, U.S. War Powers", *California Law Review*, March 1996 (<http://www.law.berkeley.edu/faculty/yooj/articles/warpowers.html>) accessed 12 September 2000, 3-4.

nations with significant ties to the former USSR—in Iraq, a regional ally and military client; in the former Yugoslavia, a Slavic country with historical and cultural ties to Russia on the margin of Soviet domination.

Although the Clinton Administration maintained its unblemished record for conscientious reporting consistent with the War Powers Resolution, the Administration effectively violated the remainder of the Resolution's requirements, including seeking authorization prior to intervention and terminating the operation within sixty days (or seeking specific congressional approval for extension). Further, the second Clinton Administration probably witnessed the evaporation of the final vestige of any effective legal barrier to presidential war powers as Congress, through legislation and through court action, displayed its inability to enforce either the Constitution's war powers clause or the War Powers Resolution. The judicial standards set by *Campbell v. Clinton* (Appendix D) render legal remedy a virtual impossibility. Legislative prohibition of funding for an intervention—a rare but occasionally effective recourse, given the resolution of interventions in Beirut, 1982-1984 and Somalia, 1992-1994 as well as the Boland Amendments—are Congress' final option to restore its Constitutional authority in the midst of unfettered executive prerogative.

Operation Allied Force in particular represents a watershed event in post Cold War history. For the first time since the War Powers Resolution, the Congress specifically rejected presidential war powers by failing to give its initial authorization to an intervention in progress. By its ruling in *Campbell v. Clinton*, the judicial branch effectively placed the legal requirement for relief based on the War Powers clause in article I and the War Powers Resolution prohibitively high, exposing—after a quarter

century--the Resolution's lack of effective means for enforcement. Currently, the legislative branch's only remaining means to balance executive prerogative is to terminate procurement of funds for a given intervention, a politically dangerous act given the need to express support for forces who may be engaged in conflict.

IV. ANALYSIS

Analysis of the case studies and background research indicates that while emerging global conditions facilitate unilateral presidential war powers, internal factors, mostly political in nature, propose a complex combination of factors that envisage a mild resurgence of executive-legislative balance in security affairs for the immediate future. The case studies show seven interrelated categories of factors relevant to US war powers: domestic politics; US public opinion; the media; legal and judiciary developments; the increased use of executive orders by presidential administrations; increasingly permissive criteria for the employment of US forces abroad; and developments in the international environment.

Domestic Politics. Political analyst Byron E. Shafer has labeled the last two decades the “Era of Divided Government” with the electorate’s tendency favoring Republicans in Presidential races and Democrats in the Congress, then its remarkable shift in the 1990s to a Democratic President and Republican-controlled congress. Not surprisingly, the five major postwar instances of opposition to executive prerogative⁴³ have occurred during periods where the executive and legislative branches were politically ‘divided’. The contrary also holds: there is a tendency towards legislative acquiescence to exercise of presidential prerogative when there is considerable single-party dominance in both the executive and legislative branches. If indeed there is a post Cold War trend towards divided government, increasing Congressional resistance to

⁴³ The Bricker Amendment (1951-53) and the Steel Seizure Case (1952); the War Powers Resolution (1973); the Boland Amendment and related legislation (1984); *Dellums v. Bush* (1990-91); *Campbell v. Clinton* (1999).

presidential war power should be expected over the long term, and should affect both parties in a relatively equal manner.⁴⁴

If, however, there continues to be little or no means of enforcement of either the War Powers clause of the Constitution or the War Powers Resolution, the ultimate result is likely to be a continuance of ‘mixed messages’ from the legislative branch, which constituted in part the basis for the Court’s rationale in finding for the President in *Campbell v. Clinton*. Typically, legislative opposition to an ongoing operation only reaches a critical level—a level that requires the withdrawal of forces due to a Congressional refusal to fund the operation—after the operation is publicly perceived a failure (*e.g.*, Vietnam, Beirut, and Somalia).

Public opinion Conventional wisdom both in the public and private sectors suggests that the congressional power to declare war is an anachronism from a previous era. The established trend towards executive prerogative in foreign policy notwithstanding, the American public’s general sense of the preeminence of Congress, not the President, in foreign affairs has remained remarkably consistent throughout the Cold War and post Cold War eras. For example, in a 1959 questionnaire by the Survey Research Center, 52% of the American public felt that Congress was dominant in the foreign policy-making process, as compared to 10% who believed that the Chief Executive had “the most say” in foreign affairs.⁴⁵ In a comparable May 1999 poll taken by CNN, 60% of Americans felt that Congress should have the “final authority for

⁴⁴ Although the Republican Party occupies both the White House and majority status in both the House and Senate in the 108th Congress, the results of the 2000 election tend to support this view, as Republican control of Congress is so marginal that the executive-legislative polarity rating for the 108th Congress is a mere 1.02—practically neutral (see figure II, page 17). Byron E. Shafer, “The Partisan Legacy”, *The Clinton Legacy*, (New York: Seven Bridges Press, 2000), 25-26.

deciding whether the United States should continue the current air strikes in Yugoslavia,” whereas only 34% felt that the final authority rested within the Presidency.⁴⁶

The Media. Anecdotal evidence suggests that the proliferation of mass media may have a disproportionate impact on US politics in general and foreign policy specifically (the CNN effect). Then-UN Secretary General Boutros Boutros-Ghali succinctly stated this point in 1995:

For the past two centuries, it was law that provided the source of authority for democracy. Today, it seems to be replaced by opinion as the source of authority, and the media serve as arbiter of public opinion.⁴⁷

George Kennan wrote privately in 1992 while watching US Marines conduct humanitarian assistance in Somalia that, if decisions related to national security are made in response to emotional outcries based on media reports,

then there is no place...for what have traditionally been regarded as the responsible deliberative organs of our government, in both the executive and legislative branches.⁴⁸

While compelling, no trend emerges based on existing data whether media reports actually stimulate, or simply mirror, foreign intervention. While it cannot be disputed that mass media travels significantly faster—and more decisively--than congress can

⁴⁵ Roberta S. Sigel, “Image of the American Presidency: Part II of an Exploration into Popular Views of Presidential Power,” *Midwest Journal of Political Science*, 10 (February 1966), 128 as quoted in Reichard, 257-258.

⁴⁶ Keating Holland/CNN, “Poll: Congress should have authority over U.S. involvement in Kosovo” May 3, 1999, <http://www.japan.com/ALLPOLITICS/stories/1999/05/03/kosovo.poll/> accessed 4 September 2000. An interesting inference that can be drawn regarding US intervention is that it is the relative size of an intervention, as opposed to the *objective* of the operation, which determines whether the President must receive Congressional approval or authorization. For example, the Grenada and Panama invasions—relatively small, but in which US forces removed a sovereign government and installed a new one—did not require Congressional approval. The Persian Gulf War, however, merely reinstated a *status quo ante bellum*, but involved a large force, thereby requiring Congressional authorization.

⁴⁷ Remarks by UN Security General Boutros Boutros-Ghali at the Freedom Forum Media Studies Center, New York, March 19, 1995, quoted in Warren Strobel, *Late Breaking Foreign Policy* (Washington, DC: United States Institute of Peace, 1997), 4.

⁴⁸ George F. Kennan, “Somalia, Through a Glass, Darkly,” *New York Times*, September 30, 1993, A25, quoted in Warren Strobel, *Late Breaking Foreign Policy* (Washington, DC: United States Institute of Peace, 1997), 4.

legislate, whether this condition portends any significant shift in favor of or against presidential action in the context of war powers remains uncertain.⁴⁹

Legal and Judiciary Developments. Judicial willingness to rule directly on the limits of executive power tends to vary inversely with the gravity of the case and the impact on foreign policy that a given opinion will make. According to some scholars the expansion of executive power in foreign affairs in the 20th century began in 1936 with the Supreme Court's decision in *United States v. Curtiss-Wright Corp.* that enabled the President to quarantine the arms trade with South America. No significant judicial activity accompanied President Roosevelt's overt circumvention of the Neutrality Acts, and the Constitution, in 1939-1941, in aiding European allies, however. The Supreme Court took no action against deployments of US forces to Korea and Europe, as noted, but denied Truman's unilateral executive authority to seize 87 large steel companies in the midst of a labor dispute on the grounds that a national emergency (the Korean War) existed (*Youngstown Sheet & Tube v. Sawyer*, 1953).⁵⁰ Judicial restraint continued through the Vietnam War, for example, when a federal judge in New York delayed the bombing of Cambodia for 48 hours to adjudicate *Holtzman v. Schlesinger*. The subsequent rulings of the Circuit Court and the Supreme Court determined that the judicial branch could not rule on the case based on what was termed the "political question"—that is, a matter that must be solved politically between the executive and legislative branches.⁵¹ From that ruling through the 1980s and 1990s, the burden of proof in questions of executive authority would shift prohibitively to the legislative branch, with obvious consequences to burgeoning presidential prerogative. In *INS v. Chadha*, the

⁴⁹ Warren Strobel, *Late Breaking Foreign Policy*

⁵⁰ Lobel, "International Law Constraints," 109.

Supreme Court ruled that only joint resolutions, as opposed to resolutions of only one house of Congress, are binding on the executive branch.⁵² The Supreme Court's 1997 ruling in *Raines v. Byrd*, related to Congressional ability to file for legal remedy related to the Line-Item Veto, rendered nearly impossible any judicial relief for Congress in reassuming a portion of its usurped war powers. As demonstrated in the case studies by the rulings in *Dellums v. Bush* and *Campbell v. Clinton*, whether "ripeness" or "standing" is provided as the justification, there is now ample legal precedent for a President to intervene unilaterally with little consideration for legal or constitutional consequence (see appendix D). The net impact of all of these findings is that there is now an insurmountable legal burden on the legislative branch when attempting to redress or remedy executive prerogative.

Executive Orders. A frequently overlooked practice which could influence presidential prerogative is the practice of initiating action by executive orders, binding policy decisions by the President that do not require legislative action or approval. Although they deal overwhelmingly with domestic policy issues, the consequences of Executive Orders may have secondary effects in the foreign policy domain. Furthermore, they may provide a model for future executive action overseas, as (like foreign interventions) contesting them requires significant legislative unanimity and effort to reverse. Since the Nixon Administration, Presidents have employed the executive order with increasing regularity, with President Clinton surpassing his predecessors in scope and quantity by issuing 102 executive orders in the first ten months of 1998 alone.⁵³ This

⁵¹ Fisher, *Presidential War Powers*, 127-128.

⁵³ Joel D. Aberbach, "A Reinvented Government, or the Same Old Government?" in *The Clinton Legacy*, edited by Colin Campbell and Bert A. Rockman (New York: Seven Bridges Press, 2000), 127-128.

practice is a symptom of an ‘era of divided government’ and the practice can be expected to continue in future administrations.

Criteria for Intervention. Another trend worth citing concerns the nature of recent US interventions in terms of presidential justification, UN authorization, and issues of national sovereignty. The pattern established by the case studies indicates a declining standard for intervention—or, conversely stated, increasing willingness to employ forces without a compelling reason. Case I, Desert Storm, was justified based on concrete US and allied interests (oil access and the health of the economy) *and* UN Security Council Resolution authority, as well as the principle of the sanctity of a nation’s sovereignty against a foreign invader—a key principal of the UN Charter. In Case II, Haiti, the Clinton Administration justified intervention using abstract national interests and UNSCR authority despite the national sovereignty issue (after all, the intervention was a violation of the inherent right to national self-defense under the UN Charter). Even relatively permissive intervention criteria (*i.e.*, vital national interests, violation of sovereignty, *or* UN resolution) fail in the case of the Balkan interventions. As illustrated by Operation Allied Force, by the end of the first post Cold War decade the standard for intervention included *none* of the following accepted prerequisites: 1) concrete and/or vital national interests; 2) UN request or authority; 3) congressional approval; or even 4) territorial violation of a sovereign nation.

Presidential recognition of UN (and in the Kosovo example, NATO) resolutions as legal authority for intervention is a contributing factor in the incremental expansion of war power authority to the executive branch. In all three of the cases, executive prerogative in employment of forces without congressional authority was speciously

justified using UN or other treaty commitments. Both the UN Participation Act of 1945 and the North Atlantic Treaty clearly state that participation in all military operations is subject to the legislative authorities of the participating nations.⁵⁴ Thus, in yet another respect, the legal standard for justifying intervention erodes, and as a consequence executive prerogative is facilitated.

Global Conditions. While there is inherent difficulty in extrapolating future international conditions, an examination of post Cold War intervention reveals several relevant issues. The most compelling trend that would tend to militate executive prerogative relates to the unipolar nature of post Cold War relative national power. The era of declared war in recent US history (1898-1945) was a feature of a multipolar period in which great powers with increasing or decreasing relative national power waged large-scale warfare. The bipolar Cold War period witnessed superpower deterrence from major (therefore declared) war while small-scale war on the peripheries of superpower influence occurred frequently. Thus far the post Cold War unipolar period has revealed an even greater proclivity toward small (and medium) scale intervention, primarily on the President's initiative. While there is currently no clear indication of an imminent transformation in global power structures, within the next several decades it is likely that some form of change will occur. The decoupling of the European democracies from the

⁵⁴ The UN Participation Act of 1945 states: “. . .nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided...” (Fisher, *Presidential War Power*, 79-81; Jane E. Stromseth, “Treaty Constraints: The United Nations Charter and War Powers” in *The U.S. Constitution and the Power To Go To War*, 89); Article 11 of the North Atlantic Treaty states that actions under the treaty are to be executed “in accordance with their respective constitutional processes;” (Fisher, 97); finally, section 8(a) of the War Powers Resolution states that “Authority to introduce U.S. Armed Forces into...hostilities shall not be inferred...from any treaty...unless such treaty is implemented by legislation specifically authorizing the introduction of Armed Forces.”

United States, ardently sought for decades by Soviet leadership during the Cold War, may be occurring at the present time. A united Europe could eventually rate as a peer-competitor with the United States. In addition, China's vast potential for economic and military strength, coupled with its current (and even, to a degree, historic) regional hegemony and current willingness to engage in alliances that counter US influence abroad increase its potential for great power status. Because unchecked executive prerogative can lead to perceptions of aggressiveness or adventurism in US foreign policy, this trend is likely to give erstwhile allies concerns that may stimulate actions to counter US global dominance.⁵⁵

The analysis of the United States Commission on National Security in the 21st Century supports the assertion that, in the future, the US is likely be unable to maintain its traditional alliances. In its "Phase I report on the Emerging Global Security Environment for the First Quarter of the 21st Century," the Commission finds that although American preeminence in world affairs will continue through 2025, the US will "find reliable alliances more difficult to establish and sustain." Threats to US national security are anticipated to be increasingly "complex" involving "forms and levels of violence shocking to our sensibilities."⁵⁶ Furthermore, unconventional threats from nonsovereign and transnational actors represent the type of nontraditional enemy with which deliberate, legislative foreign policy is unlikely to be capable of managing.

⁵⁵ Janeen M. Klinger, "International Relations Theory and the Transformation of the International System," *International Politics* vol 34 (The Netherlands: Kluwer Law International, December 1997), 27-33; also Kenneth Waltz, *Theory of International Politics*, as analyzed in Klinger. A multipolar world power structure (and, especially, a tripolar one) is considered by many scholars the most dangerous to world security and peace. Whether the current unipolar world order will spawn, or at least evolve into, a tripolar world order will certainly affect the probability of a return to legislative preeminence in foreign policy in general and legislative war power in particular.

Executive war powers are most likely to be expanded under these circumstances. Finally, increasing commitment to humanitarian assistance and disaster relief during the 1990s led to *de facto* conditions of war in Somalia, Haiti and the Balkans, operations that were conducted largely by unilateral presidential initiative.

⁵⁶ *New World Coming: American Security in the 21st Century Supporting Research and Analysis*, The United States Commission on National Security/21st Century, Gary Hart and Warren Rudman, Chairmen, September 15, 1999.

V. CONCLUSIONS

As the case studies have revealed, the post Cold War era witnessed an incremental trend from legislatively authorized warfare (Desert Storm) through lukewarm acquiescence (Haiti and Bosnia) through a conspicuous, but equivocal, denial of congressional authorization for intervention in Kosovo. As analyzed, while mixed domestic trends indicate an ambiguous effect on presidential war powers, various factors in the international environment in the early 21st century overwhelmingly facilitate the conditions for the expansion if not abuse of presidential war powers.⁵⁷

Although individual Presidential styles, nearly as much as ideology, party affiliation, legislative composition, and even current world conditions, appear to determine the degree of executive prerogative exercised by the President, there are relevant trends to be noted. For example, the extent over time of presidential exercise of executive prerogative trends to be cyclical, as opposed to linear. Viewing the subjective/relative ratings in Appendix E graphed over time, one can identify that every 20-25 years a brief era of extreme executive prerogative emerges (Truman 1950; Nixon 1970) to be replaced by trend towards executive-legislative cooperation and (Eisenhower, Ford-Carter). If the Clinton Administrations are perceived as marking the most recent interventionist in the cycle, one would envision a more cooperative Bush II (see Appendix F).⁵⁸

⁵⁷ Figure I documents the shift in the nature of US conflicts from wars of a defensive nature, such as national survival, to UN enforcement and humanitarian operations, reflecting that the conditions under which the US intervenes have evolved to those in which a declaration of war is perceived to be unnecessary.

⁵⁸ The Era of Divided Government (1980-1999) could be assessed to have had a dampening effect on the amplitude of the cycle, ensuring that no President achieved the extreme degree of executive prerogative achieved, for example, by the Truman Administration.

Furthermore, on occasions where administrations were notably compliant with the legislative branch—during the Eisenhower Administration and the post-War Powers Resolution terms of Presidents Ford and Carter—no recurring theme or trend surfaces, though presidential style and historical setting provide some clues: Eisenhower, a national hero prior to entering politics, was the most nonpartisan President of the postwar era. He also led the Republic Party prior to the division of US party politics along strictly ideological lines (*i.e.*, there remained a substantial number of liberal Republicans and some conservative Democrats in 1952-1960.) Presidents Ford and Carter served in the immediate aftermath of Vietnam, Watergate, and the War Powers Resolution, a period of legislative prerogative.

In between those extremes, however, during those periods where presidents exercised wide authority in international affairs (*e.g.*, the Kennedy and Johnson Administrations), there was a remarkable presence of single-party dominance, as would be expected. In one final category, where there was a Presidential desire for wide latitude in intervention yet high degree of resistance from Congress, such as occurred over the last two decades under the three most recent Presidents—the “era of divided government”—there was a moderate degree of executive-legislative party division. This trend is likely to continue, and a President desiring to employ force without Congressional participation will face the same executive-legislative tension.

The post Cold War era also witnessed the increasing ineffectiveness of the War Powers Resolution to limit unilateral presidential intervention because of its

unenforceability.⁵⁹ Demonstrated as impotent to date, the War Powers Resolution must be amended or it will increasingly be ignored (minus the symbolic reporting “consistent with” the resolution). An option for reform would be legislation similar to Senate Joint Resolution 323, the 1988 Byrd-Nunn-Warner-Mitchell Amendment (which failed to pass), which would have established a permanent, bipartisan consultative Congressional group with whom the President would be compelled to consult prior to committing US forces to hostilities.⁶⁰

Based on the implications of the 2000 Presidential election, the Bush-Cheney Administration appears thus far to incline toward legislative prerogative, or at least symbolic executive-legislative cooperation. President Bush’s lack of a mandate, with a loss of the popular vote and holding only marginal control over Congress may require a bipartisan style. Further, his comments regarding caution in the use of military force abroad during the presidential debates is evidence of an intent to pursue a less interventionist foreign policy. Finally, Secretary of State Colin Powell, author of the cautious Powell Corollary to the Weinberger Doctrine, will undoubtedly provide a large portion of the nation’s foreign policy guidance. Beyond the next administration, however, an era of complex and dangerous national security issues and a system of laws and government incapable of restoring the balance in foreign policy faces an uncertain and hazardous future.⁶¹

⁵⁹ For more discussion of the ineffectiveness of the War Powers Resolution, see Timothy S. Boylan and Glenn A. Phelps, “The War Powers Resolution: A Rationale for Congressional Inaction,” *Parameters* vol. XXXI, No. 1, Spring 2001, 114-124.

⁶⁰ Silverstein, 129.

⁶¹ Author’s note: as of mid-March 2001, the Bush Administration has displayed an approach that generally conforms with this analysis. President Bush has begun the drawdown of forces in Bosnia (Bill Sammon, “White House Says Troop Pullback Is First Step To Cutting Balkan Force”, *Washington Times*, March 16, 2001, 3). Internet web site: <http://ebird.dtic.mil/Mar2001/e20010316whitehouse.htm> accessed March 16, 2001. Furthermore, deviating significantly from Clinton Administration practices, the Bush Administration

has already planned detailed, formal bipartisan consultations with Congress regarding arms sales to Taiwan (Bill Gertz and Rowan Scarborough, "Inside the Ring", *The Washington Times*, March 16, 2001) Internet web site: <http://ebird.dtic.mil/Mar2001/e20010316inside.htm> accessed March 16, 2001.

Airstrikes against Iraq in February 2001, an apparent exercise of executive prerogative, more likely represented a continuation of established Clinton policy and were consistent with rules of engagement previously established for Operations Northern Watch and Southern Watch.

APPENDIX A: Debate in the Constitutional Congress on the Power to Make War⁶²
(Philadelphia, PA. August 17, 1787)

“To make war”

Mr Pinckney opposed the vesting this power in the Legislature. Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, and another peace.

Mr Butler. The Objections agst the legislature lie in a great degree agst the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.

Mr. M(adison) and Mr Gerry moved to insert “*declare*,” striking out “*make*” war; leaving to the Executive the power to repel sudden attacks.

Mr Sharman thought it stood very well. The Executive shd. be able to repel and not to commence war. “Make” better than declare the latter narrowing the power too much.

Mr Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

Mr. Elseworth. there is a material difference between cases of making *war*, and making *peace*. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration. peace attended with intricate & secret negociations.

Mr. Mason was agst giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate; because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred “declare” to “make.”

On the Motion to insert Declare—in place of Make, (it was agreed to.)

N.H. no. Mas. abst. Cont. no.* Pa. ay. Del. ay. Md. Ay. Va. ay. N.C. ay. S. C. ay. Geo- ay. {Ayes—7; noes—2; absent—1.}

Mr. Pinkney’s motion to strike out the whole clause, disagd. to without call of States.

Mr Butler moved to give the Legislature power of peace, as they were to have that of war.

Mr Gerry 2ds. Him. 8 Senators may possibly exercise the power if vested in that body, and 14 if all should be present; and may consequently give up part of the U. States. The Senate are more liable to be corrupted by an enemy than the whole Legislature.

On the motion for adding “and peace” after “war”

N. H. no. Mas. no. Ct. no. Pa. no. Del. no. Md. no. Va. no. N. C. (no) S. C. no. Geo. No. [Ayes—0; noes—10.]

Adjourned

*On the remark by Mr. King that “*make*” war might be understood to “conduct” it which was an Executive function, Mr. Elseworth gave up his objection (and the vote of Cont was changed to—ay.)

⁶² Ferrand, Max, ed., *The Records of the Federal Convention of 1787*, vol. 2, (New Haven, CT: Yale University Press, 1937), 318-319.

APPENDIX B: The Bricker Amendment⁶³
[Senate Joint Resolution 1, 83rd Congress, 1st Session]
Judiciary Committee Text

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to the legal effect of certain treaties and executive agreements.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of the several States:

ARTICLE—

Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

Section 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of the treaty.

Section 3. Congress shall have the power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

Section 4. The Congress shall have the power to enforce this article by appropriate legislation.

Section 5. This article shall be inoperative unless it shall have ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Defeated in the Senate, 42-50.

⁶³ Frank E. Holman, *The Story of the Bricker Amendment* (New York: Committee for Constitutional Government, 1954) inside front cover.

APPENDIX C:
Excerpts from The War Powers Resolution (50 USC S.1541-1548, 1973)

JOINT RESOLUTION

Concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Short Title

Section 1. This joint resolution may be cited as the " War Powers Resolution".

Purpose and Policy

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war , (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Consultation

Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Reporting

Sec. 4. (a) In the absence of a declaration of war , in any case in which United States Armed Forces are introduced --

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth --

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situations as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

Congressional Action

Sec. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs on the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(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. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Congressional Priority Procedures for Joint Resolution of Bill

Sec. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the

Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

APPENDIX D: Excerpt from the Ruling in *Campbell v. Clinton*
(boldface emphasis added)

OPINION

Since March 24, 1999, the United States has been participating in an air offensive launched by the North Atlantic Treaty Organization against the Federal Republic of Yugoslavia. Plaintiffs, twenty-six members of the United States House of Representatives, seek a declaration that the President has violated the War Powers Clause of the Constitution and the War Powers Resolution, 50 U.S.C. § 1541, *et seq.*, by involving the United States in the air offensive without congressional authorization. The defendant is the President of the United States, who has filed a motion to dismiss this action. Upon full consideration of the defendant's motion, plaintiffs' opposition, the defendant's reply and the arguments presented by counsel at the hearing held on June 3, 1999, and for the reasons stated below, the Court concludes that plaintiffs do not have standing to raise these claims. The motion to dismiss therefore will be granted.

II. DISCUSSION.

...(t)he legal landscape with respect to legislative standing was altered dramatically by the Supreme Court in its first Line Item Veto decision, Raines v. Byrd, 521 U.S. 811 (1997). **Virtually all of this Circuit's prior jurisprudence on legislative standing now may be ignored**, and the separation of powers considerations previously evaluated under the rubric of ripeness or equitable or remedial discretion now are subsumed in the standing analysis. For all intents and purposes, the strict legislative standing analysis suggested by Justice Scalia in Moore v. United States House of Representatives, 733 F.2d at 956-61 (Scalia, J., concurring), now more closely reflects the state of the law. See also Crockett v. Reagan, 720 F.2d at 1357 (Bork, J., concurring). The Court's analysis in this case therefore begins and ends with the question of standing.

Article III of the Constitution limits the jurisdiction of the federal courts to deciding actual cases and controversies. "[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process," Whitmore v. Arkansas, 495 U.S. 149, 155 (1990), and it "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Allen v. Wright, 468 U.S. 737, 750 (1984). At an irreducible minimum, in order to establish standing **plaintiffs seeking to obtain relief must allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."** See Raines v. Byrd, 521 U.S. at 818 (*quoting Allen v. Wright*, 468 U.S. at 751).

The dispute over standing in this case centers on whether plaintiffs, suing in their capacities as members of the House of Representatives, have alleged a particularized and personal injury sufficient to establish their interest in this litigation. The alleged injury must be "legally and judicially cognizable," which means, among other things, "that the plaintiff have suffered an invasion of a legally protected interest which is concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process." Raines v. Byrd, 521 U.S. at 819 (internal quotations and citations omitted). "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. at 754.

APPENDIX E: Postwar Administrations' Exercise of Executive Prerogative and Executive-Legislative Party Dominance or Opposition

(On a relative scale, with subjective rationale italicized below; aggregate polarities from Appendix C; unipolarity indicates presumed partisan tranquility, while bipolarity assumes conditions for partisan discord are present)

Description/Discussion	Administration	Relative E-L Party Dominance/Opposition
Imperial Presidency <i>Unilateral intervention (Cambodia); overt hostility to legislative branch 'interference'; War Powers Resolution veto (Republican President, Extreme Democratic dominance of House and Senate)</i>	Nixon	Extreme Opposition
Hostile Presidency <i>Resistance to legislative involvement in foreign affairs; conducted unilateral intervention (Korea); unilateral large-scale deployment to Europe (NATO); Steel mill seizure case</i>	Truman	Moderate Single-Party Dominance
Semi-Hostile Presidency <i>Intervention despite rejection of congressional authorization (Kosovo); repeated unauthorized participations (Haiti, Bosnia); repeated rejection of necessity for congressional authority [mitigating factor: conscientious reporting consistent with (though not compliance with) WPR]</i>	Clinton	Moderate Opposition
Marginal/Ambiguous, pre-WPR <i>Sought and received prior authorization from Congress for intervention (Cuba, Gulf of Tonkin), but privately did not consider legislative participation necessary or desirable; marginal degree of bona fide consultation with Congress</i>	Kennedy, Johnson	Extreme Single-Party Dominance
Marginal/Ambiguous, post-WPR <i>Intervened unilaterally without authorization (Grenada, Panama) but complied, in principle, with WPR; withdrew forces at congress' request pursuant to WPR (Beirut); sought and received, following litigation, authorization for intervention (Desert Storm), but privately did not consider legislative participation necessary or desirable; marginal degree of bona fide consultation with Congress [aggravating factor: increased covert & clandestine intervention abroad, e.g., support of contras]</i>	Reagan, Bush	Moderate Opposition

Cooperative Presidency**Eisenhower****Moderate Opposition**

Public recognition of legislative role in foreign affairs; sought/received Congressional approval prior to intervention [aggravating factor: increased covert & clandestine intervention abroad]

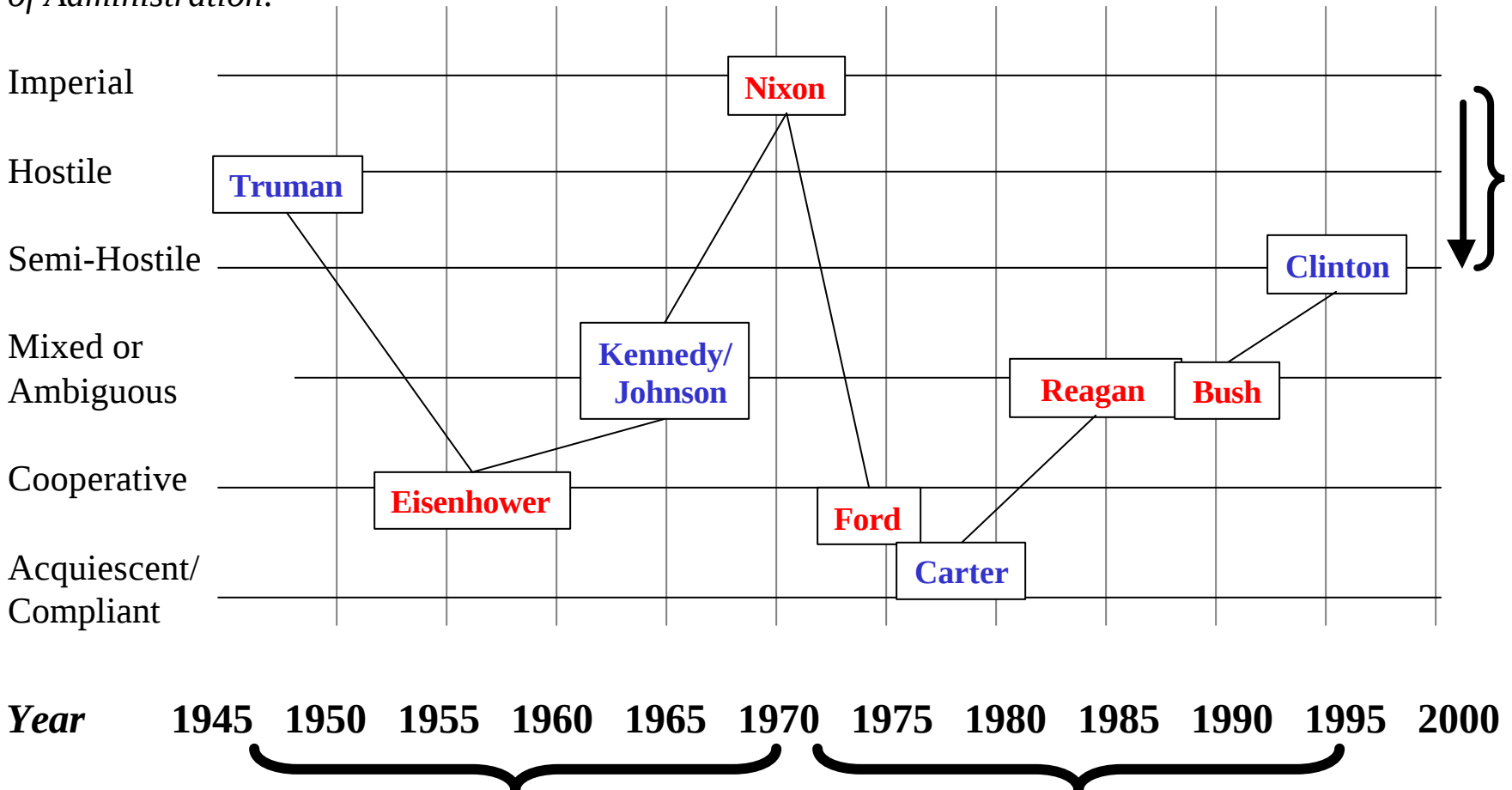
Acquiescent/**Compliant Presidency****Ford****Carter****Extreme Opposition****Extreme Single-Party****Dominance**

No major intervention(s) without Congressional approval; full or near compliance with War Powers resolution

APPENDIX F: THE CYCLICAL NATURE OF EXECUTIVE PREROGATIVE BY ADMINISTRATION, 1945-1999

(on a subjective scale based on Appendix E as judged by the author)

Characterization
of Administration:



Decreasing amplitude due to the Era of Divided Government?

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