

U.S. Senate Deliberations on the War Powers during the Bush and Obama Administrations

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ABSTRACT

The domestic and geopolitical disaster of the Vietnam War, and the process that took the United States into such a large-scale and protracted conflict, led Congress to reinforce its checks on executive war powers. The resulting War Powers Resolution (WPR) sought to inject Congress back into the decision-making process, yet no President has ever acknowledged its constitutionality. The initial debates around the WPR revealed four major lines of argument on the balance of war powers; three of those continued to be made over the next 40 years, as Presidents from both political parties deployed U.S. forces abroad, often without Congressional authorization. This study analyzed the prevalence and distribution of those lines of argument in the U.S. Senate over the Republican Administration of President George W. Bush and the Democratic Administration of President Barack Obama. Both administrations were involved in multiple deployments of U.S. forces abroad, and experienced opposition from both parties. The study found that Democrats displayed consistency across both administrations, indicating a preference for institutional loyalty in supporting compliance with the WPR, whereas Republicans tended to support the status quo. In addition, the study found that Senators from both parties acknowledged the rapidly changing nature of warfare as new technologies mostly remove U.S. armed forces from harm's way even as they conduct lethal strikes. What effect this has on Congress's ability and willingness to further check executive war powers remains to be seen, but it is clear that the debate is far from over.

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GENERAL AUDIENCE ABSTRACT

The Vietnam War led Congress to reinforce its checks on executive war powers. The resulting War Powers Resolution (WPR) sought to inject Congress back into the decision-making process. The initial debates around the WPR revealed four major lines of argument on the balance of war powers; three of those continued to be made over the next 40 years. This study looked at those three lines of argument in the U.S. Senate over the Republican Administration of President George W. Bush and the Democratic Administration of President Barack Obama. The study found that Democrats consistently took a position that defended the powers of the Congress, whereas Republicans tended to support a status quo that deferred to the power of the President. In addition, the study found that Senators from both parties acknowledged the rapidly changing nature of warfare. What effect this has on Congress's ability and willingness to further check executive war powers remains to be seen, but it is clear that the debate is far from over.

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Chapter One: Introduction

Many members of Congress have stated, and more than once, that voting on whether or not to send the men and women of the United States military into war is one of the most solemn responsibilities they have in the legislative branch. The political repercussions can be serious as well – a previous vote in favor of a war that the public later sours on has hurt the electoral chances of many an incumbent running for reelection. Yet on many issues of national importance that could affect the safety and security of their constituents, members of Congress are voting based on more than just their conscience – they must take into consideration the loyalty to their party, to their president, and to their institution. Indeed, it is so rare that members take bold stances against their own party, in order to do what they think is right, that then-Senator John Kennedy wrote a whole book – “Profiles in Courage” – dedicated to the small number who have done so.

This study examines whether party loyalty, institutional loyalty, or opposition politics have played a significant role in Senate debate of the war powers. It also examines whether debate over who truly “owns” the war powers has changed over the 21st century, as the size, scope, and technological aspects of military conflicts have evolved significantly over the past decade and a half. The time period that the research examined was also one of increasing partisanship and polarization in Congress – more than one study of congressional voting patterns has found that the legislative branch has become more polarized in the 21st century than at any time in modern history.

The study also examines whether the Senate has begun to coalesce around a single institutional viewpoint regarding the war powers – a debate that has raged between the

executive and legislative branch for over two centuries. I find that there remains a lack of consensus on the proper role of Congress: when should they get involved, at what level of leadership, and, most importantly, how far and firmly should their check on presidential power extend? Many Senators, perhaps not surprisingly, still expected the President to abide by a law that has never been recognized as constitutional, or abided by in its entirety, by anyone occupying the Oval Office since the law was passed over 40 years ago.

And all of these debates occurred in the context of a new enemy – the non-state terrorist organization, composed of non-discriminating killers who wear no recognizable uniform and pledge allegiance to no recognized government. At the same time, the technology of warfare has evolved considerably over the past decade and a half. Large invading forces with hundreds of thousands of soldiers on the ground and hundreds of pilots in the skies have been gradually replaced by more targeted interventions – a few hundred special forces carry out clandestine mission and training operations, unmanned armed drones fire weapons that can strike with incredible precision from great distances, and cutting-edge cyber weapons have the potential to take out an opponent’s critical infrastructure at the press of a button. All of these developments nearly remove altogether the need to place men and women in uniform into harm's way. The study found that debate in the Senate over the war powers has begun to recognize the puzzle that this trend presents, and more and more questions have been raised on how the advances in warfare affect Congress’s ability to have a say in the lethal use of U.S. armed forces.

The War Powers – A Brief History

The debate over who owns the war power – the executive or legislative branch – is one that the founding fathers fought over, and their arguments have carried through to the present day. In the early 1970s, the scars of American intervention in Vietnam led Congress to attempt to finally put an end to the ambiguity surrounding their role and seek to limit the ability of the executive to make war without the consent of the legislature. The “imperial presidency” that developed throughout the Cold War had seen the president gather more war-making power than at any point in the past, reflecting the prescience of James Madison when he wrote to Thomas Jefferson in 1798: “The Constitution supposes, what the history of all governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislature” (Madison, 1798).

The founding fathers were in agreement that they would explicitly reject the British model, where all war-making power lay with the monarch. Indeed, Madison went so far as to say that “in no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature and not to the executive department.” Alexander Hamilton compared the new model with the old in Federalist Paper No. 69: “The President is to be commander in chief of the army and navy of the United States... while that [power] of the British king extends to the declaring of war, and to the raising and regulating of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature.” John Jay, who, like Hamilton, was also

a supporter of strong executive power, nonetheless recognized that the President would need to be constrained when it came to matters of war. He stated in Federalist Paper No. 4: “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”

Presaging debates on the war powers that would extend into the 21st century, the first draft of the Constitution actually gave Congress the power to “make war”, but James Madison substituted the verb “declare” instead, “leaving it to the Executive to repel sudden attacks.” Roger Sherman thought this would overly restrict congressional power, but George Mason backed up Madison, noting that “make war might be misunderstood to ‘conduct’ it, which was an Executive function” (Safire, New York Times, 9/13/1987).

Article 1 of the constitution thus granted Congress the power to declare war and raise armies, while Article 2 named the president Commander in Chief of the armed forces. Some scholars believe that this invited the two branches of government “to struggle for the privilege of directing American foreign policy” (Corwin, 1957, p. 191), while others saw it more as an “inducement to collaboration, a structure designed to compel both branches to take account of their political stake in finding common ground” (Frye, 2002, S. Hrg. 107-892). One scholar, in testimony before Congress, noted that she hadn’t

previously taken a public position on the issue, because she believed that “on many occasions I think it is best that disputed constitutional issues not be resolved... I think the interbranch relationships work best when there is a healthy respect by each side for the plausible arguments that each side can make upon the Constitution” (Wedgwood, 2002, S. Hrg. 107-892). President Nixon’s speechwriter, William Safire, elegantly summed up the situation: “It leaves us in the tension of uncertainty that I think the framers thought best. The Constitution's makers, fearful of monarchy, surely intended to keep the decision to go into war away from the executive, and just as surely kept what was later called micromanagement of its conduct away from the legislature... The debate goes on, the tension never lets up; that's the way it is supposed to be. The strength of the system is that no center of power exclusively controls the power to decide when and if we get into war, how long we stay in it, and when and how we get out of it” (Safire, New York Times, 9/13/1987).

President George Washington thought that Congress should have a role as, when considering military action against the Creek Indians, he wrote that “the Constitution vests the power of declaring war in Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated on upon the subject, and authorized such a measure.” Jefferson similarly adhered to this line of thought. When it came to going after the Barbary pirates, who were devastating Mediterranean trade and demanding large tributes, Jefferson had already advised as Secretary of State that “it rests with Congress to decide between war, tribute, and ransom.” And as President, Jefferson told Congress that he was “unauthorized by the Constitution, without sanction of

Congress, to go beyond the line of defense... measures of offense," he said, must be approved by Congress. Hamilton, the champion of executive power, disagreed, believing that Tripoli – the pirate's capital – had in essence declared war. But if U.S. ships had not been attacked, even Hamilton thought that Congressional approval would be needed for military action, stating that "it is the peculiar and exclusive province of Congress, when the nation is at peace to change that State into a State of war... it belongs to Congress only to go to war." Indeed, Congress enacted ten statutes over two administrations that authorized military actions in the Barbary Wars (all above statements as quoted by Fisher, 1995).

From 1789 to 1950, all wars were either authorized or declared by Congress (Fischer, 2011, S. Hrg. 112-89). While military forces were often used without congressional authorization, these were "fairly small-scale actions, chasing bandits over the borders and doing various things, certainly not major military actions. All the military major actions were done either by declaration of war or by an authorization" (Fisher, 2002, S. Hrg. 107-892). In 1950, President Truman sent U.S. military forces into war against North Korea without congressional authorization, citing his authority under United Nations Security Council Resolution 84 and calling it a "police action." Truman set a precedent that would, over time, give rise to what scholars call the "imperial presidency," as subsequent presidents would also initiate large-scale military actions based on authority claimed under the U.N. or NATO, including George H.W. Bush in Iraq, and Clinton in Haiti, Bosnia, and Kosovo.

Eisenhower was arguably the last American president that was especially committed to the role of Congress in making war, remarking to his advisers that “there is going to be no involvement of America in war [in Indochina] unless it is a result of the constitutional process that is placed upon Congress to declare it.” Eisenhower was also pressured to unilaterally deploy U.S. armed forces in 1955 to repel China’s actions against Taiwanese forces on offshore islands. He again refused to move forward without congressional approval, noting that “it would make clear the unified and serious intentions of our Government, our Congress, and our people.” And in the Middle East, when his advisers recommended deploying U.S. forces in 1957 amid rising violence, he once again went to Congress, saying “I deem it necessary to seek the cooperation of the Congress. Only with that cooperation can we give the reassurance needed to deter aggression.” He also promised Congress “hour-by-hour” consultation if military action commenced (above statements by Eisenhower as quoted by Glennon, 2002, S. Hrg. 107-892). Decades later, when Congress sought to rebalance the war powers between the executive and legislative branches, they would look to Eisenhower’s actions as a model of presidential cooperation.

The Vietnam War and the birth of the War Powers Resolution (WPR)

In August 1964, President Johnson asked Congress to pass the Gulf of Tonkin Resolution, authorizing military action against North Vietnam after a supposed second attack on a U.S. naval vessel. The resolution, which was pushed through in just two days, passed the House by 416 to 0 and the Senate by 88 to 2. By the time the war ended over a decade later, nearly 60,000 American soldiers and millions of Vietnamese were dead, and

the country was under the control of a communist government. The tremendous speed with which the Gulf of Tonkin resolution was passed, as well as controversy about whether the second attack ever actually happened, led many Members of Congress to regret their vote in favor of the resolution.

Senator William Fulbright, Chairman of the Senate Foreign Relations Committee, began to hold a series of hearings in 1967 on the constitutional imbalance that had arisen between the President and Congress over the last 25 years in the exercise of foreign policy. Senator Fulbright lamented that the President “has acquired virtually unrestricted power to commit the United States abroad politically and militarily” (1969 CQ Almanac 946). Using findings from those hearings, in 1969 the Senate passed, by a vote of 70 to 16, the National Commitments Resolution. The resolution defined a “national commitment” as the use of armed forces on foreign territory (or the promise to assist a foreign country with U.S. military or financial resources) and stated that “it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States government by means of a treaty, statute, or concurrent resolution of both Houses specifically providing for such commitment” (115 Cong. Rec. 17245, 1969). As a “sense of the Senate” resolution, it lacked legal force, but it did send a resolute message indicating that Congress expected a stronger role in future decisions regarding the use of force, and its central message is echoed in the explicit policy statement of the WPR, which was to “insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities,” and that

“the President's powers as Commander in Chief are exercised only pursuant to a declaration of war, specific statutory authorization from Congress, or a national emergency created by an attack upon the United States” (50 USC Sec. 1541).

But the National Commitments Resolution was more than just the predecessor of the WPR, which would come just a few years later, it also gave a framework for all future congressional resolutions on the use of force, used even to the present day. In the committee report that accompanied the resolution, it was recommended that when considering future legislation on the use of force, Congress should: “(1) debate the proposed resolution at sufficient length to establish a legislative record showing the intent of Congress; (2) use the words authorize or empower or such other language as will leave no doubt that Congress alone has the right to authorize the initiation of war and that, in granting the President authority to use the Armed Forces, Congress is granting him power that he would not otherwise have; (3) State in the resolution as explicitly as possible under the circumstances the kind of military action that is being authorized and the place and purpose of its use; and (4) put a time limit on the resolution, thereby assuring Congress the opportunity to review its decision and extend or terminate the President’s authority to use military force” (Report No. 91-129, 91st Cong., 1st Session, April 16 1969).

While drafting the WPR, Congress made a few attempts to constrain President Nixon’s use of U.S. armed forces in Vietnam. In 1971, Congress repealed the Gulf of Tonkin Resolution, and therefore, in their eyes, the President’s authorization to use force against

North Vietnam. Yet the war continued. In 1973, Congress turned to the power of the purse, passing legislation to deny funds for U.S. military operations in Southeast Asia. But President Nixon vetoed the bill, and the House failed to override the veto by 35 votes, 241-73. Representative Elizabeth Holtzman (D-NY) then went to the courts, asserting that President Nixon lacked the authority to use military force in Cambodia without congressional authorization. In what would be one of the only times the courts entered the war powers debate (overall, over one hundred Members of Congress have had war powers cases rejected by the courts, either because they are deemed to be political questions, or because the plaintiffs lacked standing to sue), a federal judge in New York placed an injunction on combat operations in Cambodia, saying that “It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized.” The Second Circuit court later reversed the injunction, saying it was a political question to be resolved between the executive and legislative branches (Fisher, 1995). Controlling the purse strings, it turned out, could not stop a war of which Congress disapproved. As Senator Joe Biden would later say “we learned from Vietnam the power of the purse is useless because it presents us with a Hobson’s choice. We have our fighting men and women in place and we are told the President will not take them home, so let’s cut off the support for them so they have no guns, no bullets, no ability to fight a war” (Congressional Record, Vol. 148, No. 133).

In 1973, when the House and the Senate finished drafting their respective versions of the WPR, the competing bills had significant differences. The House's version allowed the President to use military force for up to 120 days without prior congressional authorization, while the Senate's version instead spelled out three specific conditions under which the President could act unilaterally: (1) to repel an armed attack upon the United States, its territories and possessions, retaliate in the event of such an attack, and forestall the direct and imminent threat of such an attack; (2) to repel an armed attack against U.S. armed forces located outside the United States, and its territories and possessions, and forestall the direct and imminent threat of such an attack; and (3) to rescue endangered American citizens and nationals in foreign countries or at sea. (Fisher, 1995)

The version that emerged from conference committee was a compromise (though many scholars contend the House "won" the conference negotiations) that allowed the President to unilaterally deploy U.S. military forces up to 60 days, with a 30-day extension if necessary. President Nixon vetoed the bill, believing that it was unconstitutional as it encroached upon the President's responsibilities as commander in chief. In a letter to Congress, Nixon wrote that the "only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force" (Public Papers of the Presidents, 1973, 893). The legislation passed with overwhelming

bipartisan support and defeated a presidential veto by 284 to 135 in the House and 75 to 18 in the Senate.¹

Under the legislation, if Congress does not pass an authorization for the use of force or declare war during those 60 days, then the President is obliged to begin withdrawing U.S. armed forces (the President must also begin withdrawing U.S. armed forces if Congress passes a joint resolution of disapproval). The 60-day “clock” also only starts ticking once the President reports to Congress, under Section 4(a)(1) of the law, within 48 hours of U.S. forces being introduced into hostilities or an environment where hostilities are imminent (the original language was changed from “armed conflict” to “hostilities” since armed conflict was a term of international law). Since enactment, though, only one report to Congress has been sent under Section 4(a)(1), when President Ford sent U.S. Marines to recapture the merchant ship SS Mayaguez off the coast of Cambodia in 1975. All other Presidents, in all other instances, have simply submitted reports to Congress that they say are “consistent with the WPR” (*not* pursuant to).

Yet, between the law’s enactment and the period covered by this study, U.S. armed forces were deployed abroad on many occasions. According to the Congressional Research Service, between, 1973 and 2001 U.S. armed forces were sent to or conducted actions in Cyprus, Vietnam, Cambodia, Lebanon, Korea, Zaire, Iran, El Salvador, Libya, Sinai, Egypt, Honduras, Chad, Grenada, the Persian Gulf, Italy, Panama, the Philippines,

¹ It is worth noting that the override occurred in a hyper-political atmosphere: just four days after the “Saturday Night Massacre” – when the Attorney General, Deputy Attorney General, and Watergate Special Prosecutor were all forced from government – and just two weeks before the vote Spiro Agnew, Nixon’s Vice President, resigned under a cloud of criminal charges.

Liberia, Saudi Arabia, Iraq, Sierra Leone, Kuwait, Somalia, Bosnia, Macedonia, Haiti, Rwanda, the Central African Republic, Albania, Congo, Gabon, Guinea-Bissau, Kenya, Tanzania, Afghanistan, Sudan, Yugoslavia, Kosovo, East Timor, and Yemen. While some of these were in support of evacuations of U.S. citizens or hostage rescue operations, others were lethal actions involving strikes by precision-guided weapons. Many involved putting U.S. forces into harm's way, and yet none but the Mayaguez was reported to Congress *pursuant* to the WPR (Congressional Research Service, October 2016).

While the WPR passed with a strong bipartisan consensus, it was within a unique context: the end of a long, gruesome and unpopular war in a far-off land that had claimed the lives of tens of thousands of young American servicemen. Since the passage of the WPR, presidents have repeatedly sent U.S. military forces into action overseas. Each time, debate in Congress over the war powers, and the WPR, began anew as it sought to assert its powers under the Constitution and the law. Clearly, the WPR did not do much to clear up the debate that first began among the founding fathers and has extended through every presidency since the beginning of the republic.

But the contours of the debates about the war powers and the WPR can reveal much. How, if at all, has Congress's views of its role changed over time? What drives the views of Senators – loyalty to their institution, or to their party, to their president, or simply to their own ideological viewpoint on where the war powers should lie? Moreover, given the quickly evolving nature of war due to an increasingly ambiguous enemy and

exponential advances in military technology, has debate over the war powers changed with the times? Do Senators recognize that a moribund law like the WPR, observed “more in the breach than in the observance”, will be even less effective in the coming years? Or will they continue to prefer to use the WPR as a shield for their own inaction and, some would say, impotence, when it comes to deciding the matters of modern war?

Chapter Two: Research Design

Much research has gone into the partisanship and polarization of the U.S. Senate, and voting patterns over recent decades have shown that the prevalence of partisanship has increased to all-time highs. In studying partisanship surrounding the war powers in the Senate, however, voting records do not offer a sufficient body of evidence to analyze. Indeed, while there have been several votes over the past two administrations over whether or not to authorize the president to use U.S. armed forces, there have not been any votes on whether or not the president has the constitutional authority to do so. But there has been, over the past decade and a half, a sufficient amount of debate on the actual war powers of the president to allow for a substantial qualitative analysis and to answer some key questions: Do a majority of Senators take their positions on the war powers based on their loyalty to the institution? Or are they arguing their position based on party politics and their opposition to, or common cause with, the president? Or do they simply take a position based on ideological sentiment, no matter the party of the president occupying the White House? And has the debate changed with the times? In an attempt to answer these questions, this study analyzes the Senate's debates over the war powers throughout two administrations.

Purpose

In the two presidencies over the past 15 years, one Republican, George W. Bush, and one Democrat, Barack Obama – both committed U.S. armed forces to conflicts abroad, though the conflicts were markedly different in size, scope, and intensity. In Afghanistan and Iraq, the President had authorization to use armed forces, whereas Congress never

formally approved of U.S. military action in Libya or Syria. Yet, each successive Congress has weighed the balance of the war powers, as well as the role of the WPR.

Research for this thesis reviewed Senate deliberations about the war powers, and specifically the WPR, over the course of each presidency, and analyzed the progress and evolution (or lack thereof) of the debate, considering whether party loyalty or institutional loyalty determined the positions taken.

Questions, Hypothesis, and Possible Outcomes

This study aimed to answer several questions. First, have the contours of the war powers debate changed from the 20th century to the 21st century (based on findings from the Phelps and Boylan study, detailed below) and between the administrations of George W. Bush and Barack Obama? Second, is there a correlation between political parties and types of arguments made? If so, does party loyalty trump institutional prerogative when it comes to war powers deliberations? Or do political ideologies consistently align political parties with the same clusters of argument? And third, did arguments made change across presidencies for the subset of members that remained in the Senate throughout? If so, does that change correlate with the party of the president? To answer these questions, my study applies and extends an analytic framework developed by Phelps and Boylan (2002).

My study's hypotheses were twofold. First, I hypothesized that Senators of the same political party would largely use the same arguments as each other. Such an assumption

would not have been as safe four decades ago as it is today, but Senators have closed ranks remarkably over the past several administrations, at least when it comes to their voting records.

Reasoning from that hypothesis, one possible outcome was that arguments could repeatedly correlate with political parties across presidencies, meaning that political ideology played a large role in the perception of each institution's power.

A second hypothesis was that that partisan imperatives would trump ideological consistency, and the prevailing arguments used by each political party would change based on the party of the sitting president. It would follow that most Senators who remained in the institution across multiple presidencies would “change their tune” when the political party of the president was different, meaning that party loyalty was the major determinant of their institutional view. Research shows that political parties regularly change their policy positions in response to environmental incentives such as electoral defeat (Schumacher et.al. 2013). Further research also shows that voters do not fault political leaders who change their minds about a conflict, so there is no electoral consequence for taking a different tack solely to oppose or support the President (Croco and Gartner, 2014).

Case Selection

Research for this study examined deliberations over two presidencies, occurring over approximately a 15-year period. Cases in both sets occurred under both divided and unified government. Many of the deliberations occurring during these presidencies were about ongoing wars – Afghanistan, Iraq, Libya, Syria, and beyond. However, the study did not analyze deliberations arguing the merits of these conflicts. Rather, the study focused exclusively on deliberations about the war powers and whether or not the President was exercising his powers according to how Senators interpreted his constitutional prerogative (and legal prerogative as defined by the WPR). As such, while the time period of analysis was rather long, the number of debates focusing exclusively on war powers was relatively limited compared to the number of debates about the national security value and implications of different military actions taken by the president.

Table 2.1: Control of Congress and the Presidency, 2001-2015

<i>Congress</i>	<i>Years</i>	<i>Presidency</i>	<i>Senate</i>	<i>Unified/ Divided</i>
107th	2001-2003	Republican	Republican/ Democrat*	Both
108th	2003-2005	Republican	Republican	Unified
109th	2005-2007	Republican	Republican	Unified
110th	2007-2009	Republican	Democrat	Divided
111th	2009-2011	Democrat	Democrat	Unified
112th	2011-2013	Democrat	Democrat	Unified
113th	2013-2015	Democrat	Republican	Divided

*Control of the Senate during the 107th Congress vacillated between the parties several times because of the party of the vice president, Senators switching parties, the death of a Senator, and a special election.

The study was limited to Senate deliberations for several reasons. First, Senators have more individual power than Representatives, and their opinions therefore carry more weight. Second, the Senate has historically been the originator of new legislation regarding the war powers, including both the National Commitments Resolution and the

War Powers Resolution (originally introduced by Senator Javits). Furthermore, with only 100 members, an analysis of the Senate is more feasible than one of the House of Representatives, with 435 members. In addition to floor debate, the study examined how Senators presented their arguments in Senate Foreign Relations and Judiciary Committee hearings, as well as examined proposed and passed legislation and resolutions. As a forum for debate and discussion, the Senate floor, Senate committees, and proposed legislation reflect the Senate as an institution. One factor that the study did not control for is that many Senators view the institution as a stepping-stone to the presidency, and therefore may be more likely to use their microphone in the Senate to voice opinions that will get them positive attention from their colleagues and the public, or that place them firmly in opposition to an incumbent president that they are eventually planning on running against. In the period studied, several of the sitting Senators ran for president, including Barack Obama, John McCain, John Kerry, Hillary Clinton, Joe Biden, Rand Paul, Bernie Sanders, Ted Cruz, Rick Santorum, Marco Rubio, and Lindsey Graham.

A few minutes watching C-SPAN might lead one to believe that the floor is simply a forum for political posturing where scripted talking points are repeated. Yet scholars who have studied congressional deliberations find that the *Congressional Record* is a valuable resource because “floor debate will largely define the claims and arguments that advocates will be willing to defend in any other prominent venue” (Mucciaroni and Quirk, 2006, p. 105). Similarly, Phelps and Boylan note that this rhetoric matters: it is the public positions of Senators and the arguments they utilize in justifying them that become

a matter of public record. The scholars also point out that when federal judges seek to determine the intentions or purposes of the framers of a law, “the canons of statutory construction clearly prefer the [*Congressional*] *Record* as the best source of those intentions” (Phelps and Boylan, 2002, 646). Furthermore, any member can make statements on the record whenever they choose, and any member may introduce and cosponsor legislation.

Definition of Concepts and Basic Variables

The dependent variable in this study is the nature of the arguments used in congressional debate on the WPR. That variable has four values, defined by the four “clusters of argument” (detailed below). Participation in a specific cluster was qualitatively measured through formal actions that appear in the Congressional Record: floor speeches, statements during committee hearings, introduced legislation, sponsored legislation, votes, etc. Each Senator’s statements, legislation, and votes were analyzed, and then each Senator was assigned a value of P, L, C, or R (presidentialist, legalist, congressionalist, or realist, respectively). It was possible, even expected, that some Senators may have made arguments at different times that fall across multiple values. However, this did not turn out to be the case, and members were consistent in their arguments throughout time and across presidential administrations.

The clusters of argument were taken from a study that analyzed Senators’ arguments about the WPR during its creation in 1972-1973 and its application during the Kosovo air war in 1999 (Phelps and Boylan, 2002, 647-650). This study by Phelps and Boylan was

unique in its qualitative analysis of congressional debate on the WPR, though it only covered two instances (the creation of the WPR and the Kosovo campaign), and did not analyze the role that party loyalty may have played.

The Phelps and Boylan study, in analyzing the constitutional discourse around the WPR, concluded that subsequent Congresses that debated the WPR after its passage in 1973 did not find the intentions of the law's framers to be self-evident. Three provisions were found to be particularly ambiguous: the military actions that trigger the WPR; the requirement for the President to consult with Congress; and the fast-track process for legislative approval or disapproval of executive actions. These same issues appeared repeatedly throughout debates in the U.S. Senate during the Bush and Obama Administrations.

Phelps and Boylan also found that the WPR debates showed that members of Congress often supported the same legislative provisions even while reading the meanings of those provisions differently. For example, both legalists and realists supported the WPR, but the former saw it as "binding an imperial presidency," while the latter saw it as a framework to encourage Presidents to involve Congress more in the war-making process.

After examining the original WPR debates and the Kosovo debates, Phelps and Boylan concluded that "each debate demonstrated the challenge of locating appropriate starting points: when to start the 60-day clock, when to begin debate, and when to call for an up or down vote over a military action... The existence of different interpretive camps

virtually ensured that Congress would have great difficulty agreeing on what the core war powers questions *mean*, before then seeking to pass meaningful legislation concerning use of force abroad” (Phelps and Boylan, 2002, NEEDS PAGE NUMBER).

This paper builds upon the Phelps and Boylan study by expanding the temporal scope of analysis and analyzing the correlation between party identification and WPR position.

This topic remains relevant because congressional debate about the WPR continues into the present and will well into the future, and it is useful to know whether the nature of that debate is driven by institutional prerogative or correlates with partisan loyalties.

Furthermore, the qualitative analysis revealed the evolving contours of the debates surrounding the war powers in the U.S. Senate, which can help determine whether there seems to be a growing consensus to alter how war powers are exercised in the 21st century.

The main independent variable is the political party of each Senator who expresses a position, and I evaluate the impact of party identification in the following ways. Based on the increasingly strong ideological cohesion of political parties in the Senate, as referenced above, I expected the relative “strength” of each value (i.e., the number of Senators assigned to the value) to change over time, depending on the party in control, the size of each party, and the party of the president, among other possible factors.

However, this was not the case, and the relative strengths of each argument remained more or less constant across time and administrations.

The study analyzed several different relationships. At the individual level, independent variables included both the member’s party, as well as their party in relation to the party of the president (either friendly or opposing). These variables were compared to the individual member’s value position.

Table 2.2 – Individual-level relationships between variables

Independent Variable	Dependent Variable
Member’s Party	Member’s Value Position
Member’s Party + President’s Party	Member’s Value Position

Dependent Variable Explained

All statements, amendments, legislation, , etc. by Senators were analyzed and assigned to one of four values, as conceived in the study by Phelps and Boylan (2002).

“Presidentialists” in the first WPR debates (many Republicans but also some Democrats) were opposed to any change in existing constitutional practice. They believed that Congress lacked the will - not the power - to limit presidential war-making, and that legislation would not alter that deficiency. They employed four lines of argument: (1) the balance of power in “use of force” matters had shifted to the president (despite the evident intent of the framers of the Constitution); (2) national security and the ability for rapid military response were more important than building a presidential-congressional

partnership; (3) Congress already had sufficient war powers to play an important role in national defense policy: control of appropriations and troop levels, oversight of the executive branch, advice and consent to treaties, confirmation of high military posts, and the authority to declare war; (4) the WPR intruded upon the president's rightful prerogatives as commander-in-chief.

“Congressionalists” (in the early 1970s, principally Democrats) opposed the WPR because they deeply distrusted the presidency as a source of repeated military adventurism and thought the WPR would legitimate the president's misuse of power, rather than prohibiting it. They pointed to three arguments: (1) the Constitution gave the war-making power solely to Congress; (2) the president's commander-in-chief powers were subordinate to the people's (Congress's) will and therefore the president must consult with Congress *before* any military actions beyond self-defense; (3) the WPR actually expanded the president's power by permitting virtually unlimited executive discretion to carry out military operations for 60 days – an authority never previously acknowledged (Phelps and Boylan, 2002).

So-called “legalists” (e.g., Democratic Senators Walter Mondale and Edmund Muskie) thought the WPR would restore constitutional arrangements. They saw the provisions, especially on consultation and reporting, as literal commands that trumped executive discretion in use-of-force matters. They expected the president to comply with all of the WPR's detailed provisions and bear responsibility for initiating the inevitable constitutional crisis if he did not (Phelps and Boylan, 2002). Those who make legalist

arguments against a president of their own party are arguably putting institutional loyalty above party loyalty – they believe that respect for and compliance with the WPR is more important than supporting their party’s leader.

“Realists,” such as Democrats Senator John Stennis of Mississippi and Rep. Thomas Morgan of Pennsylvania, supported the WPR but recognized the president’s continued leadership role. They thought the WPR would return some of the war-making powers to Congress, but that the president would still be the “more equal” of the two branches. They believed that at best the WPR would establish a system of sequenced powers where the president would take the lead but Congress would be fully informed and involved in affirming or challenging executive decisions as soon as possible. They thought the WPR would reduce legislative timidity but not compel executive compliance (as the legalists believed). The WPR was a statement of what a president ought to do, not a code that prevented presidents from acting according to their own assessment of the national interest (Phelps and Boylan, 2002).

Table 2.3: Clusters of Argument

<i>Cluster</i>	<i>Views on WPR</i>	<i>Actions for WPR</i>
Presidentialists	Oppose because it weakens president's war powers	Repeal
Congressionalists	Oppose because it strengthens president's war powers	Repeal
Legalists	Support because it restores congressional war powers	Strengthen
Realists	Support because it gives congress a larger role in decision making	Status quo

Source: Table is based on Phelps and Boylan, 2002, 647-650.

These clusters of arguments parallel the lines of scholarship identified in the literature review, reinforcing Phelps and Boylan's classification system and their study's findings. Although polar opposite in their reasoning, presidentialists and congressionalists both believe that the WPR should be repealed. Legalists typically want the WPR to be strengthened, to fix the deficiencies that prevent its proper application and thereby to constrain presidential war-making power. Realists fall into a third camp, recognizing the deficiencies of the WPR but nonetheless valuing the greater participation it elicits from Congress.

A qualitative analysis of WPR debates in the 21st century also revealed new areas of discussion since the original WPR debates. For example, many Senators focused on

whether the WPR was inadequate because of the evolving nature of warfare, which was entering new domains, like cyberspace; or fighting new actors, like non-state terrorist organizations; or even not directly involving combat by U.S. personnel, such as the use of unmanned drones. These discussions did not focus so much on whether the Executive Branch was exceeding its war powers (or the Legislative Branch ceding its), but whether these new factors in modern warfare required a rethinking of fundamental concepts of war powers. These concepts ranged from the meaning of the word “hostilities” within the WPR, to which kinds of enemies the WPR should apply to when military action is initiated.

Organization of This Thesis and its Significance

The thesis is organized into separate chapters that analyze scholarship on the war powers, Senate deliberations on the war powers during both administrations (a separate chapter for each), and a discussion of the results.

Chapter Three: Literature Review

Like elected officials, scholars have taken a variety of positions on the WPR. Some advocate strengthening it, while others want to scrap it entirely, and still others think it should be left as it is. Those calling for a strong WPR stress its ineffectiveness at constraining the power of the executive in matters of war. Those proposing to abolish it argue that Congress already has more than enough power at its disposal to constrain the president, especially through the authorization and appropriations process. The third group, who advocate leaving it as it is, believe that, while imperfect, the WPR plays an important role in injecting Congress back into the debate over sending U.S. armed forces into harm's way.

The WPR in Practice

Scholars measure the effectiveness of the WPR in practice in very different terms, just as the executive branch and the legislative branch interpret its meaning and legality in starkly different ways. Some believe that the WPR initially allowed for "implied consent" while others argue that, in interpreting the statute too narrowly, presidents ignore the political context within which it was formulated. And others make the argument that no matter the situation, presidents will find a way to work around the statute while claiming legal standing to do so, no matter how contorted their arguments.

Implied-consent-based war making, as identified by Geoffrey Corn, reflects "the proper constitutional process for making war" and that Congress and the president followed both before and after passage of the WPR (2011, p.1149). The practice involved the president

relying on the implied support of Congress, Congress allowing the president to take the initiative in war-making and consenting through less than express authorization, and the courts declining to intervene so long as such support was evident. However, Kosovo resulted in “the final destruction of the WPR” because Congress declined to expressly authorize the operation, which exceeded the 60-day time period established by the WPR, *and* provided implied support, which proved to be the ultimate barrier to justiciability by the courts. With Libya in 2011, Congress never authorized the use of force and even directed President Obama to explain why he did not seek any. The administration did not challenge the WPR, but argued that it did not apply because U.S. forces were not engaged in the kind of “hostilities” that would require WPR compliance.

Louis Fisher believes that this kind of interpretation “ignores the political context under which the WPR was debated and enacted” (2012, p. 181). Fisher also points out that the WPR is internally inconsistent: Section 2(c) defines the Commander in Chief’s constitutional powers to introduce U.S. armed forces “into situations where imminent involvement in hostilities is clearly indicated by the circumstances,” and the President may introduce armed forces 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.” Yet, Section 4, which details reporting to Congress, says that Presidents may report under circumstances not related to those defined in section 2(c). The law says that Presidents should report to Congress when U.S. 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. Fisher argues that this language sanctions presidential deployment of military force in instances unrelated to attacks on U.S. territory or troops, and would seem to allow, without congressional authorization, the president to deploy armed forces to “intervene in Grenada, invade Panama or Haiti, or assist in Somalia or Bosnia” (Fisher, *Presidential War Power*, 1985, p. 132).

Stephen Carter presciently noted that presidents and members of Congress may continue to quarrel over the exact meaning of “hostilities” to which section 4 of the WPR refers, and accurately described the WPR as “one perhaps clumsy effort at dealing with a world that has become increasingly complex.” Despite the law’s “clumsiness,” he finds “genius” in the WPR’s guarantee that the U.S. military machine is not in the hands of a single individual (Carter, 1984, p.101). But Peter Spiro, in testimony to Congress, said that the WPR “does not supply a useful vehicle for facilitating inter-branch cooperation... for all its notoriety, the War Powers Resolution has had little effect on war powers practice.” He notes that President Clinton cited congressional funding as sufficiently satisfying the requirements of the WPR, while Congress accepted the expiration of the 60-day window without taking any action. On the reporting requirement, he pointed out that “any President faced with the winding down of the 60-day clock would identify some justification for avoiding the terms of section 5(b)... if not authorization gleaned from a funding measure, if not an argument relating to the definition of hostilities, then some

other avenue would present itself to evade the termination provision.” (Spiro, S. Hrg. 112-89, 2011) The Obama Administration’s extremely narrow interpretation of “hostilities” is a fine example of his argument, as is repeated presidents only adhering to the reporting requirement “consistent with” the WPR, and not pursuant to, thereby keeping the 60 day clock from ever actually starting to tick. Presidents over the past 40 years have made it a point to artfully remain consistent with the WPR, even as they openly challenge its constitutional merit.

In fact, the question of the law’s constitutionality has never been settled, because the courts have, on more than one occasion, refused to consider lawsuits by members of Congress demanding that the executive branch adhere to the law. As a result of the judicial branch’s unwillingness to rule on the dispute, as well as a lack of initiative by Congress to amend the law – despite the introduction of many bills designed to do so – each president has refused to abide by the WPR on the grounds that it runs counter to the powers given to the executive branch in Article 2 of the constitution.

Strengthening the WPR

Those scholars calling for a stronger WPR tend to highlight its ineffectiveness at constraining the power of the executive in matters of war, similar to the argument made by those who propose abolishing it. The former believe that Congress should have more say in the war-making process, as the current situation is not as the founders expected. This group of scholars believes that the president has sidelined the constitutional

prerogative of Congress when it comes to war-making. They offer a range of reasons why the WPR does not work and how to fix it.

Patrick Robbins (1998, p. 141) declares the WPR a “dead letter” and calls for modifying it, citing the Reagan administration’s distrust of the law, congressional ambivalence in employing it, and the federal judiciary’s refusal to enforce it. Kelly Cowan (2004, p. 99) proposes modifying the WPR due to the statute’s ineffectiveness at restricting the president’s war powers and the legislature’s inability to manage the problems resulting from the WPR’s weaknesses. She argues that the WPR must be altered if Congress wishes to reassert its constitutionally defined role in war-making.

Few laws are written perfectly, and many a loophole can be found throughout the U.S. code. Yet some scholars insist that this is not an acceptable state of being when it comes to legislation that is supposed to dictate matters of war. John Ely (1988, p.1379) wrote that Congress attempted to make itself accountable with the WPR but failed because it did not sufficiently plan for presidential defiance. He calls on Congress to repair this defect in the WPR, arguing that our history supports the framers’ judgment that Congress tends to be more responsible than the president when it comes to issues of war and peace. Jane Stromseth, in testimony before Congress, said that Congress expected executive branch consultations under the WPR need to be more meaningful: merely being informed does not go far enough, consultation should involve Members of Congress when the decision is pending and the President himself should seek their advice, opinion, and, in

some circumstances, approval, all while making all relevant information available (Stromseth, 2002, S. Hrg. 107-892).

Repealing the WPR

Another line of scholarship calls for the complete repeal of the WPR. These scholars argue that Congress already has plenty of constitutional power over war-making and the defective (and perhaps unconstitutional) WPR simply allows members of Congress to debate statute instead of substance. John Kavanagh (1997, p.159) calls on Congress to abolish the WPR as a “failed attempt to encroach upon the president’s right to conduct foreign policy,” and instead exercise influence over foreign affairs through its power of the purse. He also asserts that the congressional power to declare war has already been rendered obsolete, because the United Nations Security Council now has the power to authorize the use of force.

Others believe that Congress already has more than sufficient power to constraint the executive branch in matters of war, but that it simply lacks the will to exercise this power. Furthermore, the argument goes, by providing Congress with the relatively slow-moving but absolute powers of authorization and appropriation, the Constitution meant for Congress to deliberate only after the President had decided. For example, Douglas Kmiec declared in testimony before Congress that “the primary infirmity of the [WPR] lies in a faulty assumption; namely, that the Constitution envisioned a collective judgment on the introduction of armed forces. Respectfully, it does not.” He went on to say that the constitution envisaged a President that could respond to threats with energy and dispatch,

and a Congress that would then deliberate on actions taken and then use the power of the purse to influence future action (Kmiec, 2002, S. Hrg. 107-892).

Stromseth, however, laid out a strong counter-argument in her congressional testimony, stating that “Congress’ power of the purse, though critically important, is not a substitute for congressional authorization of war before it is commenced.” She goes on to assert that relying on the appropriations process as a check on executive power can be “overly blunt” and “sometimes ineffective and counterproductive as a tool for expressing Congress’ will” (Stromseth, 2002, S. Hrg. 107-892). Many Senators have also reflected on using the power of the purse, as shown in the analysis in following chapters. In the same congressional hearing, Michael Glennon made the point further, arguing that “to view the congressional appropriations power as the only constitutional check on Presidential war power is, for all practical purposes, to eliminate the declaration-of-war clause as a constitutional restraint on the president” (Glennon, 2002, S. Hrg. 107-892).

Glennon goes on to offer an alternative to the WPR, which he refers to as a “mechanical contrivance that was surely overrated thirty years ago.” He makes a similar case as Alton Frye does below, arguing that the President should seek congressional approval for policy reasons, rather than legal ones. In this scenario, the President would request authorization without acknowledging that the Constitution requires it. In Glennon’s argument, this would set up a kind of win-win, allowing the President to maintain that he can act alone, while also allowing the Congress to maintain that he cannot act alone – presuming that he

would not proceed if Congress, and by extension the public, disapproved (Glennon, 2002, S. Hrg. 107-892).

A Good Enough WPR

Finally, some claim that the WPR, though imperfect, does a good job of getting Congress involved and holding the president to some level of accountability. For example, the U.S. deployed peacekeeping forces to Lebanon in the early 1980s, which was, as events tragically proved, a very hostile environment. Regarding WPR debate over that intervention, Donna Henry wrote that although uncertainty over the constitutionality of the WPR undermined the operative provisions of the legislation, that very uncertainty went some way in forcing the president to compromise with Congress over compliance with the WPR's reporting requirements. She even predicted that such "successful use of the Resolution in Lebanon" would lead it to play an increasingly important role as a negotiating tool in attempts to limit presidential war-making (Henry, 1984, p.1037).

Similarly, Eileen Burgin argued that although the WPR failed to achieve its authors' main intentions, during the Persian Gulf crisis it offered members a vehicle for asserting Congress's institutional prerogatives, reinforcing its legitimate role to participate as well as individual members' responsibilities to participate. In an interesting twist, she points out that the WPR works in its own special way by exerting an effect on congressional action, asserting that "the legislators' perspectives on the impact of the WPR may, in some sense, become self-fulfilling prophecies" (Burgin, 1995, p.23).

Alton Frye, in testimony before Congress, argued that the WPR should not be abandoned, but rather Congress should set up a parallel procedure that allows it “to reach the high policy issue in pristine form.” He stated that Congress should put forth a concurrent resolution that allows both houses to vote on the question of whether military force is authorized for the purposes recommended by the President. In that way, Congress could “separate policy verdict from pragmatic consequences... creating a clear political context, either aligning the two branches or facilitating later decisions to enforce legislative will” (Frye, 2002, S. Hrg. 107-892). He also indicated that a pure policy vote would make the executive branch more disciplined.

Curiously enough, there was one instance in which an agency of the executive branch seemed to recognize the practicality and even legitimacy of the WPR. In 1980, the Justice Department’s Office of Legal Counsel (OLC) affirmed the 60-day time limit of the WPR, writing that “We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of [section 5(b)] of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of ‘unavoidable military necessity.’ This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers” (Office of the Legal Counsel, 1980). Yet the president is not obliged to follow the opinion of the OLC and, indeed, the “rogue” nature of the OLC in this opinion may be why the Obama Administration, for example,

bypassed the OLC and relied on the State Department to come up with a legal determination that defined “hostilities” in such a way as to not trigger the WPR 60-day clock.

The scholarly literature demonstrates, then, what history has also shown: that there has never been, and may well never be, a broad consensus on the proper role or even legitimacy of the WPR. This should not come as a great surprise, as these arguments were debated as the republic’s founders wrote the Constitution, and again as, nearly 200 years later, Congress tried to resolve the issue by writing the WPR. What can be determined, however, is how the war powers and the WPR are debated in an age of rapidly changing warfare, and whether the contours of that debate point to some potential future resolution of the issue.

Chapter Four: War Powers Debates During the Bush Administration

Introduction

This chapter assigns and analyzes all of the statements made about the war powers in the Senate during the George W. Bush Administration, separating and analyzing the arguments by category. WPR debates during the two terms of the Bush Administration (2001-2009) centered on the use of U.S. armed forces in the “War on Terror”, especially large-scale deployments to Afghanistan beginning in 2001 and Iraq in 2003. Congress debated those deployments, and subsequent ones during the Obama Administration, in the context of Authorizations for the Use of Military Force (AUMF).² Senators who both supported and opposed military action used the discussions surrounding each AUMF to debate the role of Congress in the war powers decision-making process.

Based upon their statements in the Congressional Record, Senators were coded into one of the four clusters: congressionalist, presidentialist, legalist, or realist. To briefly review, congressionalists opposed the WPR and sought to repeal it because they believed that it strengthened the president’s war powers. Conversely, presidentialists opposed the WPR and sought to repeal it because they believed that it weakened the president’s war powers. Legalists supported the WPR and sought to strengthen it because they believed that it restored Congress’s war power. And realists supported the WPR and sought to maintain it “as is” because they believed that it gave Congress a larger role in war powers decision-making, but still left the lion’s share of authority with the president.

² AUMFs have been used in place of a full declaration of war since World War II, ostensibly because they have a lesser impact on formal diplomatic relations.

I recognize that the debates surrounding the creation of the WPR – which gave rise to the four categories that Phelps and Boylan identified – are markedly different from the debates over the use of military force that occurred during the Bush and Obama Administrations. A legalist is easy to identify in the original WPR debates, as it was a member who wanted to strengthen that specific piece of legislation. So how is a legalist defined when that piece of legislation is no longer on the table? In this study, a legalist is a Senator who sought to use legislative means – such as introducing or modifying a bill – to strengthen Congress’s war powers. The legalist label was also applied to members who called upon the President to strictly follow certain provisions of the WPR, such as the 60-day clock. Realists, on the other hand, were those who believed that the WPR was playing a sufficient role in the AUMF debates, and did not need to be more stringently applied to constrain the power of the president. They were satisfied with the status quo. Congressionalists, who would have sought to repeal the WPR because it weakened Congress, did not appear anywhere in these debates. Presidentialists were identified as those who argued that Congress should not restrict the President’s war powers in any way, though that did not always involve advocating repeal of the WPR.

Legalist Arguments During the Bush Administration

The legalist position remained a strong one into the 21st century, with Senators from both sides of the aisle repeatedly criticizing the president for not abiding by the letter of the law. As defined by Phelps and Boylan, legalists believed that the WPR would strengthen Congress’s hand when it came to the war powers. Legalists could best be defined as “true

believers” in the WPR – they may recognize that it is not perfect, but they insist that it is the law of the land and the President is bound to follow it. They believe that Congress should have a larger role, and they believe that the WPR is the best way to realize that vision. For the purposes of this study, Senators who introduced legislation to constrain the president’s war authority were also classified as legalist.

At the outset of the Bush Administration, but before the terrorist attacks of September 11, 2001, one legalist sought to strengthen Congress’s hand by imposing additional legislative restrictions on the president, in an attempt to close some of the loopholes of the WPR. Senator Max Cleland (D-GA), a U.S. army veteran of the Vietnam War, in which he lost both legs and his right arm, was a champion of Congress asserting a stronger role in the exercise of the war powers. In the first few months of the first session of the 107th Congress, shortly after President George W. Bush assumed office in 2001, Senator Cleland introduced S. 931, *A bill to require certain information from the President before certain deployments of the Armed Forces, and for other purposes*. The bill sought to prohibit the spending of any money to deploy the U.S. military until the President submitted a report to relevant officials and committees of Congress which “addresses the national interests involved, the inadequacy of diplomacy and other means, policy objectives, and authority for such a deployment under the Constitution or international law.” The bill made exceptions for deployments that were responding to a war or national emergency, declared by either Congress or the President, and caused by an attack on United States territory or armed forces abroad (S. 931, 107th Congress).

Senator Cleland had introduced the same bill the previous year, likely as a result of having second thoughts about his vote in 1999 to authorize airstrikes in Yugoslavia.

Shortly after that vote, Senator Cleland said in an interview with the Augusta Chronicle that “I hope that my vote on air strikes was not the Gulf of Tonkin resolution of this intervention... I was on the receiving end of the Gulf of Tonkin resolution. And I have resolved to myself I won't participate in that anymore.” Senator Cleland had also successfully added an amendment to the 1999 defense authorization bill requiring that the administration, when deploying U.S. force abroad, submit a report to Congress on mission objectives and end-game plans. Senator Cleland was reportedly upset that the Clinton administration did not comply with this reporting requirement in its Yugoslavia campaign (Augusta Chronicle, April 1999).

In his floor speech introducing the bill, Senator Cleland harkened back to the arguments of the founding fathers, saying that “judging by the text of the Constitution and the debate that went into its drafting, Members of Congress have a right, and I would say an obligation, to play a key role in the making of war and in determination of the proper use of our armed forces.” He went on to lament that Congress is not sufficiently informed by the President on policy objectives and means prior to the commitment of armed forces, and that Congress then abdicates its responsibilities for declaring war and using the power of the purse. His bill aimed for “a more workable system for Presidential and congressional interaction on the commitment of American forces into combat situations (Congressional Record, Vol. 147, No. 73)”. It is notable that he used the verb “making”

of war, indicating that he perhaps believed Congress should have a hands-on role in approving operations, not just being informed of them. The use of the term “making” also harkens back to the original debate about what wording should be used in the Constitution. Senator Cleland’s introduction of the bill can also be seen as somewhat prescient, given that, during that same session, Congress would pass two different authorizations for the use of military force.

The terrorist attacks on United States territory on September 11, 2001, precipitated a flurry of action in the Senate. Senators immediately began drafting an Authorization for the Use of Military Force (AUMF) to respond to the attacks.

At the time, over 80 percent of Americans supported the use of U.S. ground forces in Afghanistan, with just 18 percent opposing. However, the makeup of those in opposition had a decidedly partisan character. While only 8 percent of polled Republicans opposed the use of ground troops, a full 25 percent of Democrats were classified as “doves” – those who did not want U.S. forces to invade Afghanistan. Furthermore, 22 percent of all those polled identified as “hawks”, who would have supported military action in Afghanistan even had the terrorist attacks not occurred. Here, partisan differences were also evident: while 31 percent of Republicans identified as hawks, only 14 percent of Democrats fell into this category. So Democrats were over three times as likely to be doves, while Republicans were over twice as likely to be hawks. Nonetheless, even among Democrats, 75 percent still supported the use of ground forces in Afghanistan (Gallup, November 1, 2001).

Table 4.1 – Results of November 1, 2001 Gallup Poll

	Doves (%)	Reluctant Warriors (%)	Willing Supporters (%)	Hawks (%)
Total (N=1006)	18	22	39	22
Republican	8	23	38	31
Democrat	25	24	37	14

Source: Moore, David. *Eight of 10 Americans Support Ground War in Afghanistan*. Gallup, 01 November 2001, <http://www.gallup.com/poll/5029/eight-americans-support-ground-war-afghanistan.aspx>. Accessed 26 November 2016.

So opposing the military intervention was not really an option for Senators on either side of the aisle. Even though 75 percent of Democrats expressed some degree of acceptance of military intervention, only 14 percent were hawks. This meant that Democrats needed to placate the 86 percent of their constituency who were not hawks, and that would involve ensuring that the president was not acting with unfettered authority and was still constrained by their representatives in Congress. This would explain why only Democrats took legalist positions: it allowed them to approve of the military deployment while still appearing to act as a limit on the president’s authority, as any good opposition party should. It also explain why Republicans, with 92 percent of their constituency supporting the intervention, took only presidentialist and realist positions, neither of which attempted to constrain the president’s authority in any way.

Senator Russ Feingold (D-WI), who consistently took legalist stands in later WPR debates, placed his support for the AUMF against Al Qaeda and associated forces within the context of the Constitution and the WPR. Addressing the Senate on September 12, Senator Feingold pointedly noted that “what we did today [is not] something similar to the Gulf of Tonkin resolution. It is not a blank check.³ We can respect Article I of the Constitution if we are talking about a declaration of war. We can respect the War Powers Act. We can act together as an executive and as a Congress to be sure we are unified” (Congressional Record, Vol. 147, No. 118). In these remarks, Senator Feingold appeared to draw a direct line from the Constitution, to the WPR, to Executive-Legislative cooperation. He is also explicitly couching his support within strict legal guidelines – he is supporting the president’s military mission because it is being made with the cooperation and consultation of Congress and in accordance with the Constitution and the WPR (and, arguably, with overwhelming public support).

In later remarks, Senator Feingold went further, saying that, under the WPR, the AUMF actually was not necessary for any immediate military response, because the WPR recognized the President’s authority to immediately respond to attacks on the United States. However, he noted that “we act today to authorize the use of force, as required by the War Powers Resolution.” But he strongly asserted, in lines later quoted by other Senators, that “Congress owns the war power. By this resolution, Congress loans it to the President in this emergency.” While lamenting that “the War Powers Resolution has become a bit like the family relative that nobody wants to talk about”, he still believed

³ It is doubtful that Senator Feingold would have made this statement if he had known that the 2001 AUMF would still be in use 15 years later to justify military action in several countries far from Afghanistan like Yemen, Somalia, Libya, and Syria.

that “the War Powers Resolution is as relevant today as it was [when] enacted in 1973” (Congressional Record, Vol. 147, No. 120) Few other Senators struck such a supportive vision of the WPR, and Senator Feingold was relatively unique in his belief that the WPR had not lost any relevance despite continued rejection of it by successive presidents for nearly 40 years.

Senator Christopher Dodd (D-CT) also placed his support for the AUMF within the context of the consultative role that the WPR granted to Congress, saying that Congress had acknowledged the President’s authority to prevent acts of terrorism, “consistent with the War Powers Act” and that it was his expectation “that the President and his advisers will consult with the Congress before taking action [as] contemplated by the War Powers Act” (Congressional Record, Vol. 147, No. 120). That the WPR principally functions as a stimulus to consultation between the executive and legislative branches was also a common position among many realists, as seen below. But in a later debate in 2002 over the International Criminal Court (ICC), Senator Dodd ardently defended congressional war powers, saying that an amendment by Senator Warner (R-VA) to allow the President to “use all means necessary and appropriate” to free U.S. personnel detained by or for the ICC would “give the administration a war powers blank check... just as the Gulf of Tonkin Resolution. This is a huge giveaway of congressional war powers authority” (Congressional Record, Vol. 148, No. 73). This position went beyond a mere expectation of consultation or maintenance of the status quo, as the president already has the authority to use whatever military means he chooses to free U.S. personnel. By claiming that the amendment would greatly reduce congressional war powers authority, Senator

Dodd expressed his belief that the executive branch must operate within the legal strictures of the WPR when contemplating military action.

Senator Carl Levin (D-MI), then Chairman of the Armed Services Committee, declared his strong support for the WPR when he said that the 2001 AUMF was “based upon and is an exercise of the Congress’ constitutional war powers role as codified in the War Powers Resolution.” He put this legalist assertion into practice, and was instrumental in changing the draft AUMF’s language to remove a clause, submitted by the White House, which stated that the President had constitutional authority to take action to “deter and prevent” acts of international terrorism against the United States. In its place, Senator Levin said, “references to the War Powers Resolution were added. It does not recognize any greater presidential authority than is recognized by the War Powers Resolution” (Congressional Record, Vol. 147, No. 120). The language read as follows:

(b) War Powers Resolution Requirements.--

(1) Specific statutory authorization.--Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of other requirements.--Nothing in this resolution supersedes any requirement of the War Powers Resolution.

In inserting that clause, Senator Levin and his colleagues set an important precedent – every successive bill authorizing military force and written in the Senate contained identical language, enshrining the WPR into any legislative text that would authorize the

executive branch to use military force. While this set down a clear legal marker of congressional authority, and while successive administrations signed legislation that included this assertion of the WPR, it nonetheless did little to actually constrain the war-making decisions of the executive branch, which would continue to refuse to recognize the constitutionality of the WPR while also picking and choosing when or if congressional authority was warranted. Furthermore, in being placed in all subsequent AUMF legislation, the WPR clause eventually became a sort of fig-leaf: its absence would raise eyebrows, but its presence did not effectively alter the balance of power (as the WPR was meant to do).

In early October 2001, Senator Robert Byrd (D-WV), also President Pro Tempore of the Senate, staked out a strong legalist defense of the WPR, noting that in the WPR's inclusion in the AUMF, it was clear that "the crux of the War Powers Resolution is that it provides specific procedures for Congress to participate with the President in decisions to send U.S. forces into hostilities." He acknowledged that the President had limited authority under the WPR, and, without authorization from Congress, could go after terrorists who had attacked the United States, but pointed out that "he may not exercise it without triggering the reporting and termination requirements of the War Powers Resolution" (Congressional Record, Vol. 147, No. 129). Senator Byrd's insistence on compliance with the reporting and termination requirements of the WPR put him squarely in the legalist camp.

Senator Byrd also later cited the WPR as giving Congress the role of “active participants in foreign affairs, and certainly such adventures as making war” (Congressional Record, Vol. 148. 89). This marked another strong legalist defense by a long-serving and highly-respected Senator, but also raises the question of why, after so many decades of the WPR’s lacking any power, such a senior figure would insist that it was still relevant.

In April 2002, as the war in Afghanistan was at full tilt and Iraq began to loom on the horizon as the next target in the Bush Administration’s “War on Terror”, Senator Feingold, as Chairman of the Judiciary Committee’s Subcommittee on the Constitution, Federalism, and Property Rights, held a hearing titled “Applying the War Powers Resolution to the War on Terrorism.” In his opening statement, he made an impassioned case for the WPR, which, “by recognizing Congress as custodian of the authority to declare war or otherwise to provide statutory authority to send our troops into harm’s way, the War Powers Resolution also demands regular and meaningful consultations between the two branches of government, both to begin and to sustain our military engagements.” He later made the explicit point, however, that neither he, nor any of his colleagues, expected to be consulted about every tactical decision, which he called “a scary thought.” He also noted that Congress was often loath to engage on the issue of war powers, because it is easier to let the President make the decisions and blame him if things go wrong, but if they go well, to say “we were with him all the way” (S. Hrg. 107-892).⁴

⁴ Senator Feingold, when later discussing the potential introduction of U.S. armed forces into Liberia, reiterated that “United States troops must always be deployed in a manner consistent with the War Powers Act of 1973”, but qualified his statement by saying that “watching and waiting” is not an option that would serve U.S. interests (Congressional Record, Vol. 149, No. 100).

Senator Dianne Feinstein (D-CA), discussing the potential use of armed force against Iraq, noted that while she was pleased with Secretary of State Powell's pledge to consult with Congress before taking military action, it was still "imperative that we comply with the provisions of the War Powers Resolution, a joint legislative act that will ensure: 'The collective judgment of both Congress and the President will apply to the introduction of United States armed forces into hostilities'" (Congressional Record, Vol. 148, No. 34). She therefore stressed more than just the consultative provisions of the WPR, and expected Congress to have a role – as defined by the WPR – in the actual decision to go into war. Ultimately Senator Feinstein, a senior member of the Senate Intelligence Committee, got her wish in the form of the Iraq AUMF, which she voted in favor of.

Senator Feingold, in June of the same year, reinforced the need for consultation, arguing that if the administration was planning to take action against Iraq in the following year, as the press was reporting at the time, then there was still plenty of time to "initiate meaningful consultations with Congress over the necessity and scope of this new military campaign." (Congressional Record, Vol. 148, No. 75).⁵ Senator Feingold would ultimately join a minority of his Democratic colleagues in voting against the Iraq AUMF.

It should be noted that while public support for the Iraq war was high, it did not meet the initial levels of support for the war in Afghanistan, especially among Democrats. In a late

⁵ Senator Harry Reid, then majority whip, declared that his stance on the President's plans was not related to the WPR, saying "I am not a big fan of the War Powers Act. I felt that way in the House; I feel that way in the Senate. This is more than the War Powers Act. This is a situation where we must have the support of the international community" and the American people (Congressional Record, Vol. 148, No. 112).

February 2003 poll (about one month before the invasion), Gallup found that 59 percent of Americans were in favor of invading Iraq with ground troops in an attempt to remove Saddam Hussein from power, while 37 percent were opposed. Gallup found that partisanship was an important predictor of opinion. While 82 percent of Republicans polled were in favor, only 44 percent of Democrats held the same view. This split opinion among Democrats was somewhat reflected in the party’s Senate vote, with 29 in favor and 21 opposing. (Gallup, March 24, 3003)

Tables 4.2a and 4.2b – Results of March 24, 2003 Gallup Poll

Table 4.2a - Overall Response to the Question: “Would you favor or oppose invading Iraq with U.S. ground troops in an attempt to remove Saddam Hussein from power?”

	Favor (%)	Oppose (%)	No Opinion (%)
Overall	59	37	4

Table 4.2b - Response to the Question: “Would you say your mind is made up about invading Iraq?” (by Party Identification)

	Favor and mind is made up (%)	Favor but could change mind (%)	Total in favor (%)
Republican	51	31	82
Democrat	22	22	44

Source: Newport, Frank. *Public Support for Invasion of Iraq Holds Steady*. Gallup, 28 February 2003, <http://www.gallup.com/poll/7891/public-support-invasion-iraq-holds-steady.aspx>. Accessed 26 November 2016.

Senator Dick Durbin (D-IL), a stalwart opponent to the war, condemned the Bush Administration for seeking “congressional approval for war as an option, not a fundamental requirement under the Constitution” (Congressional Record, Vol. 153, No. 166). He was referring to the administration’s assertion that, even had Congress rejected the AUMF, the President would still send U.S. armed forces into Iraq. Such a blatant disregard not just for the WPR but also for Congress’s role in the war powers was a natural progression of the “imperial presidency” and its strengthening grip on the war powers. Senator Durbin also introduced an amendment to the Iraq AUMF which would amend it “to cover an imminent threat posed by Iraq’s weapons of mass destruction rather than the continuing threat posed by Iraq” (S.AMDT.4865, 107th Congress, U.S. Senate, Library of Congress, 2002-10-10). The amendment was rejected by a vote of 30-70. Reflecting his opposition to the AUMF both from the perspective of the WPR and its overly-broad justification, Senator Durbin voted against the AUMF. Senator Levin also introduced an amendment designed to derail the AUMF, which stated that military force would be authorized “pursuant to a new resolution of the United Nations Security Council, to destroy, remove, or render harmless Iraq’s weapons of mass destruction” (S.AMDT.4862, 107th Congress, U.S. Senate, Library of Congress, 2002-10-10). The amendment was rejected by a vote of 24-75, and appeared to have split support among the legalists, with Senators Byrd, Feinstein, and Levin voting in favor, with Cleland, Feingold, and Dodd voting against (though the latter three may have opposed the amendment simply because they opposed the overall resolution).

When debating the Iraq AUMF, Senator Byrd also introduced an amendment that would place a one-year limit on the use of force, and presciently noted that while the nature of the threats against the United States may have changed since when the Constitution was drafted, “the reasons for limiting the war powers of the President have not changed at all... the concerns of the Framers are even more relevant because the consequences of unchecked military action may be more severe for our citizens than ever before” (Congressional Record, Vol. 148, No. 133). Senator Byrd’s amendment was rejected by a vote of 14 to 86, and he voted against the Iraq AUMF.

By 2007, opposition to the Iraq War and plans to introduce more troops was escalating significantly on the Senate floor, as evident in several resolutions of disapproval introduced. Senator Ted Kennedy (D-MA), a long-time and vociferous opponent to the Iraq War, took to the floor to say that the American people “expect Congress to be an effective restraint on the President and his misuse of the war power. Opposition to the escalation of the Iraq war is becoming louder.” (Congressional Record, Vol. 153, No. 15). A few months later, Senator Kennedy, speaking about the WPR, noted that its “congressional assertion of power in matters of war and peace resonates loudly today. Opponents of our efforts to bring the Iraq war to an end have mischaracterized any use of this congressional power as an abandonment of our soldiers on the battlefield. Nothing could be further from the truth” (Congressional Record, Vol. 153, No. 81). Senator Kennedy was not claiming that the WPR was *the* “effective restraint on the President”, merely that the law’s intent – to reinforce congressional war powers – was in line with what the people wanted. While he wanted Congress to play a stronger role, he did not

expect the WPR to be of much help. Rather, he evoked the WPR in order to recall the spirit of past congressional efforts to limit the war powers of the president after Vietnam. He wanted to place current efforts to end the Iraq war within that same spirit of congressional empowerment, though not within the legal parameters of the WPR. Rather, he introduced a separate bill that would use the power of the purse by requiring congressional approval before committing any additional troops to Iraq (S.233, 110th Congress, U.S. Senate, Library of Congress, 2007-02-06). While the bill made no explicit mention of the WPR, it was a clear attempt to use legislative means to limit the president's war power.

A few interesting themes emerge from examination of the legalist positions taken during the debates of the Afghanistan and Iraq AUMFs. First, all the legalists in both debates were Democrats, who were in the opposition. Second, Democrats used the legalist position when both supporting and opposing the president's actions. While in support, for example on the Afghanistan AUMF, they used the WPR as a mechanism to insist on a role for Congress and a recognition of their own authority when it came to war powers – essentially to assert their own relevance and ability to constrain the president, if they so wished. During the Iraq AUMF debates, by contrast, most legalists – especially Byrd, Durbin, and Levin – used their legalist position on congressional war powers to oppose the president and attempt to stop or constrain him from exercising executive war power. In these cases, the Democratic Senators appeared to be using the legalist position both to engage in opposition politics and display institutional loyalty.

In 2004, when discussing a resolution to censure Iran, Senator Joe Biden (D-DE) staked out a legalist position by stressing the existing constitutional authority of Congress, which was reinforced by the WPR. He pointed out that the bill did not encourage the use of military force against Iran, and that “under our Constitution and the War Powers Resolution, only legislation signed by the President can do that” (Congressional Record, Vol. 150, No. 103). Senator Biden later more explicitly stated his opinion on where the war power lay, saying that “defining the overall mission of U.S. troops is entirely within the power of the Congress under the U.S. Constitution. Indeed, not doing so would be an abdication of our fundamental duty under the Constitution, which clearly manifests war power in the hands of the Congress” (Congressional Record, Vol. 153, No. 45). And Biden showed that he did not believe the appropriations process was sufficient for Congress to assert its war powers (as a realist or congressionalist might), stating during the Iraq AUMF debates that “we learned from Vietnam the power of the purse is useless” (Congressional Record, Vol. 148, No. 133). Many foreign policy scholars would likely argue that Senator Biden’s position evolved when he served as Vice President during the Obama Administration, and his strongly legalist stance as Senator could be interpreted as both a defense of the Senate’s institutional prerogative, and as a desire to limit the war-making power of a Republican president that had excessively exercised that power.

Realist Arguments During the Bush Administration

Realists are generally accepting of the status quo, lopsided balance of the war powers, accepting that the WPR does not necessarily work as intended, but that it does still give Congress a mechanism with which to insert itself into the debate. Realists cite the WPR

mostly to point out that it is being sufficiently complied with (as opposed to legalists, who insist that it is not being fully followed). 21st century WPR realists think that Congress should play a role regardless of the WPR, but often note its usefulness for prodding congressional action or executive consultation. In comparison to legalists, realists mostly cite the consultation provisions of the WPR as opposed to the 60-day clock. In so doing, they are neither acquiescing to presidential power, nor taking a position where they would need to confront it, but could be seen most appropriately as proponents of the current balance.

On September 14, 2001, just three days after the attacks, several Senators that fall into the realist camp took to the floor to speak about the Afghanistan AUMF, with a few explicitly mentioning the WPR. Senate Majority Leader Tom Daschle (D-ND) noted that the AUMF was “providing specific statutory authorization and requiring continuing consultation between the President and the Congress, we also underscore the importance of the War Powers Resolution.” These remarks indicate that Senator Daschle believed that the WPR was sufficiently allowing Congress to have a consultative role in the decision-making process. Senator Mikulski (D-MD) reinforced that view by pointing out that “the requirements of the War Powers Resolution remain in force.” Senator Olympia Snowe (R-ME) noted that “this resolution, consistent with the War Powers Resolution, is precisely the right course for the Congress to take at this momentous juncture in American history” (Congressional Record, Vol. 147, No. 120). These Senators appeared to use the WPR as a kind of seal-of-approval, mentioned only in passing, though which

would lend further legitimacy to the AUMF. They did not use the WPR to demand more from the administration or criticize it.

When introducing the Iraq AUMF, Senator Daschle also mentioned the WPR, noting that “this resolution protects the balance of power by requiring the President to comply with the War Powers Act and to report to Congress at least every 60 days on matters relevant to this resolution” (Congressional Record, Vol. 148, No. 133). He was referring to the language that had been copied from the Afghanistan AUMF, which was originally drafted and inserted by the legalist Senator Levin. But Senator Daschle only refers to the consultative provision of the WPR and, as with the Afghanistan AUMF, seems to be using it as a selling point, rather than a realistic assertion of congressional power.

Senator John McCain (R-AZ) also rose to defend the Iraq AUMF in late January, 2003, at the outset of the 108th Congress. He pointed out that it contained a provision stating that the AUMF constituted specific authorization within the WPR, noting that “Congress has spoken, and its message could not be clearer” (Congressional Record, Vol. 149, No. 16). That the AUMF included language on the WPR indicated to him that the administration and Congress were in full compliance with the WPR, and that, in his view, the system was working and the status quo was sufficient.

Senator Arlen Specter (R-PA, though he later switched back to the Democrats), in early 2002, stated that, even though Presidents did not agree that the WPR was constitutional, they still complied with it. He recalled going to the floor in 1998, when military action

against Iraq looked imminent, and calling on Congress to make a determination whether to authorize it. In a point echoed by many other Senators, he lamented that “the Congress is never very anxious to make that determination. It is easier to let the President make the decision. If he is wrong, he gets the blame. If he is right, then the issue passes”

(Congressional Record, Vol. 148, No. 13). This stance comports with some of the scholarship noted above, and also reflects Senator Specter’s view that the WPR should not be used to constrain the president’s power, but to force Congress to take some form of action.

On an issue of great importance to a large and powerful constituency of Florida voters, Senator Bill Nelson (D-FL) in May 2002 went to the floor to raise concerns about remarks by the Bush Administration that Cuba was potentially producing biological weapons for export. He asserted that “the Bush Administration should not just be making speeches about it. They ought to be planning an action in consultation with the Congress under the War Powers Act” (Congressional Record, Vol. 148, No. 56). Senator Nelson was therefore requesting that the Administration consult with Congress before introducing armed forces, not reporting to Congress after the introduction of forces – thereby stressing the consultation process and not the actual 60-day clock provisions.

As mentioned earlier, focusing on the consultation process versus the 60-day clock was one key defining difference between the realists and legalists. “Consultation” is a somewhat broad term that, in the case of the WPR, can be defined in many different ways

(What constitutes consultation? Who must be consulted with?), whereas the 60-day clock is a concrete requirement against which legalists could clearly point to non-compliance.

Both Republicans and Democrats adopted positions within the realist camp during the Bush Administration, and were split fairly evenly across parties. These Senators cited the WPR for a variety of reasons: to give legitimacy to proposed legislation, to point out that Congress should not shirk its responsibilities, and to promote Congress's consultative role. They did not make impassioned defenses of the WPR, or demand greater constraints on the president's power, nor even an expansion of congressional power. What also separates the realists from the legalists, then, is ambivalence toward the notion that Congress has been weakened with regards to the war power.

Presidentialist Arguments During the Bush Administration

Presidentialists, while smaller in number than legalists and realists, still made their appearance.⁶ Vocal presidentialists stated their belief that the WPR should be scrapped because it infringes on the executive branch's authority, and that Congress has plenty of power to constrain the executive through the authorizations and appropriations processes.

⁶ The "congressionalist" – a member who believed that the WPR should be repealed because it reduced the war powers of the legislative branch – appears to be an extinct species, at least when it comes to the Congressional Record of debate in the Senate. This does not come as a large surprise, because the congressionalist was born in the flames of the Vietnam War, when the thought to some of allowing a president to unilaterally initiate any type of military action, without congressional approval, was totally anathema. Just such an action had led to the intervention and escalation in Vietnam. But in the 21st century, after decades of presidents routinely exercising the war power without congressional approval, the congressionalist seems to have slowly disappeared, replaced by a much more popular position of using the WPR as a rather powerless rhetorical weapon against presidential overreach.

All those who took a presidentialist position during the Bush Administration were Republicans.

Senator Orrin Hatch (R-UT), in the hearing on “Applying the War Powers Resolution to the War on Terrorism,” made the rare case for nonpartisan rejection of the WPR, believing that “the 1973 War Powers Resolution is an unconstitutional encroachment on executive power by the legislative branch. And, my legal assessment remains the same regardless of who happens to sit in the White House” (S. Hrg. 107-892) The record shows that to be true, as Senator Hatch supported President Clinton sending U.S. armed forces into Kosovo without congressional authorization.

Senator Hatch was not alone in his presidentialist views, though. Senator Strom Thurmond (R-SC), in a statement at the same hearing, said he believed that the President has the power to commence military operations, in Iraq or other countries, without congressional authorization. He said that he voted against the WPR in 1973 because he thought it unnecessary to restrict the President’s ability to conduct military operations determined to be in the best interest of the United States. He went on to say that Congress’ real power “does not lie in the implementation of a system of notification and authorizations, as the WPR attempts to do. Rather, it is the power of the purse that enables Congress to refuse to fund presidential prerogatives” (S. Hrg. 107-892). Yet, as detailed in other parts of this study, many other Senators, constitutional scholars, and even a federal judge have disagreed with that argument.

Senator Jeff Sessions (R-AL), making a less overt statement in support of presidential war powers, said in an Armed Forces Committee hearing on detention and trial of war combatants that “we’re operating under the war powers provision here, which is an executive-branch function” (S. Hrg. 107-513).

Senator Warner (R-VA) was also a regular and staunch defender of the President’s war powers, saying that in his 25-year Senate career, he had never questioned the President’s constitutional authority to send U.S. armed forces into harm’s way. On the matter of consultation, in August 2003 he said that “there is always debate, as reflected in the history of the War Powers Act, to what extent he should consult” and that, while it is “wise” that Congress work with the administration on matters of war, he believed that “the Constitution gives that right to the President and should not ever be in question” (Congressional Record, Vol. 149, No. 117). A couple of years later, Senator Warner also endorsed the conclusions of the National War Powers Commission (discussed in more detail below), specifically that “the law purporting to govern the Nation’s decision to engage in war -- the War Powers Resolution -- has failed to promote cooperation between the two branches of government; the [WPR] is ineffective at best and unconstitutional at worst; and the [WPR] should be replaced by a new law that would, except for emergencies, require the President and Congress to consult before going to war” (Congressional Record, Vol. 154, No. 128).

While favoring a requirement for the President to consult with Congress before going to war may appear to limit presidential power, and therefore be an anti-presidentialist

approach, the lack of a definition of “consult” means that such a requirement could very well lack teeth. For example, the President could call select members to the White House, tell them that he is sending troops into hostilities, and ask for their opinion, but without any legal obligation to follow their advice. Without requiring a binding vote of approval, mere consultation does not necessarily constrain the executive’s power in any significant way.

The arguments of the presidentialists were all made by Republican senators, though, as at least shown in the case of Senators Hatch, Warner, and Thurmond, their position was not one of party loyalty, but rather of ideological belief.

Conclusion

During the Bush Administration, the sample includes 19 Senators, of which 12 were Democrats and 7 were Republicans. Thus nearly twice as many Senators from the Democratic party spoke up on the issue of war powers.

Table 4.3 – Findings: Argument Clusters during the Bush Administration

<i>Cluster</i>	<i>Number of Senators total who expressed a position</i>	<i>Republican</i>	<i>Democrat</i>	<i>As a % of sample</i>
Congressionalist	0	0	0	0
Presidentialist	4	4	0	21%
Legalist	9	0	9	47%
Realist	6	3	3	32%

Qualitative analysis and coding of WPR deliberations during the Bush Administration revealed several themes. First, Democrats dominated the legalist position, split the realist position with Republicans, and ceded the presidentialist position completely to Republicans. Given that Democrats were in opposition throughout both terms, this points to a leveraging of the legalist position to assert both institutional prerogative during the Afghanistan AUMF (as they did during the original WPR debates), and political opposition regarding the Iraq AUMF and, especially, the surge in 2007.

Both Republicans and Democrats adopted realist positions during the Bush Administration, with roughly equal numbers on both sides. Realists were generally approving of the president’s actions, and what most set them apart from legalists was their ambivalence toward the notion that Congress has been weakened with regards to the

war power. They did not demand greater constraints on the president's power nor an expansion of congressional power.

U.S. Senate deliberations during the Bush Administration did demonstrate that the contours of the war powers debate have changed from the 20th century to the 21st century. First, no one adopted the Congressionalist position of demanding a repeal of the WPR because it limited the power of Congress. Second, the position of legalist evolved from one that demanded full compliance with the WPR to one that focused on compliance with specific elements of the WPR, such as the 60-day clock or reporting requirements. In addition, legalists insisted that any AUMF include a WPR provision. 21st century legalists also did not predict a “constitutional crisis” if the president refused to abide by the WPR, as the original legalists did, but rather used the WPR as a mechanism to criticize the administration and demand more cooperation and consultation from the executive branch. Realists of the 21st century were largely similar to their predecessors, viewing the WPR as a useful tool to get Congress involved, but generally acquiescing to the president's “more equal” authority when it came to matters of war.

U.S. Senate deliberations of the WPR during the Bush Administration also partially supported the study's first hypothesis, that Senators of the same political party would largely use the same arguments as each other. For example, all those who took the presidentialist position were Republican (this was mostly the case during the original debates as well). And all of those who argued a legalist position were Democrats. Realists were split roughly evenly between both parties. The second hypothesis – that partisan

imperatives would trump ideological consistency and the prevailing arguments would change between administrations – will be addressed in the next chapter, which analyzed the Obama Administration.

Chapter Five: War Powers Debate During the Obama Administration

Introduction

Deliberations over the WPR during the Obama Administration fell into two broad categories: reflection and action. With Democrats now in control of the Senate (and, for the first two years, the House), and therefore in charge of committee agendas, they held hearings that both looked back at how the WPR was used during past administrations, as well as how the Obama Administration was using the WPR (specifically in Libya). For action, the Obama Administration also saw its fair share of AUMF debate, especially around military operations in Libya and against the Islamic State.⁷

As the Obama Administration progressed, debate began to focus increasingly not only on how the WPR was being ignored, but on whether the provisions of the WPR were relevant in a new age of warfare, where pilotless and perhaps even autonomous drones conduct lethal operations, and cyber-attacks can cause more damage than conventional weapons. This shift in warfare, particularly the growing use of drones, caused a shift in the debate over compliance with WPR from a focus on reporting and withdrawal requirements to the legal definition of the word “hostilities.” Furthermore, the Obama Administration would see new legislation introduced that both attempted to fix some of the WPR’s past flaws, as well as anticipate the needs of the future in light of the seismic technological, tactical, and political changes that warfare was experiencing.

⁷ Majority Leader Mitch McConnell introduced an AUMF for operations against the Islamic State, which had the same WPR language as previous AUMFs, declaring that the bill constituted specific statutory authority under the WPR and that nothing in it superseded any requirement of the WPR (S.J.Res.29). There was no debate on the bill.

Debates during the Obama Administration also saw a shift in political dynamics.

Whereas during the Bush Administration all legalists were Democrats and there was approximate parity among the parties among the realist camp, the Obama Administration saw a significant number of Republicans adopting the legalist position, while there were twice as many Democrats as Republicans making realist arguments.

It is also worth noting that President Obama won office by campaigning as the anti-war candidate. His original opposition to the Iraq war was instrumental in his defeat of Hillary Clinton (who voted for the war in 2003 as a U.S. Senator) during the Democratic primary campaign. And in the general campaign, he differentiated himself from the Republican candidate, John McCain (a noted hawk), by promising to end the wars in Afghanistan and Iraq, as well as pursue the elimination of nuclear weapons.

Nonetheless, President Obama would ultimately decide to execute a military intervention in Libya and escalate the war in Afghanistan with a “surge” of troops similar to the Bush Administration’s Iraq strategy in 2007. He would also vastly expand the use of armed drones to conduct lethal strikes across a far greater number of countries, as well as the deployment of small teams of Special Forces to conduct lethal operations – what some would call “light footprint” warfare when compared to the military interventions of the Bush Administration. These practices were also a reflection of a new type of enemy that the United States faced – non-state terrorist and militant groups that moved and hid among civilian populations, mostly avoiding open combat in favor of guerilla warfare

tactics and terrorism. These phenomena, as well as the increasing deployment of unmanned military platforms and the ongoing development of autonomous lethal weapons, would create new concerns about the shortfalls of the WPR and the ever-shifting balance of the war powers moving toward the direction of the executive branch.

Legalist Arguments During the Obama Administration

In April 2009, shortly into the first term of the Obama Administration, Senator Kerry (D-MA), then Chairman of the Foreign Relations Committee, held a hearing entitled “War Powers in the 21st Century.” The hearing’s witnesses featured two former secretaries of state -- James Baker from the first Bush Administration and Warren Christopher from the Clinton administration -- and former Congressman Lee Hamilton, who in the early 1990s had served as Chairman of the House Foreign Affairs Committee. Baker and Christopher had served as co-chairs on the National War Powers Commission (of which Hamilton was also a member), a bipartisan body impaneled in 2007 by the University of Virginia’s Miller Center of Public Affairs. The Commission’s work lasted 14 months, at the end of which they issued a report to the President and Congress which recommended repealing and replacing the WPR with a new “War Powers Consultation Act.” The five principle roles of the proposed statute were that it:

1. Provides that the president shall consult with Congress before deploying U.S. troops into “significant armed conflict”—i.e., combat operations lasting, or expected to last, more than a week.
2. Defines the types of hostilities that would or would not be considered “significant armed conflicts.”

3. Creates a new Joint Congressional Consultation Committee, which includes leaders of both Houses as well as the chair and ranking members of key committees.
4. Establishes a permanent bipartisan staff with access to the national security and intelligence information necessary to conduct its work.
5. Requires Congress to vote up or down on significant armed conflicts within 30 days. (Miller Center, National War Powers Commission Report, 2008)

At the report's release, Secretary Baker was explicit that the proposed statute did not attempt to resolve the constitutional questions surrounding the debate over the war powers, but rather aimed to "create a process that will encourage the two branches to cooperate and consult in a way that is both practical and true to the spirit of the Constitution" (Miller Center, National War Powers Commission Report, 2008). At the hearing, Secretary Baker was far more blunt in his assessment of the WPR, calling the existing statute "a joke" that is "observed more in the breach than in the observance" (S. Hrg. 111-255).

Despite the coming to office of a president from the same party who was also committed to ending both U.S. wars, Senator Feingold maintained a strong legalist position in support of the WPR, arguing that Congress' war powers had been weakened over several decades and needed to be restored. At the April 2009 hearing, Feingold criticized the proposal for ceding too much authority to the executive branch, pointing out that, under the Constitution, only Congress has the power to declare war. He said that while the existing WPR was an "imperfect solution", it still retained a critical decision-making role for Congress. The Commission's proposal, he pointed out, would require Congress to

pass a Resolution of Disapproval by a veto-proof majority if it wanted to force the President to withdraw U.S. forces from hostilities. The President, then, would only need one-third plus one of either the House or the Senate to continue a unilaterally-started war -- similar to what would be needed to stop a restriction on appropriations. Senator Feingold lamented that “that cannot be what the Framers intended when they gave to Congress the power to declare war.” However, his proposed solution for fixing the WPR -- that future Presidents “simply abide by the resolution” -- has been proven as a highly naïve approach (S. Hrg. 111-255). Senator Feingold had supported the 2001 AUMF and pointed out that – under the WPR – the president did not require congressional authorization for the immediate use of U.S. armed forces. He had even explicitly said that the 2001 AUMF was “not a Gulf of Tonkin resolution.” But he had opposed the 2002 Iraq AUMF, which was, as many official studies and reporting pointed out, like the Gulf of Tonkin resolution -- based on false evidence. With the experience of the Iraq war in hindsight, Senator Feingold was understandably wary of setting the bar even lower in allowing presidents to put U.S. armed forces into harm’s way.

Senator Lugar (R-IN), at the same hearing, recalled an anecdote that, to him, illustrated proper consultation by the executive branch with the legislative branch. He recalled that when President Reagan ordered air strikes on Libya in 1986, he summoned senior Senate and House leaders to the White House at 4pm and told them that U.S. warplanes were in the air, heading toward Tripoli and due to strike at 7pm. Lugar believed that this meeting “constituted acceptable consultation” given the need for secrecy and that the planes could have been turned around if the leaders had expressed strong opposition. However, he

noted, “some commentators” thought the meeting did not meet the requirements for “full” congressional consultation (S. Hrg. 111-255).

In March 2011, the United States, acting in concert with NATO and a coalition of Arab states, mounted a military intervention in Libya to suppress the forces of then-president Qaddafi. The intervention was made under the auspices of a United Nations Security Council resolution, and therefore legal under international law. The resolution imposed a no-fly zone over Libya and authorized “all necessary means to protect civilians and civilian-populated areas, except for a ‘foreign occupation force’ (UNSC, “Security Council Approves ‘No-Fly Zone’ over Libya”, March 17 2011).

Importantly, the intervention did not involve any U.S. ground troops, only fighter aircraft and unmanned drones. In addition, Qaddafi’s military was unable to shoot down any NATO planes. Three months later, the Senate’s Foreign Relations Committee began considering a resolution that would authorize the president to continue to use military force in Libya. Following standard protocol, the committee first held a legislative hearing to inform their deliberations.

At the June 2011 hearing, titled “Libya and War Powers”, Senator Lugar mounted a strong legalist defense of Congress’s role in the war powers and criticized the administration for its interpretation of certain clauses in the WPR. He noted that the President had not sought congressional authorization before initiating hostilities and had carried them out for more than three months without such authorization, creating “a state

of affairs at odds with the Constitution.” He went on to warn that “the accrual of even more war-making authority in the hands of the Executive is not in our country’s best interest.” He also criticized the administration’s interpretation of hostilities, saying that just because U.S. forces are not doing the shooting does not mean that they are not involved in acts of war. He summed up his opinion on the war powers thus: “the President does not have the authority to substitute his judgment for constitutional process when there is no emergency that threatens the United States and our vital interests” (S. Hrg. 112-89). Senator Lugar also successfully passed an amendment to the Foreign Relations Committee draft of the Libya AUMF (S.J.Res.20) that came out of the hearing, adding language to the resolution, similar to that included by Senator Levin in a previous AUMF, which stipulated that it constituted specific statutory authorization under the War Powers Resolution. He also went a step further, attempting to constrain the executive branch through the authorization process by passing an amendment to the Libya AUMF to restrict the use of funds to “deploy, establish or maintain” any U.S. armed forces on the ground in Libya, thereby turning to the power of the purse to restrict potential expansion of the military action (Senate Report 112-27 to S.J.Res.20). Though he later voted against the AUMF in committee, he had been successful in ensuring that it included at least some provisions which would keep Congress relevant. During Senate debate on the resolution, Lugar took to the floor to question the rationale behind the Libya intervention, saying that “saving lives alone cannot be our standard for using military force” and that the President’s assertion that he did not require congressional authorization represented “a serious setback to the constitutional limits on Presidential war powers” (Congressional Record, Vol. 157, No. 98). While admittedly on a smaller

scale than the Bush Administration's Iraq intervention, that the Obama Administration also did not believe it needed congressional authorization was a clear continuance of the notion of the imperial presidency.

Senator Jim Webb (D-VA), a decorated Vietnam War veteran, also criticized the administration's interpretation of hostilities during the hearing, but zeroed in on what he thought was a more important issue: the unilateral use of U.S. military force based on "a vague standard of humanitarian assistance", noting that "we have not seen that before." This echoed Senator Lugar's argument that there was no threat to the United States or its vital interests. Earlier that month, Webb had gone to the Senate floor to stake out his legalist position, asserting that the President "has violated the edicts of the War Powers Act", and had unilaterally begun a military campaign "for reasons that he alone defines as meeting the demanding standards of a vital national interest" (Congressional Record, Vol. 157. No. 82). The next year, Webb would go to the floor to further criticize what he saw as the administration's flouting of the WPR, lamenting the "contorted constitutional logic" that the administration had used to intervene in Libya, but acknowledging that it was not a political issue and that they could face "the exact same constitutional challenges no matter the party of the President." He therefore took a step to close the administration's newly created WPR loophole around the word "hostilities", by introducing legislation that would require the President to obtain formal approval by the Congress before introducing U.S. forces into any situation "where American interests are not directly threatened," and requiring Congress to begin debate on it within a matter of days of the request. He stressed that he was not there to debate the WPR, but believed

that “other statutory language that covers these kinds of situations must be enacted” (Congressional Record, Vol. 158, No. 65). He thus believed that the WPR need not be repealed, but that it had loopholes which needed to be closed with additional legislation.

Senator Lugar, one of the more senior members of the Senate and well known for taking bipartisan positions on matter of foreign affairs, was not the only Republican to make legalist arguments. Newly elected, more partisan members also adopted legalist stances. Senator Corker (R-TN), for example, criticized the Obama Administration’s “no hostilities” argument, posing the hypothetical that the United States could thus drop a nuclear bomb on Tripoli and not be involved in hostilities. He also agreed on the need to update the WPR, saying that in light of new technology and new conflicts, the WPR would need narrower definitions (to be strengthened, basically) so that “cute arguments” could not be used to work around Congress. Senator Corker also believed that the Administration was not fulfilling its responsibilities under the WPR, and referenced it when demanding more consultation and coordination from the executive branch. For example, in a floor speech on the Libya AUMF, Corker claimed that the President was trying to circumvent the WPR, and that “there is no question, in my opinion, the President should be made to seek authorization” (Congressional Record, Vol. 157, No. 98).

Senator Rand Paul (R-KY) took a decidedly legislative approach to asserting his legalist position and defending congressional war powers, introducing several resolutions and amendments. The first was an amendment to an unrelated bill, which would insert a sense

of the Senate clause stating that “the President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation” (S.Amdt.276 to S.493) (that language had actually come from an interview that then Senator Obama had given to the *Boston Globe* while he was running for president). The next month, he introduced a joint resolution declaring that the President had exceeded his authority under the War Powers Resolution as it pertains to the ongoing engagement in Libya (S.J.Res.16). The bill, which had no cosponsors, declared that the President had exceeded the statutory time limits of the WPR, and called on him to seek authorization. In his floor speech on the bill, Senator Paul contended that if Congress did not vote on the Libya military action, then they would be left with an “unlimited Presidency... a very dangerous notion.” He stressed the nonpartisan nature of his effort, saying that, because of his strong belief in constitutional checks and balances, he “would take this position no matter that the party affiliation were of the President” (Congressional Record, Vol. 157, No. 4). A month later, Senator Paul introduced an amendment to the PATRIOT Sunsets Extension Act of 2011, which also declared that the President was in violation of the WPR and must seek authorization from Congress or cease military action against Libya (the amendment, S.Amdt.372 to S.990, was not considered). Senator Paul’s repeated use of the WPR as a weapon against presidential overreach is curious given that he already knew the administration would not recognize it, and it is surprising that he did not introduce new legislation that would strengthen Congress’s power without confining it to the moribund WPR.⁸

⁸ The debate over the Libya AUMF shortly petered out. Senator Corker acknowledged during debate that discussing the Libya AUMF was pointless, as the House had already rejected their version of it, so

Just as he had during the Republican Bush Administration, Senator Durbin asserted his strong, nonpartisan support for the WPR during this Democratic administration, noting that “this President is my friend. He was my colleague in the Senate. We are of the same political party.” However, he went on to say, more than 60 days had passed since U.S. forces attacked Libya (an action that he supported at the time), and regarding the ongoing debate about whether the WPR applies, he came down firmly on the side that it did, saying that “Congress [should] consider [the Libya intervention] under the War Powers Resolution.” In asserting that the Administration should respect the WPR’s 60-day clock, Durbin was again placing himself firmly in the legalist camp. And Durbin was relatively unique in that he used the WPR both to take the administration to task and to urge Congress to play a more active role. He noted that considering the matter was a constitutional responsibility that all Senators swore to uphold, though, admittedly, “it is also a responsibility which politically we try to avoid.” (Congressional Record, Vol. 157, No. 85). He also clearly stated his strong legalist support for the WPR as reflecting the original intent of the founders on the nature of the war powers balance, saying that “the War Powers Act set out to describe in statute what we believe the Constitution said in its clear language.” Like other Senators, he also considered that, in light of the changing nature of war -- no-fly zones, embargos, drones, cyber warfare -- Congress would need to consider war in a new context (Congressional Record, Vol. 157, No. 90)

there was no point in the Senate debating its version for a week, and he exhorted his colleagues to turn to what he believed a far more pressing concern, the budget. Senators Hutchison and Sessions made similar arguments on the floor and, ultimately, Majority Leader Reid tabled the Libya AUMF to move to the budget and debt limit discussions.

Senator Tom Udall (D-NM) also staked out a strong legalist position for the WPR and congressional war powers when he criticized an earlier Libya resolution that was up for consideration on the grounds that it was a sense of the Senate resolution, and “a sense of the Senate does not meet the requirements of the War Powers Act... and falls short of meeting our constitutional obligation to declare war” (Congressional Record, Vol. 157, no. 85). Udall’s position was unique and somewhat muddled in that he thought Congress both had an obligation both to adhere to the WPR and to declare war, even when the proper application of the WPR would not involve a declaration of war, but merely an approval and authorization for the use of military force.

While many Senators repeatedly bemoaned the inadequacy of the WPR, it was a rare event when a fully-considered replacement was introduced. In early 2015, Senators Tim Kaine (D-VA) and McCain, with Senator Angus King (I-ME) as a cosponsor, did just that. The War Powers Consultation Act of 2014, which was based on the findings of the National War Powers Commission (on which Senator Kerry had held a hearing in early 2009), set out as its purpose to “establish a means by which the judgment of both the President and Congress can be brought to bear when deciding whether the United States should engage in a significant armed conflict,” while the Act explicitly was “not meant to define, circumscribe, or enhance the constitutional war powers of either the executive or legislative branch of government” (S.1939). Notably, the bill called for the repeal of the

original WPR.⁹ In introducing the bill, Senator McCain specifically hoped that it would help to reconcile Congress's role with the changing nature of warfare. It is likely he had the administration's legal interpretations during the Libya intervention in mind. Senator Kaine said the bill would improve upon the existing WPR by setting up a permanent consultative committee, composed of the majority and minority leaders from both the House and the Senate, as well as the chairs and ranking members from four committees: Intelligence, Armed Services, Foreign Relations, and Appropriations.¹⁰ The other key improvement, he noted, was that the bill would require a vote from both houses of Congress within seven days of the President initiating military action (Congressional Record, Vol. 160, No. 10). I interpreted this bill as a legalist approach because, even though it sought to repeal the WPR, it was doing so in the context that the WPR was insufficient in enforcing congressional war powers, and therefore a newer, stronger piece of legislation should take its place. This differs from the realist position (analyzed in the next section), which argues that the WPR may be flawed, but it still does a good enough job of invoking Congress's participation.

In late 2014, Senator Levin took to the floor to also introduce a new piece of WPR legislation, the War Powers Against Non-State Actors Act of 2015 (S. 3109). The bill

⁹ However, the bill does not qualify as an original congressionalist position because it is not arguing that the WPR should be repealed because it expands presidential war powers, but rather that the WPR is simply dysfunctional in asserting congressional war powers.

¹⁰ It is worth noting here that during Senator Feingold's judiciary subcommittee hearing back in 2002, two of the witnesses, Michael Glennon and Louis Fisher, both recommended against setting up a new and separate consultative committee. Fisher argued that much of Congress's strength comes from its decentralization and expertise among its committees and subcommittees, and that "any move upward to centralize ends up weakening Congress." Glennon feared that a permanent consultative committee would be co-opted by the executive branch, which would target them for favors and special treatment, and might not represent their colleagues' views. He agreed with Fisher that "decentralized power is a source of congressional strength, not weakness" (S. Hrg. 107-892).

was meant to recognize that, in an era when our military was fighting against disparate terrorist groups spread across multiple countries, the WPR was dated and could not effectively assert the Congress's war powers. Levin's bill would not have repealed the WPR, but would amend it so that any authority to use U.S. forces against non-state actors would terminate 60 days after the submission of a presidential report explaining that use, unless the President's actions were based on existing law for the use of force against a non-state actor (such as the 2001 AUMF), or the President notifies Congress that the continued use of force against the non-state actor is necessary because they pose a continuing and imminent threat to the United States. In introducing his bill, Levin stated that the WPR had not been effective, and that it "needs to be modernized to make it more relevant to the situations our military is likely to face in the 21st century -- in particular, the ongoing struggle against new and evolving terrorist groups" (Congressional Record, Vol. 160, No. 155). In seeking to strengthen the WPR and Congress's war powers, Levin was adopting a classical legalist position as defined by Phelps and Boylan.

In the 114th Congress, focus on the balance of war powers revolved around engagements with the Islamic State. Senator Kaine took to the floor in May 2015 to criticize the administration for ignoring the WPR in its actions against the Islamic State, noting that "we have blown long past all of the deadlines of the act, Congress has said nothing, and yet the war continues" (Congressional Record, Vol. 161, No. 69). He also later went to the floor to complain that "neither Congress nor the President feels obliged to follow the 1973 War Powers Resolution" (Congressional Record, Vol. 161, No. 126).

Several legalists in the Democratic party voiced their positions in floor debates. These Senators were arguably displaying institutional loyalty over party loyalty, as they took a critical position of their party's political leader based on non-compliance with the WPR. Legalists during the Obama Administration also offered more comprehensive legislative overhauls of the war powers than were seen during the Bush Administration. This was largely due to two factors. First, the Vietnam-like "quagmire" that the United States found itself in Iraq reestablished an urge by the legislative branch to limit the president's ability to set out on large military campaigns with no set end. Second, new technologies and tactics in warfare, such as unmanned drones and the proliferation of targeting of non-state terrorist groups, led to a recognition that new legislative language would be needed for both greater clarity and efficacy. Several realists, as seen below, also recognized this development.

Realist Arguments During the Obama Administration

Realists during the Obama Administration would also come from both parties, though were smaller in number than legalists, and skewed toward the Democratic party. A principle difference between realists and legalists during the Obama Administration was that legalists would refer to the WPR in demanding that the president take complying actions, whereas realists would point to the WPR as a spur for Congress to take action. Some realists would also take the administration to task for its definition of hostilities, though they would not place those critiques within the context of demands that the WPR should be triggered.

At the early 2009 hearing on “War Powers in the 21st Century,” Senator Kerry stated that he had no illusions about the effectiveness of the WPR, saying that “what is clear to all is that the 1973 War Powers Resolution has simply not functioned as intended.” But he would not make a robust realist defense of the balance of war powers until a few years later, after U.S. intervention in Libya. At the same hearing Senator Ted Kaufman (D-DE) said that the WPR had “been like a rugby football that’s been kicked around for 36 years.” Yet, he noted, Presidents have still consistently come to Congress because they know they need the broad support, and therefore, he said “the system works.” That sentiment – that the system works – was a perfect description of the realist position (S. Hrg. 111-255).

Soon after President Obama launched military operations against Libya, Senate Minority Leader Mitch McConnell took to the floor to discuss what role the U.S. military would play after the transfer of operational command to NATO. He noted that a mission which would involve close air support could last indefinitely and “would trigger congressional consideration,” and called upon the President to ask Congress for authorization before extending the mission (Congressional Record, Vol. 157, No. 42). By merely calling on the President to seek authorization, and not insisting that a lack of authorization would make the mission untenable within the strictures of the WPR, Senator McConnell was adopting the realist position that the WPR could be used to inject Congress into the debate, but not necessarily to constrain the President’s power.

Senator McCain, a strong supporter of the Libya intervention, nonetheless joined his colleagues on both sides of the aisle when he went to the floor to attack the administration's interpretation that U.S. forces were not engaged in hostilities in Libya and that, therefore, did not require authorization under the WPR. He criticized the administration for causing "further delay and confusion over Congress's role in this debate" which, he argued, would "continue ceding the initiative to the strongest critics of our actions in Libya" (Congressional Record, Vol. 157, No. 87). He later voiced his support for considering the Libya action under the WPR, stating that "it is time we did have a debate... and an opinion rendered in keeping with the War Powers Act" (Congressional Record, Vol. 157, No. 98). And in late 2012, McCain defended the President's use of force in Libya prior to seeking congressional authorization, saying that his actions "were in keeping both with the constitutional powers of the President and with past practices," but that Congress should still be involved, asserting that "the War Powers Act expressly calls that Congress make decisions. The Congress needs to be informed" (Congressional Record, Vol. 158, No. 154). In his statements, Senator McCain was supportive of the Obama Administration's military actions, but critical of its definitional gymnastics. However, his criticism did not focus on non-compliance with the WPR, but rather that the Administration's actions had caused delay and confusion, and that Congress needed to take action to make its own opinion known. In so doing, he was calling on Congress to take responsibility, not calling to constrain the administration or have it acknowledge Congress' war powers.

As mentioned in the previous section, Senator Kerry held a Foreign Relations Committee hearing on “Libya and War Powers” in June 2011, which was a prelude to the drafting of authorizing legislation for the use of military force. Much of the hearing revolved around the Obama Administration’s interpretation of the word “hostilities”, which, he pointed out, the Ford administration had defined as a situation where U.S. forces were exchanging fire with hostile forces. In Kerry’s interpretation, U.S. forces involved in the Libya conflict were not engaged in hostilities because they were not being shot at (S. Hrg. 112-89). A week earlier, he had explained on the floor that “even though I support the War Powers Act,” he did not believe it had been triggered because U.S. forces were not being shot at. At the hearing, he also criticized Congress for not acting to authorize or disapprove of the ongoing military action. But Kerry admitted that the WPR “was not drafted with drones in mind” and “maybe it is up to us now to redefine it in the context of this more modern and changed warfare and threat.” Kerry was thus staking out a realist position by acknowledging the role of the WPR, though not recognizing its legitimacy in this situation. Importantly, he put the onus on Congress for failing to take action, even though that, within the parameters of the WPR, a failure to take action over a certain time period (60 days) is still considered an “event” that triggers military withdrawal (as a legalist stance would have pointed to those deadlines). He also noted that the WPR’s structure was becoming dated as the nature of warfare evolved further. Senator Chris Coons (D-CT) also wondered whether the WPR needed updating to “reflect the reality of modern warfare” (S. Hrg. 112-89).

Senator Mike Lee (R-UT) also found it hard to accept the administration's definition of hostilities, arguing that armed personnel firing at military targets on foreign soil, "regardless of whether we have boots on the ground," should be considered hostilities. In an earlier floor speech, Senator Lee asserted the legitimate grounds of the WPR, noting that there comes a point when "we can recognize that we are at war and that some authorization is required by Congress", and that Congress, through the WPR, has distilled that principle (Congressional Record, Vol. 157, No. 48). Senator Lee was thus supporting the spirit of the WPR and the principles that it laid out, without necessarily demanding that it be adhered to. Rather than citing a 60-day clock, he makes a more general argument that since there is a war, it there should be "some" authorization by Congress. He is therefore supporting strong congressional war powers, but without using the WPR as a legal mechanism to do so (though he nonetheless did not pass up on the opportunity to take a potshot at the administration's "hostilities" argument).

In the 113th Congress, Senator Cardin specifically cited the WPR as an impetus for congressional action, saying that the Constitution involves both the President and Congress in deploying U.S. forces, and, specifically that "the President, as Commander in Chief, and the Congress, under the War Powers act, have a responsibility to authorize the use of force" (Congressional Record, Vol. 159, No. 118). Senator Cardin also introduced a bill, cosponsored by Senators Murphy and Merkley, to sunset the 2001 AUMF after three years, and included a provision that the President must work with Congress to secure new authorities for any military actions taken against al Qaeda and its affiliates after the expiration of the AUMF, in compliance with the Constitution and the WPR

(S.526). In both instances, Senator Cardin is citing the WPR as a mechanism to stimulate Congressional participation, not solely as a mechanism to constrain presidential power or expand congressional power. Rather, he wants Congress to make its voice heard, no matter whether it justifies doing so under the WPR or under the Constitution. Essentially, Cardin was not asserting that the Executive Branch had overstepped its bounds, but rather that Congress was being too timid.

Again, the defining characteristic separating legalists and realists during the Obama Administration was whether they appeared to think that the WPR put the onus on the president or on the Congress. Realists did refer to the WPR, but only within the context of accusing Congress of shirking its responsibilities, not of the president overstepping his.

Presidentialist Arguments During the Obama Administration

Senator Lindsey Graham, also an Air Force Judge Advocate General and strong advocate for intervention in Libya, went to the floor during the debate over the Libya AUMF and made a rare presidentialist argument, stating that “I believe the War Powers Act is unconstitutional,” and that there were two things Congress could do: either declare war or cut off funding – a classic power of the purse argument. He exhorted his colleagues who opposed the U.S. action in Libya to “not try to micromanage the war through congressional fiat” (Congressional Record, Vol. 157, No. 98).

In a curious move, and with no public explanation, in November 2011 Senator Thune (R-SD) submitted an amendment to the 2012 Department of Defense appropriations bill,

calling for the repeal of the WPR. Without any context, it is difficult to ascertain whether this was because he thought the WPR constrained the president or overly empowered the president. But given that all other presidentialists were Republican, and that there were no congressionalists in either party across both administrations studied, it is fairly safe to assume that Thune thought the WPR should be repealed because it was unconstitutional and, as he offered no alternative to strengthen or replace it, that he is a believer in executive authority.

Conclusion

During the Obama Administration, the sample included 17 Senators, of which 10 were Democrats (including one Independent who caucuses with the Democrats) and 7 Republicans.

Table 5.1 Findings: Argument Clusters during the Obama Administration

<u>Cluster</u>	<u>Total Number of Senators Expressing a Position (% are in parentheses)</u>	<u>Republicans</u>	<u>Democrats</u>
Congressionalist	0 (0)	0	0
Presidentialist	2 (12)	2	0
Legalist	10 (59)	3	7
Realist	5 (29)	2	3

U.S. Senate deliberations during the Obama Administration showed some evolution from those during the Bush Administration. Among the legalists, there was more focus on

legislative solutions to overhaul the WPR and assert Congress's war powers. These grew out of the negative experience of the Iraq war as well as the changing technologies and tactics of "light-footprint" warfare – a point also recognized by some realists. The administration's assertion that U.S. troops were not involved in hostilities – partly due to the deployment of stand-off weapons and unmanned platforms – brought these arguments and realizations to the fore. Realists were also more critical of the Obama Administration than their cohort was during the Bush Administration, but nonetheless did not argue that the president was overstepping his bounds, merely that Congress was not living up to its own responsibilities.

Debates during the Obama Administration also showed little shift in partisan political dynamics among the different groupings. Democrats dominated the legalists during the Bush Administration and there were no Republican legalists, and the Obama Administration still saw a strong number of Democrats among the legalist camp, while adding a few Republicans to their number. Yet the number of Democratic realists stayed roughly the same throughout both administrations – and were far fewer than the legalists. Combined, these findings suggest that Democratic Senators are more likely to maintain the legalist position whether they are in the opposition or not. This further suggests that Democrats are likely to adopt the legalist position out of institutional loyalty and not necessarily out of partisan expediency.

Chapter Six: Conclusion

The WPR sought to inject Congress back into the decision-making process, yet no President has ever acknowledged its constitutionality. The initial Congressional debates around the WPR revealed four major lines of argument on the balance of war powers; three of those continued to be made over the next 40 years, as Presidents from both political parties deployed U.S. forces abroad – often without Congressional authorization.

This study analyzed the prevalence and distribution of those lines of argument in the U.S. Senate across two administrations – one Republican and one Democrat – that were involved in multiple deployments of U.S. forces abroad, and experienced opposition from both parties. The study found that Democrats displayed consistency across both administrations, indicating a preference for legalist arguments that reflected both institutional loyalty and opposition politics, whereas Republicans tended to support the status quo with realist arguments. With Democrats likely to remain in the minority in the Senate for at least the next four years, they will probably continue to favor legalist arguments that express both their institutional loyalty and support their opposition politics.

In addition, the study found that Senators from both parties acknowledged the rapidly changing nature of warfare as new technologies mostly remove U.S. armed forces from harm's way, even as they conduct lethal strikes. With the incoming Trump administration appointing hawkish former generals to top positions in the national security apparatus, there is a strong possibility that they will favor military solutions to address some foreign

policy problems. What effect these trends will have on Congress's ability and willingness to further check executive war powers remains to be seen, but it is clear that the debate is far from over.

Summary and Analysis of Findings

This study applied the four "clusters" of argument surrounding the WPR, as identified by Phelps and Boylan, to Senate debates held during the Bush and Obama Administrations. Those clusters were as follows: congressionalists opposed the WPR because it gave the President too much power; presidentialists opposed the WPR because it constrained the President's power by too much; legalists supported the WPR because they believed that Presidents would follow the letter of the law; and realists supported the WPR because they believed it would inject Congress back into the warmaking process through more consultation and sequenced processes.

Based upon their relevant statements in the Congressional Record, each Senator was coded into one of the four clusters. For example, if a Senator believed that the WPR was unconstitutional because it infringed on executive power, they were coded as a presidentialist. If a Senator explicitly called upon the President to obey the terms of the WPR, they were coded as a legalist. If a Senator mentioned the WPR as helpful for prodding congressional action, but generally thought the President was not overstepping his bounds, they were coded as a realist. The study found no congressionalists.

A few data points stand out from the above quantitative analysis. First, no Republican Senators in the sample took a legalist position during the Bush Administration, whereas during the Obama Administration Republicans were roughly equal in favoring both the realist and legalist approaches. As the legalist position is associated with the opinion that the President needs to do more to involve Congress, and the realist position is associated with the opinion that the President is doing enough (status quo), it is perhaps not surprising that Republicans were more satisfied with the status quo during the Bush Administration, and more dissatisfied during the Obama Administration.

In addition, Democrats in the sample were roughly twice as likely to adopt the legalist position than the realist position, no matter whether the administration was Democratic or Republican, and adopted the respective positions in roughly equal numbers across both administrations. This suggests that Democrats have strong institutional loyalty and expect compliance with the WPR whether or not the President is a member of their party. Furthermore, no Democrats ever adopted a presidentialist position, which was to be expected based on the findings of the Phelps and Boylan study.

No Senators changed their tune when making arguments under a different president. However, Senators from both parties did state that the situation was not the same in the House of Representatives, which apparently had a more partisan approach to debating the WPR. Members from both parties expected more participation by and consultation with Congress when it comes to decisions regarding the use of armed force, but there did not appear to be much coherence or consistency among them as to what that should look like

in practice. Members of both parties introduced bills to upgrade or improve the intent and implementation of the WPR, but none made much progress in the legislative process. All of the AUMFs that passed explicitly referenced the WPR, yet there seemed to be near universal recognition among both realists, legalists, and presidentialists that the WPR did not function as it was intended to.

Legalists

The legalist position remained a strong one into the 21st century, with many Senators from both sides of the aisle repeatedly criticizing the presidents of both parties for not abiding by the letter of the law. As defined by Phelps and Boylan, legalists believed that the WPR would strengthen Congress's hand when it came to the war powers. Those authors explicitly noted the difference between these two clusters in their study: "the key difference between the legalists and the realists is the stress that the former places on following procedure (the letter of the law) and the latter places on broad principles (the spirit of the law). Timing is appropriate for the legalists if it follows the dictates of the law. For the realists, the context of the times and the end results (will the end product of debates and votes be valid and sensible?) are given priority" (Phelps and Boylan, 2002). For this study, any Senator who explicitly called on the President to obey the terms of the WPR – especially the 60-day clock – was coded as a legalist. The same assignment did not necessarily apply to those Senators who called on Congress to abide by the spirit of the WPR, as they were using the WPR to prod Congress to action, not to constrain the President.

Legalists could best be defined as “true believers” in the WPR – they may recognize that it is not perfect, but they insist that it is the law of the land and the President is bound to follow it. They believe that Congress should have a larger role, and they believe that the WPR is the best way to realize that vision. However, the legalist position is also the least logical: by arguing for the president to follow a law which no president has ever recognized as constitutional, the legalists are waging a quixotic campaign at best. They know the WPR does not work, and that the president will not follow it, yet they simultaneously insist on its application. The conclusion of Phelps and Boylan held true through this study, namely that “the hope, then, of the legalists that the WPR would provide a clear and unambiguous legislative interpretation of the Constitution concerning the use of military force has proven too optimistic” (Phelps and Boylan, 2002).

What is striking from the results is that, across both administrations, legalists composed a plurality of those Senators who went on record with their views about the war powers. Yet, the legalist position is arguably the least tenable. The presidentialists and congressionalists have clear rationale: the WPR is bad, and should be repealed – this position has held its logic ever since the legislation was crafted over 40 years ago, even if the congressional camp has gone the way of the woolly mammoth. The realist position has also maintained its logical underpinning: that there will never be a complete resolution of the issue of the war powers between the president and congress, and that, all things being (un)equal, the status quo seems to work well enough – the Congress gets to have its say one way or another, and a desire for legitimacy and public approval ultimately drives

president's to seek congressional authorization. If he fails to do so, then the political consequences of failure are on his shoulders alone.

But the legalists have maintained the same argument even though 40 years of practice have shown it to be completely untenable. When the WPR was crafted in the early 1970s, the legalists expected that the executive branch would follow it to the letter and that it would thus restore the war powers of the legislative branch. But that has never been the case – nor is it likely to ever be the case. All of the legalists seem to realize this – they are smart people with smart staffs, yet they still cling to the position that the president should follow a law that no president has ever followed. There could be any number of reasons behind this stance: perhaps they fear abdicating what little power the statute gives them, or perhaps they know that, once the WPR is officially buried, nothing will rise to take its place, and that it's better to have a broken tool than no tool at all.

Realists

On realists, Phelps and Boylan's study concluded that “the realists' hope (and the congressionalists' fear)—that perhaps the WPR would at best provide a framework within which the great debates about war and peace might be conducted—is probably closer to the mark” (Phelps and Boylan, 2002). My study, meanwhile, found that realists were generally accepting of the current state of play, realizing that the WPR does not work as intended but that it does still give Congress a mechanism with which to insert itself into the debate. Realists think that Congress should play a role regardless of the WPR, but they note its usefulness for prodding congressional action. In comparison to

legalists, they cite the consultation provisions of the WPR as opposed to the 60-day clock. In so doing, they are neither acquiescing to presidential power, nor taking a position where they would need to confront it, but could be seen most appropriately as proponents of the status quo (the WPR in practice – unobserved).

Congressionalists

The “congressionalist” – a member who believed that the WPR should be repealed because it reduced the war powers of the legislative branch – appears to be an extinct species, at least when it comes to the Congressional Record of debate in the Senate. This does not come as a large surprise, because the congressionalist was born in the flames of the Vietnam War, when the thought to some of allowing a president to unilaterally initiate any type of military action, without congressional approval, was totally anathema. Just such an action had led to the intervention and escalation in Vietnam. But in the 21st century, after decades of presidents routinely exercising the war power without congressional approval, the congressionalist seems to have slowly disappeared, replaced by a much more popular position of using the WPR as a rather powerless rhetorical weapon against presidential overreach.

Presidentialists

Presidentialists, however, continue to thrive, albeit in relatively small numbers. Vocal presidentialists stated their belief that the WPR should be scrapped because it infringes on the executive branch’s authority, and that Congress has plenty of power to constrain the executive through the authorizations and appropriations processes. It should also be

noted that, consistent with the findings of the Phelps and Boylan study, all presidentialists were members of the Republican party.

The Role of Partisanship

Possible partisan correlations also came into view across the two administrations, in that there were no Republican legalists during the Bush Administration, but some during the Obama Administration. Democratic Senators, on the other hand, maintained approximately consistent numbers of realists and legalists across both administrations.

One possible explanation is that, as legalists were more likely to be dissatisfied with the Administration's actions with regards to the level of consultation and coordination with Congress, Republicans were unlikely to adopt a critical legalist position against the Bush Administration given widespread support among the public and their party for military action against Iraq. Democrats, on the other hand, whether supporting (2001 AUMF) or opposing (2002 AUMF) the President's actions, could use the legalist position to take a critical stance against the Administration. Similarly, as Democrats are more likely to be "doves" (those with a softer foreign policy position, advocating diplomacy over military force), it would be expected that some would adopt a critical legalist position against a President of their own party, while Republicans would adopt a legalist position against a Democratic President within the context of opposition politics. In adopting the legalist positions across both administrations, Democrats may also have been demonstrating a propensity for institutional loyalty over party loyalty.

While partisanship did not appear to play a role in Senate debates over the WPR, the situation was apparently different in the House of Representatives. Majority Leader Harry Reid (D-NV) took to the floor to express his support for U.S. actions in Libya, but lamented that Republicans in the House of Representatives and on the campaign trail had “decided to use the War Powers Resolution as a political bludgeon to pursue a partisan agenda” (Congressional Record, Vol. 157, No. 90). Senator Leahy, Chairman of the Judiciary Committee, later made the same point on the floor, saying that many Republicans, including leaders in the House, had contended that the WPR was unconstitutional during the previous Bush Administration, but were “now seeking to use it as a partisan cudgel to diminish this President” (Congressional Record, Vol. 157, No. 95). Senator Lindsey Graham (R-SC) would echo these charges against his own party a year later, when he went to the floor during debate of a resolution on Iran and said that, even though he thought the WPR unconstitutional, he found it “odd that our party for all these years has railed against the War Powers Act until President Obama is in office, and all of a sudden we are great champions of the War Powers Act” (Congressional Record, Vol. 158, No. 71).

President Obama, when speaking about the decision on whether to intervene in Syria, complained about some Republican Senators who sought to avoid making a politically difficult decision. He recalled the situation in an interview with *New York Magazine*: “My decision was to see if we could broker a deal without a strike to get those chemical weapons out, and to go to Congress to ask for authorization, because nowhere has Congress been more incoherent than when it comes to the powers I have. You had

people, I think, like Marco Rubio, who was complaining about us not doing anything, and when I said, ‘I’m gonna present to Congress,’ suddenly he said, ‘Well, I’m gonna vote against it.’ Maybe it was Ted Cruz. Maybe both. They’re all over the map. The primary principle—and this is not true for all of them, but for many of them—was ‘Just make sure that we don’t get blamed for whatever decision you make’” (New York Magazine, October 2016).

Both of the Senators Obama referred to ran for the Republican nomination, so they might have been especially keen to avoid taking any responsibility for the President’s decision to use military force, but the underlying point is one also recognized by scholars of the WPR – that Congress often uses it as a way to criticize the President without making an actual decision on the actions he chooses to take. Demanding that the President adhere to an unrecognized relic of the past like the WPR gives the Senators safe harbor – it is familiar ground, a clear reference point laid out by their predecessors, and one which they can claim should hold the executive branch to account on matters of war without, indeed, ever having to actually hold themselves to account on the same solemn issue. Perhaps that is what serves their interests best: to keep arguing the same arguments, insisting on their institutional prerogative while taking no action that might actually enforce their own perceptions and, more pointedly, present potential political difficulties for their own careers.

Limitations of the Study

The study has several limitations. Firstly, legislation and statements made on the floor and in committee proceedings are not an exhaustive source of congressional deliberations; most of what members say on a matter probably never makes it into these records. Furthermore, many members may choose to remain silent, so these sources do not reflect the full universe of members' opinions. That being said, members with strong views on a subject have ample opportunity to make their views known in the public record and through introduced legislation. As a forum for debate and discussion, the floor, committees, and proposed legislation reflect the Senate's institutional voice. Another obvious limitation is the limited time period to be analyzed, but the study will be easily replicable for other presidencies should future studies wish to expand on its findings. In addition, it should be noted that the Bush Administration entered two major military conflicts and had Congressional authorization for both, whereas the Obama Administration was involved in much smaller-scale conflicts and failed to obtain Congressional authorization for any of them.

The study recognizes that Senators who remain in the institution over time will gradually achieve leadership positions, which, in turn, may affect how they view the institution and its powers, independent of the president's party. For example, a freshman Senator may be more deferential to the president's power than a long-term member who holds the chairmanship of a national security committee.

The study also only examined the Senate, so it is not be clear whether the same findings would apply for the House of Representatives. However, when choosing which institution to examine, the Senate has many advantages over the House: its members serve longer terms, have more relative power, and have more opportunity to speak on the floor.

Future research

Future research on this topic should incorporate the House of Representatives. Doing so would provide data for several interesting comparisons, such as whether the House is a more partisan institution when it comes to the WPR, and whether the content of the debate differs significantly from that in the Senate.

Given the relatively small sample size gleaned from just using the Congressional Record, future research could also widen the aperture to include everything on the public record, including statements to the media, public speeches not made in the Senate, op-eds, etc. This would likely capture a larger number of Senators and provide a fuller picture of both the content and the evolution of the debate.

There is also potentially enough on the record for a more focused study of how the debate has evolved in parallel with the evolution of modern warfare, and how Congress has made various attempts to “catch up.”

Broader Implications

With a new administration soon coming into office, the findings of this study provide a sense of how the current and future Senates might respond to the President's use of force abroad. While Senators from both parties spoke of updating the WPR to reflect the evolution of modern warfare, these discussions appeared to only take place during the Obama Administration. The likely explanation is that the Obama Administration made much greater use of small, targeted interventions such as Special Forces raids and remote strikes by armed drones. In addition, new technologies became available for deployment during this time period. The Bush Administration, by contrast, mostly pursued large-scale deployments of U.S. armed forces, of the kind that the original drafters of the WPR imagined. Furthermore, the Obama Administrations use of remotely controlled and stand-off capabilities led to the controversy over the definition of "hostilities" – an argument that was taken up by legalists on both side of the aisle. Though, as Phelps and Boylan noted in their study, this was not a new phenomenon: "the task of defining terms such as war, hostilities, and consultation and phrases such as 'in every possible instance' has not become easier since 1973" (Phelps and Boylan, 2002).

As the Obama Administration progressed, debate began to focus increasingly not only on how the WPR was being ignored or violated, but on whether the WPR was even sufficient anymore given the evolving nature of warfare, where pilotless drones roam the battlefield instead of armed soldiers, and cyber attacks on critical civilian infrastructure can be perhaps as or more damaging than attacks by conventional weapons. Given new weapons, doctrines of warfare, and threats -- virtually all from disparate, non-state actors

spread across both governed and ungoverned spaces -- a piece of legislation crafted to control the deployment of tens or hundreds of thousands of soldiers will not apply well, notwithstanding that it already is not adhered to by the executive branch.

President Obama articulated his own concerns about the rise of the use of drones during his presidency, and what it could mean under future presidencies if Congress did not take a more active role. In an interview with *New York Magazine*, Obama said that “the critique of drones has been important, because it has ensured that you don’t have this institutional comfort and inertia with what looks like a pretty antiseptic way of disposing of enemies... And it troubled me, because I think you could see, over the horizon, a situation in which, without Congress showing much interest in restraining actions with authorizations that were written really broadly, you end up with a president who can carry on perpetual wars all over the world, and a lot of them covert, without any accountability or Democratic debate” (*New York Magazine*, October 2016).

If there ever was to be another “Vietnam moment” of the sort that catalyzed congressional action to pass the WPR, then it arguably would have been the Iraq War carried out by the first Bush Administration which, like the Vietnam War, was authorized on a premise that was later proved to be false, and lasted for far, far longer than anyone had expected (indeed, soon to be longer than the Vietnam War). Yet that has not led to a serious or sustained discussion on the need for a new WPR. One therefore sees little likelihood that Congress will gather the institutional consensus to properly address the war powers issue.

A close review of deliberations in the Senate over the course of the first two administrations of the 21st century also reveals that the contours of the debate over the war powers began to shift. During the Bush Administration, the Senate adopted the practice of adding WPR language to all AUMFs under consideration, institutionalizing the language of the WPR and giving it a role (and therefore a lever for legalists to use against the Administration) in every piece of legislation that granted the President the authority to use military force.

What strikes the observer as curious, however, is that given the repeated position by the executive branch that the WPR is unconstitutional (and the refusal by the judicial branch to weigh in), why do Senators still insist on invoking the WPR? With the original writers of the WPR having long since left the Senate, why not simply accept that their piece of legislation had failed, and move the discussion toward more productive ends, rather than re-litigating a losing argument again and again? Such a position could ostensibly be seen as admitting defeat and accepting a reduction of congressional power, without getting anything in return. But it could also be viewed as a recognition that the job was not done right, and, especially given the new context of stateless terrorist groups and advanced warfare technology, the time has come to approach the issue anew. However, even were Congress able to craft new legislation, one can imagine that any solution they come up with will similarly become dysfunctional or obsolete within a relatively short period of time, given the increasingly quickly evolving nature of modern warfare.

Yet one could argue that a stronger legislative branch check on executive power is needed now more than ever. Ever since September 11th, 2001, the United States has been at war in multiple countries across multiple theaters. While the term “Global War on Terror” may have been abandoned, the use of military force against terrorist organizations around the world has not. If anything, the scope and intensity has only increased with time, and all based on an authorization that is nearly 15 years old. The wars in Iraq and Afghanistan, while having a discrete starting date, still have no foreseeable end for the involvement of U.S. forces, despite the best efforts of President Obama to end withdraw U.S. troops from both countries. The incoming Trump Administration, while during the campaign season having espoused a relatively non-interventionist foreign policy stance, has already chosen relatively hawkish, hard-line candidates to become National Security Advisor and Director of the Central Intelligence Agency, meaning a potential uptick in military engagement against violent extremists and terrorist groups. Former generals are being vetted for other top positions in national security agencies, which could possibly lead to military options being considered as first options to address some foreign policy problems.

Meanwhile, terrorist groups are expanding their operations into new countries around the world, especially in Europe, South Asia, and Northern Africa. While traditional zones of conflict like the Middle East still occupy U.S. attention, increasingly aggressive actions by more traditional geopolitical foes, like Russia in Crimea and Eastern Europe, or China in the South China Sea, are also attracting the attention of U.S. military planners. Terrorism now afflicts more countries than at any other time in history, and while the

United States has avoided any major, foreign-directed attacks since 2001, other countries have lost hundreds or thousands of their citizens over the years. The decreasing security situation and an increase in conflict-related immigration has consequently led to a surge in popularity among far-right political candidates, who promise to take an even harder line on terrorist groups.

At the same time, new tactics and technologies have been and are being developed that make it easier than ever to deploy military force without “going to war” in the traditional sense. Combined with the abandonment of the draft system for an all-volunteer force, fewer and fewer parts of the population have any direct relation to, or even acquaintance with, the soldiers, sailors, airmen, and marines that are sent abroad and put in harm’s way.

All of these trends put together could lead to the conclusion that the President has a greater ability to exercise the use of military force with less oversight from the public than ever before. It should then fall to Congress to take a stronger approach toward exercising its check on executive powers in matters of war. Clearly, the WPR as it stands has not worked as a sufficient solution over the past 40-plus years. If anything, it has allowed Congress to mostly shirk its legislative responsibilities in matters of war while engaging in rhetorical battle over presidential compliance (or lack thereof) with the WPR. In an interview toward the end of his final term, President Obama complained of Congress’s lack of efficacy in this regard: “on all the issues we’ve discussed, but certainly on these issues of war and peace, the need for a more effective Congress and the

desirability of legislation as the best solution to most of these problems remains... If there's one wish that I have for future presidents, it's not an imperial presidency, it is a functional, sensible majority-and-opposition being able to make decisions based on facts and policy and compromise" (Chait, New York Magazine, October 2016).

While the results of the 2016 presidential election were doubtless based more on economic than foreign policy concerns, they nonetheless reflected a rejection of interventionist policies and a desire to reduce America's military footprint abroad. Whether or not that means that Congress will not need to exercise its war powers in the coming years remains to be seen. With Democratic Senators likely in the minority for the next four years, they will probably continue to maintain legalist positions both out of the prerogatives of opposition politics and their sentiment for institutional loyalty. Republicans, meanwhile, are likely to maintain a mix of mostly realist and presidentialist positions, perhaps with a few legalists added in. Yet regardless of which clusters dominate future debates, it's clear that the WPR will continue to fail as an effective check on executive power, and that Senators will likely work on the margins of their legislative powers to attempt to influence the President's decisions on matters of war and peace.

Works Cited

Bowman, Steve. *Kosovo and Macedonia: U.S. and Allied Military Operations*. Congressional Research Service. July 08, 2003

Burgin, Eileen. *Rethinking the Role of the WPR: Congress and the Persian Gulf War*. Winter, 1995. *Journal of Legislation*. p. 23

Carter, Stephen L. *The Constitutionality of the WPR*. February, 1984. *Virginia Law Review*; p. 101

Chait, Jonathan. *Five Days That Shaped a Presidency*. *New York Magazine*, 2 October 2016, <http://nymag.com/daily/intelligencer/2016/10/barack-obama-on-5-days-that-shaped-his-presidency.html>. Accessed 26 November 2016.

Cohen, Jeffrey E. *Review: Agendas and Instability in American Politics*. *The Journal of Politics*, Vol. 56, No. 4 (Nov. 1994), 1164-1166.

Corn, Geoffrey S. *Clinton, Kosovo, and the Final Destruction of the WPR*. April 2011. *William and Mary Law Review*. p.1149

Corwin, Edward S. *The President: Office and Powers, 1787-1957*. New York University Press. 1957. p. 171

Cowan, Kelly L. *Rethinking WPR: a Strengthened Check on Unfettered Presidential Decision Making Abroad*. Winter, 2004 45 *Santa Clara Law Review* 99.

Croco, Sarah E. "Flip-Flops and High Heels: An Experimental Analysis of Elite Position Change and Gender on Wartime Public Support." *International Interactions*, Vol. 40, No. 1. January 01, 2014.

Dagget, Stephen. *Costs of Major U.S. Wars*. Congressional Research Service. June 29, 2010.

Editorial Board. "Cleland's Second Thoughts." *Augusta Chronicle*, 24 April 1999, http://chronicle.augusta.com/stories/1999/04/25/op_259899.shtml#.WDfRbuErK3V. Accessed 24 November 2016.

Ely, John Hart. *Suppose Congress Wanted a War Powers Act that Worked*. 88 *Columbia Law Review* 1379 (November 1988)

Fisher, Louis. "Military Operations in Libya: No war? No Hostilities?" *Presidential Studies Quarterly* 42 (March 2012) p.181

Fisher, Louis. *Presidential War Power*. University Press of Kansas, 1995.

Gijs Schumacher, Catherine E. de Vries, Barbara Vis, "Why Do Parties Change Position? Party Organization and Environmental Incentives," *The Journal of Politics* Vol. 75, No. 2. April 2013.

Grandoni, Dino. "Senate Gridlock Explained in One Chart." *The Wire*, 08 March 2012, <http://www.thewire.com/national/2012/03/us-Senate-now-completely-polarized/49641/>. Accessed 24 November 2016.

Henry, Donna H. *The WPR: A Tool for Balancing Power through Negotiation*. June 1984. *Virginia Law Review*. P.1037-1058

Kavanagh, John J. *U.S. War Powers and the United Nations Security Council*. Boston College International and Comparative Law Review. Winter, 1997. p.159

Madison, James. *Letter to Thomas Jefferson, April 2, 1798*. The Writings of James Madison, ed. Gaillard Hunt, vol. 6, pp. 312-33

Morrison, "Libya, 'Hostilities,' the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation," *Harvard Law Review Forum*, 2011, 62ff

Moore, David. *Eight of 10 Americans Support Ground War in Afghanistan*. Gallup, 01 November 2001, <http://www.gallup.com/poll/5029/eight-americans-support-ground-war-afghanistan.aspx>. Accessed 26 November 2016.

Mucciaroni, Gary and Paul J. Quirk. *Deliberative Choices: Debating Public Policy in Congress*. University of Chicago Press, 2006.

Newport, Frank. *Public Support for Invasion of Iraq Holds Steady*. Gallup, 28 February 2003, <http://www.gallup.com/poll/7891/public-support-invasion-iraq-holds-steady.aspx>. Accessed 26 November 2016.

Poole, Keith; Rosenthal, Howard. "Average Ideology of the House and Senate, 1947 – 2014." *Brookings Institution*, 09 July 2013, <https://www.brookings.edu/interactives/average-ideology-of-the-house-and-senate-1947-2014/>. Accessed 24 November 2016.

Rettig, Jessica. *End of NATO's Libya Intervention Means Financial Relief for Allies*. U.S. News: October 31, 2011.

Robbins, Patrick D. *The WPR after fifteen years: A Reassessment*. American University, *American University Law Review*. Fall, 1988 38 Am. U.L. Rev.

Safire, William. *Tug of War*. New York Times, 13 September 1987, <http://www.nytimes.com/1987/09/13/magazine/war-powers-tug-of-war.html?pagewanted=1>. Accessed 26 November 2016.

Torreon, Barbara Salazar. "Instances of Use of United States Armed Forces Abroad, 1798-2016." *Congressional Research Service*. October 7, 2016.

U.S. Congress. Senate. *Congressional Record: Vol. 147, No. 73*. 107th Cong., 1st Sess., May 24, 2001.

U.S. Congress. Senate. *Congressional Record, Vol. 147, No. 118*. 107th Cong., 1st Sess., September 12, 2001.

U.S. Congress. Senate. *Congressional Record, Vol. 147, No. 120*. 107th Cong., 1st Sess., September 14, 2001.

U.S. Congress. Senate. *Congressional Record, Vol. 147, No. 129*. 107th Cong., 1st Sess., October 1, 2001.

U.S. Congress. Senate. *Congressional Record, Vol. 148, No. 13*. 107th Cong., 2nd Sess., February 13, 2002.

U.S. Congress. Senate. *Congressional Record, Vol. 148, No. 34*. 107th Cong., 2nd Sess., March 21, 2002.

U.S. Congress. Senate. *Congressional Record, Vol. 148, No. 56*. 107th Cong., 2nd Sess., May 7, 2002.

U.S. Congress. Senate. *Congressional Record, Vol. 148, No. 73*. 107th Cong., 2nd Sess., June 6, 2002.

U.S. Congress. Senate. *Congressional Record, Vol. 148, No. 75*. 107th Cong., 2nd Sess., June 10, 2002.

U.S. Congress. Senate. *Congressional Record, Vol. 148, No. 89*. 107th Cong., 2nd Sess., June 28, 2002.

U.S. Congress. Senate. *Congressional Record, Vol. 148, No. 112*. 107th Cong., 2nd Sess., September 9, 2002.

U.S. Congress. Senate. *Congressional Record, Vol. 148, No. 133*. 107th Cong., 2nd Sess., October 10, 2002.

U.S. Congress. Senate. *Congressional Record, Vol. 149, No. 100*. 108th Cong., 1st Sess., July 9, 2003.

U.S. Congress. Senate. *Congressional Record*, Vol. 149, No. 117. 108th Cong., 1st Sess., August 1, 2003.

U.S. Congress. Senate. *Congressional Record*, Vol. 150, No. 103. 108th Cong., 2nd Sess., July 22, 2004.

U.S. Congress. Senate. *Congressional Record*, Vol. 153, No. 15. 110th Cong., 1st Sess., January 25, 2007.

U.S. Congress. Senate. *Congressional Record*, Vol. 153, No. 45. 110th Cong., 1st Sess., March 15, 2007.

U.S. Congress. Senate. *Congressional Record*, Vol. 153, No. 166. 110th Cong., 1st Sess., October 30, 2007.

U.S. Congress. Senate. *Congressional Record*, Vol. 154, No. 128. 110th Cong., 2nd Sess., July 30, 2008.

U.S. Congress. Senate. *Congressional Record*, Vol. 157, No. 48. 112th Cong., 1st Sess., April 5, 2011.

U.S. Congress. Senate. *Congressional Record*, Vol. 157, No. 82. 112th Cong., 1st Sess., June 8, 2011.

U.S. Congress. Senate. *Congressional Record*, Vol. 157, No. 85. 112th Cong., 1st Sess., June 14, 2011.

U.S. Congress. Senate. *Congressional Record*, Vol. 157, No. 90. 112th Cong., 1st Sess., June 22, 2011.

U.S. Congress. Senate. *Congressional Record*, Vol. 157, No. 95. 112th Cong., 1st Sess., June 29, 2011.

U.S. Congress. Senate. *Congressional Record*, Vol. 157, No. 98. 112th Cong., 1st Sess., July 5, 2011.

U.S. Congress. Senate. *Congressional Record*, Vol. 158, No. 65. 112th Cong., 2nd Sess., May 9, 2012.

U.S. Congress. Senate. *Congressional Record*, Vol. 158, No. 71. 112th Cong., 2nd Sess., May 17, 2012.

U.S. Congress. Senate. *Congressional Record*, Vol. 160, No. 10. 113th Cong., 1st Sess., January 16, 2014.

U.S. Congress. Senate. *Congressional Record*, Vol. 160, No. 155. 113th Con., 1st Sess., July 31, 2014.

U.S. Congress. Senate. *Congressional Record*, Vol. 161, No. 69. 113th Con., 2nd Sess., May 7, 2015.

U.S. Congress. Senate. *Congressional Record*, Vol. 161, No. 126. 113th Con., 2nd Sess., August 5, 2015.

U.S. Congress. Senate. Committee on Foreign Relations. *A Joint Resolution Authorizing the Limited Use of the United States Armed Forces in Support of the NATO Mission in Libya: Report (to accompany S.J. Res. 20)*. 112th Cong., 1st Sess., 2011. S. Rep. 112-27.

U.S. Congress. Senate. Committee on Foreign Relations. *National Commitments: Report*. 91st Cong., 1st Sess. 1969. S. Rep. 91-129.

U.S. Congress. Senate. Committee on Foreign Relations. *Applying the War Powers Resolution to the War on Terrorism: Hearing before the Committee on Foreign Relations*. 107th Cong., 2nd Sess., April 17, 2002. S. Hrg. 107-892.

U.S. Congress. Senate. Armed Services Committee. *Department of Defense's Implementation of the President's Military Order on Detention Treatment and Trial by Military Commission of Certain Noncitizens in the War on Terrorism: Hearing before the Armed Services Committee*. 107th Cong., 2nd Sess., December 12, 2001. S. Hrg. 107-513.

U.S. Congress. Senate. Committee on Foreign Relations. *War Powers in the 21st Century: Hearing before the Committee on Foreign Relations*. 111th Cong., 1st Sess., April 28, 2009. S. Hrg. 111-255.

U.S. Congress. Senate. Committee on Foreign Relations. *Libya and War Powers: Hearing before the Committee on Foreign Relations*. 112th Cong., 1st Sess., June 28, 2011. S. Hrg. 112-89

U.S. Congress. Senate. *A joint resolution declaring that the President has exceeded his authority under the War Powers Resolution as it pertains to the ongoing military engagement in Libya*. S.J.Res.16. 112th Cong. (2011)

U.S. Congress. Senate. *A joint resolution authorizing the limited use of the United States Armed Forces in support of the NATO mission in Libya*. S.J.Res.20. 112th Cong. (2011)

U.S. Congress. Senate. *War Powers Consultation Act of 2014*. S.1939. 113th Cong. (2014)

U.S. Congress. Senate. *War Powers Against Non-State Actors Act of 2015*. S. 3109. 113th Cong. (2014)

U.S. Congress. Senate. *Sunset of the 2001 Authorization for Use of Military Force Act*. S. 526. 114th Cong. (2015).

U.S. Congress, Senate. *Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant and its Associated Forces*. S.J.Res.29. 114th Cong. (2016)

War and National Defense, U.S. Code 50 (1973) §§ 1541.

U.S. Department of Justice, Office of the Legal Counsel. “Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization.” February 12, 1980. <https://www.justice.gov/olc/opinion/presidential-power-use-armed-forces-abroad-without-statutory-authorization> (accessed November 26, 2016).

CQ Almanac. “Concern Grows Over U.S. Foreign Commitments.” 1967. <https://library.cqpress.com/cqalmanac/document.php?id=cqal67-1313177> (accessed November 26, 2011).

Richard Nixon, “Veto of the War Powers Resolution. October 24, 1973, ” in *Public Papers of the Presidents of the United States: Richard Nixon*. 1973, p. 311.