THE WAR POWERS RESOLUTION AND THE CONCEPT OF HOSTILITIES

*By Erica H. Ma**

* J.D., 2020, New York University School of Law; B.A., 2015, University of Pennsylvania. Many thanks to David Golove, Tess Bridgeman, David Kamin, Tommy Bennett, and members of the Furman Academic Program at NYU Law for their comments and feedback on earlier drafts of this work.

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ABSTRACT

In early 2020, in response to airstrikes that killed Iranian general Qassem Soleimani, the U.S. House and Senate passed a resolution calling for President Trump to end escalating military hostilities against Iran. Although ultimately vetoed, this resolution marked only the second time in history that measures invoking the War Powers Resolution of 1973 to limit the President's authority to use force have passed both legislative houses, demonstrating Congress's increasing willingness to assert its constitutional role in matters of war powers. Although questions of when the nation can go to war are deeply contested, this Article argues that the steady accretion of the President's war powers should not remain unconstrained.

The War Powers Resolution (WPR), which imposes a withdrawal mandate on unauthorized introductions of armed forces into "hostilities," remains the best framework for checking presidential unilateralism. This Article presents a systematic investigation of the executive branch's practice of circumventing the WPR's requirements, highlighting two examples of how the executive branch has narrowly interpreted "hostilities" in recent years. In analyzing whether and how legal processes constrain the President, this Article proposes two ways of reconceptualizing "hostilities" to prevent future circumvention of the WPR. First, it argues that a state of "hostilities" can exist even when the U.S. plays a supporting role in a partner mission and that "hostilities" must be reframed to encompass situations in which U.S. troops use or are subject to lethal force. Second, this Article proposes considering the following criteria to determine whether U.S. armed forces face ongoing hostilities: (1) whether there is a risk of harm to U.S. forces from exchanges of fire, taking into consideration the likelihood of sustained violence occurring over an extended period of time, as indicated by factors like internal rules of engagement; and (2) whether there is regular use of force by or against U.S. forces, taking into consideration additional troop deployments.

Introduction

In February 2020, the Senate passed a resolution calling for an end to escalating military hostilities against Iran without congressional authorization.[1] A month later, the House of Representatives passed the resolution as well,[2] but in May 2020, the resolution landed on President Donald Trump's desk, where it was vetoed.[3] The day after, Congress attempted to override the veto but lacked the necessary two-thirds majority.[4] With only a handful of Republicans breaking ranks in both the House and Senate to vote for the resolution, it amounted to no more than a "legal slap on the wrist"[5] for the Trump Administration.

Congress pushed for this resolution in response to the Trump Administration's series of strikes against Iran in late 2019 and the January 2, 2020, strike that killed Iranian general Qassem Soleimani. House Foreign Affairs Chairman Eliot Engel argued on the House floor that legislation curtailing President Trump's actions against Iran was necessary, and that "Congress's powers are not as narrow as the administration would like us to believe."[6]

These steps that Congress took are significant. A provision of the War Powers Resolution of 1973 (WPR) allows Congress to direct the President to remove U.S. armed forces from "hostilities,"[7] and the Iran resolution marks only the second time in history that measures invoking the WPR to limit the President's authority to use force have passed both the House and Senate. The first instance occurred in April 2019, only a year prior, when the House and Senate passed resolutions calling for an end to U.S. support for the Saudi-led coalition in Yemen's bloody civil war.[8] U.S. involvement at

1 Catie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. Times (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html.

2 H.R. Res. 891, 116th Cong. (2020); Connor O'Brien, *House Votes to Curtail Trump's Iran War Powers, Setting Up Veto Fight*, Politico (Mar. 11, 2020), https://www.politico.com/news/2020/03/11/house-trump-iran-war-powers-126247.

3 166 Cong. Rec. S2286-87 (daily ed. May 6, 2020) (Presidential Message).

4 Roll Call Vote No. 25, S.J. Res. 68, 116th Cong. (2020); Jordain Carney, *Senate Fails to Override Trump's Iran War Powers Veto*, Hill (May 7, 2020), https://thehill.com/homenews/senate/496616-senate-fails-to-override-trumps-iran-war-powers-veto.

5 *See* O'Brien, *supra* note 2.

6 *U.S. House of Representatives: House Session*, C-SPAN (2:14:18), https://www.c-span.org/video/?470231-2/house-session&start=7991.

7 War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548).

8 Robbie Gramer & Amy Mackinnon, *Congress Is Finally Done with the War in Yemen*, Foreign Policy (Apr. 4, 2019), https://foreignpolicy.com/2019/04/04/congress-

the time had included arms sales,[9] military advisers, intelligence, and mid-air refueling of Saudi aircraft.[10] The Trump Administration, maintaining that U.S. troops were not involved in "hostilities" in Yemen, argued that the WPR did not require the withdrawal of troops.[11] Ultimately, Congress was unable to muster two-thirds majority support, and the resolution died after Trump's veto.[12]

Congress's actions over Iran and Yemen represent an attempt to reassert its constitutional authority over U.S. military action. Importantly, these steps demonstrate that Congress "is both able and willing to take on the responsibility of articulating approaches to foreign policy independent of the executive branch."[13] Despite the fact that the Obama Administration initiated U.S. involvement in Yemen without congressional authorization, Congress's recent actions attempt to rebalance constitutional war powers and engage in meaningful oversight over future uses of force.[14] As Stephen Pomper has noted, executive overreach "does not mean Congress has to throw in the towel on its rights and responsibilities."[15]

Questions of when and how the President can go to war or send U.S. armed forces abroad are deeply contested, and considerations of the balance of war powers are especially relevant now at a time when U.S. involvement in overseas conflicts is once again at the forefront of the national conversation. Political scientist Edward Corwin once famously observed that the Constitution is "an invitation to struggle for the privilege of directing American foreign policy."[16] Under the Constitution, war powers are divided between the President and Congress. The President is Commander in

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makes-history-war-yemen-powers-bill.

9 *Id.*

10 Lawrence Friedman & Victor Hansen, *The Senate Strikes Back: Checking Trump's Foreign Policy*, JUST SECURITY (Dec. 14, 2018), https://www.justsecurity.org/61867/senate-strikes-back-checking-trumps-foreign-policy.

11 *See* Gramer & Mackinnon, *supra* note 8.

12 *See* Roll Call Vote No. 25, S.J. Res. 68, 116th Cong. (2020); Mark Landler & Peter Baker, *Trump Vetoes Measure to Force End to U.S. Involvement in Yemen War*, N.Y. TIMES (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/us/politics/trump-veto-yemen.html.

13 *See* Friedman & Hansen, *supra* note 10.

14 *See id.* ("[T]he Senate vote represents the kind of congressional involvement that may lead to greater accountability for American foreign policy decisions that typically escape the attention of many citizens.").

15 Stephen Pomper, *The Soleimani Strike and the Case for War Powers Reform*, JUST SECURITY (Mar. 11, 2020), https://www.justsecurity.org/69124/the-soleimani-strike-and-the-case-for-war-powers-reform.

16 EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 171 (4th ed. 1957).

Chief of the armed forces,[17] and Congress has the power to declare war, among other related powers.[18] The Founders believed that Congress was primarily responsible for authorizing uses of force, with narrow exceptions permitting the President to repel sudden armed attacks or rescue American nationals abroad.[19] Over the course of U.S. history, there have been formal declarations of war across five wars, in addition to statutory authorizations for the use of force.[20] However, since the time of the founding, the executive branch has steadily interpreted its war powers expansively, and with courts reluctant to adjudicate any sort of tug-of-war-powers between the President and Congress, the law in this area has been heavily based on historical practice.[21] With a history of "under-motivated Congresses and over-reaching presidents,"[22] the conventional adage is that the President's war powers have become essentially unconstrained.

This Article joins the ranks of scholarly work arguing that presidential unilateralism, which risks "miscalculation and aggrandizement,"[23] is not normatively appealing and should not remain unconstrained. It argues that Congress should seek to reassert its role in regulating war powers in order to produce better military policy and to act as a check on the President's ever-expanding powers. Generally, views on war powers have favored either pro-Congress or pro-executive stances. The pro-Congress school believes that pursuant to the Article I power to declare war (among other Article I powers), war powers should primarily reside with Congress, with the President's unilateral ability to use force limited to narrow circumstances.[24]

17 U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

18 U.S. Const. art. I, § 8, cl. 11 (describing authority to declare war, grant letters of marque and reprisal, and make rules governing capture on land and water); *id.* cl. 12 (describing authority to fund military operations); *id.* cl. 13 (describing authority to provide and maintain a navy); *id.* cl. 14 (describing authority to make rules regulating land and naval forces); *id.* cl. 15, 16 (describing authority relating to raising and providing for militias); *id*. cl. 18 (describing authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States").

19 Pomper, *supra* note 15.

20 Jennifer K. Elsea & Matthew C. Weed, Cong. Rsch. Serv., RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications 1 (2014) (these five wars are the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II).

21 *See infra* Section I.B.

22 Pomper, *supra* note 15.

23 Louis Fisher, Presidential War Power 185–86 (1995).

24 These include defending the United States against sudden attack and rescuing

This school includes members of Congress; scholars such as John Hart Ely, Louis Henkin, and Michael Glennon; and, most notably, President Joseph Biden.[25] In contrast, the pro-executive school, populated by scholars like John Yoo, believes that pursuant to the Article II Commander in Chief Clause and Vesting Clause, the Constitution places war powers squarely with the President.[26]

This Article contends that the law in this area, informed by historical practice and the statutory language of the WPR, is not fully without content and can in fact constrain the President. However, the ability of the law to constrain has been threatened by the executive branch's existing practice of creating self-imposed limits that do not meaningfully limit presidential discretion.[27] But based on Congress's recent resolutions invoking the WPR, there seems to be a way forward. After four years of the Trump Administration's eager exercise of executive branch unilateralism, and with a new administration helmed by President Biden, who has historically supported pro-Congress war powers reform,[28] there may be political will within Congress to reexamine its ability to check the President. In particular, Congress may be motivated to strengthen an existing constraint on the President: the War Powers Resolution.

Today, as the President's war powers fall under renewed public scrutiny, the WPR has become a focal point of any discussion on the use of force.[29] Passed in 1973 over President Nixon's veto,[30] the WPR represents Congress's attempt to assert its authority to limit and oversee the President's engagement of U.S. forces in military operations abroad. Despite the expansion of presidential war powers since its enactment, and despite executive branch interpretations limiting its statutory reach, the WPR "remains the key statutory framework for regulating the relationship

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American nationals abroad. *See* NATIONAL WAR POWERS COMMISSION, APPENDIX ONE: AN OVERVIEW OF PROPOSALS TO REFORM THE WAR POWERS RESOLUTION OF 1973, at 3, 6 (2008).

25 *Id.*

26 *See id.*

27 *See infra* Section II.B (describing how the executive branch's current test of whether a military operation rises to the level of war in the constitutional sense does not meaningfully constrain the President).

28 *Infra* note 241 and accompanying text (describing then-Senator Biden's proposed WPR reforms).

29 *See, e.g.*, TESS BRIDGEMAN, REISS CENTER ON LAW AND SECURITY, WAR POWERS RESOLUTION REPORTING: PRESIDENTIAL PRACTICE AND THE USE OF ARMED FORCES ABROAD, 1973–2019 (2020), https://warpowers.lawandsecurity.org/wpr-reporting-1973-2019.pdf (tracking and analyzing every military activity report submitted by the President to Congress pursuant to the WPR).

30 *See* H.R. DOC. NO. 93-171 (1973); H.R.J. Res. 542, 93d Cong. (1973).

between the political branches with respect to the use of U.S. armed forces abroad."[31] For purposes of this Article, the WPR's most important provision for congressional control is Section 5(b), which creates a sixty-day termination clock. If the President introduces armed forces into hostilities or imminent hostilities, then unless Congress declares war, otherwise authorizes military action to continue, or extends the period by law, the President must withdraw the forces within sixty days.[32] However, since the enactment of the WPR, the executive branch has worked to limit the sixty-day clock's applicability to the President's use of force by narrowly interpreting the meaning of "hostilities." The current executive branch standard for what constitutes "hostilities" originated from State Department Legal Adviser Harold Koh's 2011 testimony on airstrikes in Libya, in which he concluded that a military operation limited in mission, exposure of armed forces, risk of escalation, and military means does not engage in hostilities as envisioned by the WPR.[33]

This Article argues that although the WPR still serves as the best framework through which Congress can check presidential unilateralism, one flaw in the resolution is the elasticity of the term "hostilities," which has allowed the executive branch to raise colorable arguments that the WPR's withdrawal mandate does not apply to a wide range of military activities abroad. This Article proposes to clarify and reconceptualize the term "hostilities" under the WPR. It aims to provide clearer standards of what constitute engagements in "hostilities," so that Congress can raise the political costs of presenting weak legal justifications for deploying U.S. armed forces, as well as shape public opinion when the President's actions are inconsistent with the WPR, which may ultimately constrain presidential decision-making.

This Article makes two proposals: First, it argues that "hostilities" can still exist when the United States plays a supporting role in a "partner

31 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 10.

32 War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555, 556 (1973) ("Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.").

33 *See Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. 7–11 (2011) (statement of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State) [hereinafter *Koh Hearing*] (describing how the executive branch's historical practice informed this interpretation of "hostilities").

mission"—a mission at the express invitation of another state, pursuant to UN authorization, or with a coalition like NATO—and must be reframed to encompass not only situations where U.S. forces participate in active exchanges of fire, but in which they use or are subject to lethal force. In support of this argument, this Article clarifies that while U.S. participation in partner missions is an indicator that the mission is narrow in scope, such participation is not on its own sufficient to show that U.S. forces have avoided engagements in "hostilities."

Second, this Article proposes considering the following criteria in determining whether U.S. armed forces have been introduced into ongoing (rather than intermittent) hostilities: (1) whether there is a risk of harm to U.S. forces from exchanges of fire, taking into consideration the likelihood of sustained violence occurring over an extended period of time, as indicated by factors like internal rules of engagement; and (2) whether there is regular use of force by or against U.S. forces, taking into consideration additional troop deployments. This proposed reconceptualization of "hostilities" is motivated by the desire to create statutory guidance that would limit implausible executive branch interpretations that circumvent congressional oversight, and to provide clarity in order to allow Congress ways of channeling political sanctions and public opinion to constrain presidential overreach.

This Article is informed by and expands upon a rich literature proposing reforms to the WPR, including to the definition of "hostilities."[34] Past reform proposals have aimed to strike a balance between providing the President flexibility in responding to a range of combat situations and providing guidance on when the President can use force without prior congressional authorization. This Article offers a novel contribution by proposing a reconceptualization of "hostilities" informed in part by executive branch practices that have in past instances acted as some limitation on presidential decision-making.[35] Moreover, building off the balancing act in the literature, this Article aims to tip the balance away from presidential discretion and towards clearer standards on situations that constitute "hostilities" and trigger the sixty-day withdrawal requirement—standards that are required to curb unauthorized U.S. involvement in consequential military operations.

This Article proceeds in three parts. Part I provides the history of the division of war powers between Congress and the President and discusses how the WPR operates. This Part describes how the war power

34 *See infra* Section III.B (reviewing past WPR reform proposals).

35 *See infra* Section III.C.ii (proposing standards incorporating executive branch criteria for determining whether the WPR has been triggered to start running the sixty-day countdown clock).

was initially envisioned and presents the problem of the executive branch's steady accretion of power. Part II argues that the law in this area, and not solely politics, can serve as a constraint on the President. It suggests that self-imposed constraints by the executive branch offer no meaningful limits, and that congressional checks like the WPR must be fortified. This Part explores the executive branch's erosion of the term "hostilities" in the WPR through two examples: the 2011 Libya operation and the 2020 Soleimani strike. Part III presents two proposals for reconceptualizing "hostilities" within the WPR, demonstrating that Congress can strike the right balance in curtailing presidential power while avoiding the pitfall of imposing a "'one size fits all' straitjacket"[36] on the President's decisions to commit armed forces abroad.

36 *Koh Hearing*, *supra* note 33, at 5.

I. THE HISTORY AND PRACTICE OF WAR POWERS

This Part provides the history of the division of war powers between Congress and the President and discusses how the WPR operates. Section I.A provides historical background on war powers, Section I.B traces the steady expansion of the President's claims of unilateral authority to use force abroad, and Section I.C describes the WPR, Congress's attempt to check the President's expanding war powers.

A. *The Constitutional Framework and Historical Developments*

Under the constitutional framework, the President is Commander in Chief of the armed forces, and Congress has the power to declare war, among other related powers.[37] The first occasion to raise constitutional questions about the President's and Congress's respective war powers under this framework came soon after the founding. In 1793, the Founders faced an early constitutional foreign relations crisis, precipitated by the possibility of U.S. involvement in a war between France and Great Britain.[38] During this neutrality controversy, the Founders confronted the question of whether U.S.-French treaties of alliance compelled the United States to join France in the war or whether the United States could remain neutral.[39] At this early stage of the country's history, "[n]either law nor policy dictated an obvious answer" as to how the government should proceed.[40] On April 22, 1793, George Washington issued the Proclamation of Neutrality, declaring that the United States and its citizens should be impartial toward France and Great Britain.[41] The Proclamation, however, faced criticism, and opponents questioned whether the President had the authority to issue the Proclamation or whether Congress's power to declare war meant that only Congress could declare neutrality.[42]

In the aftermath of the Proclamation, Alexander Hamilton, under the name Pacificus, penned a series of essays defending the President's power to issue the Proclamation, and James Madison, under the name Helvidius,

37 *See* U.S. CONST. art. II, § 2, cl. 1; *id.* art. I, § 8, cl. 11–16, 18.

38 Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 328–32 (2001).

39 *Id.* at 332–34.

40 *Id.* at 332.

41 GEORGE WASHINGTON, NEUTRALITY PROCLAMATION, *reprinted in* 12 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 472–74 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005).

42 *See* Prakash & Ramsey, *supra* note 38, at 328–29 n.424 (discussing how opponents of the Proclamation publicly questioned the President's authority to declare neutrality).

responded with his own essays rebutting Hamilton's arguments.[43] This famous Pacificus-Helvidius debate provides insight into early arguments about the scope of the presidential war power. Hamilton believed that the war power by its nature was an executive power, and that Congress's constitutionally enumerated power to declare war was a carveout from this natural framework.[44] In contrast, Madison believed that the power to declare war was a legislative power and properly belonged to Congress.[45] This early debate provides us with a few insights. The first is that one reading of the Constitution gives the President "residual" power over U.S. foreign policy, arising from the general grant of executive power and separate from Article II's enumerated powers regarding the military and receiving foreign ambassadors.[46] The second is that in the early days of the United States, the Founders understood that the President could not unilaterally enter into war. Despite Hamilton and Madison's disagreement about how broadly to construe Congress's enumerated power to declare war, they reached common ground on the fact that the President cannot wage a war without authorization from Congress.[47] There was an understanding that the power to declare war and the power to conduct war should not be held by the same branch of government.

However, since Hamilton and Madison first debated these issues, the executive branch's understanding of the scope of unilateral presidential power to engage in military activity abroad has expanded dramatically,

43 *See* Alexander Hamilton, Pacificus No. 1 (1793), *reprinted in* 4 The Works of Alexander Hamilton 432, 439 (Henry Cabot Lodge ed., 1904); James Madison, Helvidius No. 1 (1793), *reprinted in* 1 Letters and Other Writings of James Madison: Fourth President of the United States 611 (1865).

44 *See* Hamilton, *supra* note 43 (arguing that this was an "*exception*[] and *qualification*[]" to the general grant of executive power in Article II).

45 Madison, *supra* note 43, at 615–16.

46 *See* Prakash & Ramsey, *supra* note 38, at 346–50 ("War was one of the principal executive powers of foreign affairs in the taxonomy of the great eighteenth-century writers.").

47 Scholars generally agree that a congressional authorization for use of force is functionally the same as a declaration of war. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2059 (2005) ("[A]lmost no one argues today that Congress's authorization must take the form of a declaration of war."). A declaration of war needs only to "constitutionally manifest its understanding and approval for a presidential determination to make war," and an authorization for use of force achieves this goal. *See* Harold Hongju Koh, *The Coase Theorem and the War Power: A Response,* 41 Duke L.J. 122, 126 (1991). For instance, the 2001 Authorization for Use of Military Force (AUMF), passed on September 18, 2001, in response to the September 11 terrorist attacks, is considered to "confer[] full congressional authorization for the president to prosecute a war." Bradley & Goldsmith, *supra*, at 2078, 2083.

especially as the nature of war has changed. In the nineteenth century, the early story of U.S. foreign engagements was one of a country "blessed by a dearth of powerful enemies."[48] With the retreat of European nations from the western hemisphere, the United States was free to conduct foreign policy without interference from established military powers.[49] During this era, two major military engagements stand out: In 1846, Congress declared war on Mexico, and in 1898, Congress declared war on Spain.[50] But in the twentieth century, the United States assumed a greater role in the international community and became involved in larger wars that required more resources.[51] After World Wars I and II, the United States followed this "new model" of international engagement, entering the Korean conflict without a formal congressional declaration of war and engaging in proxy wars around the world.[52] In the post-Cold War era, U.S. military engagements veered toward missions authorized by the UN Security Council.[53] Most recently, since 9/11, the use of force abroad has shifted from responding to state actors to responding to terrorist organizations.[54]

This expansion of U.S. military interventions has "created a permanent imbalance between the different branches of government,"[55] with the President's powers growing relative to the powers of Congress. In recent times, the system for regulating presidential use of military force abroad "inhabits a grey zone between law and lore."[56] The Constitution lacks clarity on the division of war powers between the President and Congress, leading to gaps that "must be filled by reference to extratextual sources: practice, convenience, necessity, national security, international relations law and theory, [and] inherent rights of sovereignty."[57] Most notably, the law in this area has been informed by historical practice and the legal opinions of the Justice Department's Office of Legal Counsel (OLC), as discussed in

48 Christopher A. Preble, *The Founders, Executive Power, and Military Intervention*, 30 PACE L. REV. 688, 694 (2010).

49 *Id.* at 695.

50 *Id.*

51 *See id.* at 697.

52 *See id.* (describing U.S. involvement in Southeast Asia, Iran, and Guatemala).

53 *See* Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RSRV. L. REV. 1237 (1997).

54 *See* BRIDGEMAN, WAR POWERS RESOLUTION REPORTING, *supra* note 29, at 20 (observing a trend in WPR reports that indicated a "dramatic swing toward operations involving non-state actors in the post-9/11 era").

55 Preble, *supra* note 48, at 701.

56 Tess Bridgeman & Stephen Pomper, *Introduction: The War Powers Resolution*, TEX. NAT'L SECURITY REV.: POL'Y ROUNDTABLE (Nov. 14, 2019), https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/#intro.

57 Prakash & Ramsey, *supra* note 38, at 233.

Section II.A.

B. *The President's Expanding War Powers*

As the nature of military activity has changed, the executive branch's understanding of the scope of the President's war powers has expanded. The conventional understanding is that the President has the power pursuant to Article II's Vesting Clause and Commander in Chief Clause to conduct limited types of military activity without congressional authorization.[58] The "core" historical cases of unilateral presidential action include repelling attacks on the United States and rescuing U.S. citizens abroad.[59] Indeed, members of Congress have generally agreed that "the President as Commander in Chief ha[s] power to lead the U.S. forces once the decision to wage war ha[s] been made, to defend the nation against attack, and perhaps in some instances to take other action such as rescuing American citizens."[60] However, the executive branch has adopted a more expansive interpretation of the kinds of military activity the President may unilaterally conduct based solely on Article II authority. These activities include "[e]ngaging in hot pursuit of aggressors," like President Monroe's involvement in Spanish Florida in 1818; "conducting punitive reprisals," like President Reagan's bombing of Libya in 1986; "preemptively attacking enemies," like President Nixon's bombing of Cambodia in 1970; and "enforcing treaties, international agreements, international law, and acting pursuant to membership in international organizations," like President Truman's involvement in Korea pursuant to UN authorization in the early 1950s.[61]

In recent times, there have been three schools of thought on the scope of the President's war powers. The first view, articulated by scholars like John Hart Ely, is that for any military activity outside of core Article II powers, the President must obtain prior congressional authorization before engaging U.S. armed forces.[62] This view, perhaps due to its extreme limits

58 *See* Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 8–9.

59 *Id.*

60 Matthew C. Weed, Cong. Rsch. Serv., R42699, The War Powers Resolution: Concepts and Practice 7 (2019).

61 *See* National War Powers Commission, Appendix Four: A War Powers Primer 5 (2008). Other examples include authority to "rescue foreign nationals where such action facilitates the rescue of U.S. citizens . . . suppress civil insurrection, implement the terms of an armistice or cease-fire involving the United States, and carry out the terms of security commitments contained in treaties." *See* Weed, Cong. Rsch. Serv., *supra* note 60, at 7.

62 *See* Marty Lederman, *Syria Insta-Symposium: Marty Lederman Part I–The Constitution,*

on the President's actions, "has not carried the day for many decades in terms of U.S. practice."[63] The second view is a maximalist theory espoused by John Yoo and Jay Bybee, among others, who argue that "[t]he President can take the Nation into full-fledged, extended war without congressional approval, as President Truman did in Korea, as long as he does so in order to advance the 'national security interests of the United States.'"[64] This view also has not appeared in executive branch practice, with the possible exception, as Yoo and Bybee noted, of U.S. involvement in Korea.[65] The third view, articulated by OLC in a 2011 opinion, most accurately reflects the executive branch's interpretation of the scope of the President's war powers. But even this theory suggests an understanding of expansive presidential powers. The OLC opinion provides a two-pronged test of when the President may unilaterally use force abroad: (1) if the use of force serves a "significant national interest," and (2) if the activity is not extensive enough in "nature, scope, and duration" as to constitute a "war" in the constitutional sense, a standard that is generally satisfied "only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."[66] As Section II.B discusses, this test presents no meaningful limit to the President's unilateral uses of force, and is used to justify actions in situations such as the 2011 Libya intervention, where operations far exceeded the traditionally-understood Article II powers of repelling attacks and rescuing citizens.

C. *The War Powers Resolution as a Congressional Check*

In the mid-20th century, Congress's concerns about the President's expansive view of war powers intensified following the Korean conflict. By the 1970s, after U.S. involvement in Vietnam began with President Nixon's unilateral deployment of military advisors and ordering of a secret bombing campaign in Cambodia a few years later, Congress believed that "the constitutional balance of war powers had swung too far toward the President and needed to be corrected."[67]

In response to this expansion of presidential power, Congress passed

the Charter, and Their Intersection, OPINIO JURIS, (Jan. 9, 2013) http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection.

63 *Id.*

64 *Id.*

65 *Id.*

66 Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 27–31 (2011).

67 WEED, CONG. RSCH. SERV., *supra* note 60, at 7.

the War Powers Resolution (WPR)[68] in 1973 with the objective of reasserting Congress's role in authorizing uses of force. The joint resolution, passed over President Nixon's veto,[69] purported 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, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces."[70] However, beginning with President Nixon, successive Presidents have challenged the constitutionality of the resolution.[71] In his veto message, Nixon warned that the resolution would "attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years."[72]

The WPR and the executive branch differ in their conceptualizations of the scope of the President's war powers. Section 2(c) of the WPR recognizes the power of the President to authorize the use of force in situations of hostilities or imminent hostilities only pursuant to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[73] In contrast, the executive branch has stated that pursuant to Article II, the President has authority to use force for a broader range of purposes, including "to rescue American citizens abroad, rescue foreign nationals where such action facilitates the rescue of U.S. citizens, protect U.S. Embassies and legations, suppress civil insurrection, implement the terms of an armistice or cease-fire involving the United States, and carry out the terms of security commitments contained in treaties."[74]

Section 4(a), the "triggering provision" of the WPR, requires the President, "in the absence of a declaration of war,"[75] to submit a report to Congress within 48 hours of introducing U.S. forces under one or more of three circumstances: (1) "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances"[76]; (2) "into the territory, airspace or waters of a foreign nation, while equipped for

68 War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).
69 *See* H.R. Doc. No. 93-171 (1973).
70 War Powers Resolution § 2(a).
71 *See generally* National War Powers Commission, *supra* note 24.
72 *See* H.R. Doc. No. 93-171.
73 War Powers Resolution § 2(c).
74 Weed, Cong. Rsch. Serv., *supra* note 60, at 7; *see also War Powers: A Test of Compliance: Hearings Before the Subcomm. on Int'l Sec. & Sci. Affairs of the House Comm. on Int'l Relations*, 94th Cong. 69 (1975).
75 War Powers Resolution § 4(a).
76 *Id.* § 4(a)(1).

combat . . ."[77]; or (3) "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[78] From the first forty-eight-hour report submitted by President Ford in 1975[79] through December 2019, there have been 105 such reports, ranging from "notification of the use of U.S. forces to transport refugees in South Vietnam to safer areas in the country, to the November 11, 2019, report in which President Trump notified Congress of the deployment of additional forces to the Kingdom of Saudi Arabia."[80]

For the purposes of this Article, the most important WPR provision is Section 5(b), which creates a sixty-day termination clock. Section 5(b), which was meant to "provide teeth" to the resolution,[81] requires that for reports submitted pursuant to Section 4(a)(1) (the hostilities/imminent hostilities prong), unless Congress declares war or otherwise authorizes the military action to continue or extends the period by law, the President must terminate the action within sixty days.[82] The President may extend this sixty-day period by thirty days if required by "unavoidable military necessity respecting the safety of United States Armed Forces."[83] If Congress declares war or authorizes the use of force during this period, the sixty-day withdrawal countdown is tolled. For instance, one "classic example" of such congressional authorization envisioned by the WPR[84] is the 2002 Authorization for Use of Military Force against Iraq.[85] The language of

77 *Id.* § 4(a)(2).

78 *Id.* § 4(a)(3).

79 *See* Letter from Gerald Ford, President of the U.S., to Congressional Leaders on the Transport of Refugees from Danang (Apr. 4, 1975) (describing deployment of U.S. troops for a humanitarian effort to transport refugees in South Vietnam).

80 BRIDGEMAN, WAR POWERS RESOLUTION REPORTING, *supra* note 29, at 11, 16. Military activities covered by these reports include response to state and non-state threats, protection of U.S. citizens and/or property, evacuations, humanitarian missions, stabilization missions, assistance to other states, and rescue missions/hostage recovery. *See id.* at 12.

81 WEED, CONG. RSCH. SERV., *supra* note 60, at 4.

82 War Powers Resolution § 5(b) ("Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.").

83 *Id.* This Article refers to this period as the "sixty-day countdown clock," but recognizes that it may be extended up to ninety days.

84 WEED, CONG. RSCH. SERV., *supra* note 60, at 42.

85 Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1500–01 (2002).

the authorization noted that it was intended to "constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."[86]

In line with the purpose of the resolution, the Senate report of the WPR noted that Section 5(b) is the "heart and core" of the resolution and "represents, in an historic sense, a restoration of the constitution[al] balance which has been distorted by practice in our history."[87] Executive branch officials, however, have challenged this provision in particular as an "unconstitutional infringement on the President's authority as Commander in Chief."[88] Moreover, the executive branch has argued that this provision "interferes with successful action, signals a divided nation and lack of resolve, gives the enemy a basis for hoping that the President will be forced by domestic opponents to stop an action, and increases risk to U.S. forces in the field."[89] While Section 5(c) of the WPR allows Congress, through a concurrent resolution, to direct the President to remove U.S. armed forces from situations of hostilities, the Supreme Court's 1983 decision *INS v. Chadha*, which struck down one-house legislative vetoes not presented to the President for signature, has cast doubt on the constitutionality of Section 5(c).[90]

Because of the dispute over the constitutionality of Section 5(b), the meaning of "hostilities" under the WPR has become contested through the years, as the sixty-day termination clock is only triggered when U.S. armed forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[91] At the time of the WPR's passage, a report of the House Foreign Affairs Committee defined "hostilities" broadly: It noted that "hostilities" is "broader in scope" than an "armed conflict" (a term with legal meaning under international law), and that "hostilities" can include a "state of confrontation in which no shots have been fired."[92] However, as Section II.C elaborates, subsequent presidential administrations—including the Ford Administration, the first

86 *Id.* at 1501.

87 S. Rep. No. 93-220, 93d Cong. 220, at 28 (1973).

88 Weed, Cong. Rsch. Serv., *supra* note 60, at 6.

89 *Id.* at 9.

90 INS v. Chadha, 462 U.S. 919 (1983); *see* Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 10, 31 n.16 (describing how *Chadha* "by invalidating the 'legislative veto,' casts essentially fatal doubt on Congress' ability to order the withdrawal of U.S. forces by concurrent resolution" and how, post-*Chadha*, "Congress can only enforce withdrawal if it commands a veto-proof supermajority" (internal citations omitted)).

91 War Powers Resolution, Pub. L. No. 93-148, § 4(a)(1), 87 Stat. 555, 555–56 (1973).

92 H.R. Rep. No. 93-287, at 7 (1973).

to submit a forty-eight-hour report pursuant to the hostilities/imminent hostilities prong of the WPR—interpreted "hostilities" narrowly to encompass only situations where "units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces."[93] This narrow interpretation of "hostilities" has allowed Presidents through the years to claim that there is a greater range of situations into which he can send U.S. armed forces without triggering the WPR's withdrawal mandate.

Other provisions of the WPR include the Section 3 consultation provision, which requires the President to consult with Congress in "every possible instance"[94] before introducing U.S. armed forces into hostilities or imminent hostilities unless there has been a congressional declaration of war or authorization of use of force. Presidential administrations have not contended that this particular requirement is unconstitutional.[95] However, researchers have found "very little consultation with Congress under the Resolution when consultation is defined to mean seeking advice *prior* to a decision to introduce troops."[96] Rather, Presidents have generally consulted with Congress "after the decision to deploy was made but before commencement of operations."[97]

The WPR has a mixed record. No President has accepted the WPR as fully constitutional.[98] Some members of Congress believe that

93 Letter from Monroe Leigh, Legal Adviser, U.S. Dep't of State, and Martin R. Hoffman, Gen. Counsel, U.S. Dep't of Def., to Hon. Clement J. Zablocki, Chairman, Subcomm. on Int'l Sec. & Sci. Affairs, Comm. on Int'l Relations, U.S. House of Representatives (June 3, 1975), *in War Powers: A Test of Compliance: Hearings Before the Subcomm. on Int'l Sec. & Sci. Affairs of the House Comm. on Int'l Relations*, 94th Cong. 38–40 (1975).

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

95 *See* Supplementary Discussion of the President's Powers Relating to the Seizure of the American Embassy in Iran, 4A Op. O.L.C. 123, 128 (1979) ("When President Nixon vetoed the Resolution he did not suggest that either the reporting or consultation requirements were unconstitutional. Neither the Ford nor Carter administrations have taken the position that these requirements are unconstitutional on their face." (internal citation omitted)).

96 RICHARD F. GRIMMETT, CONG. RSCH. SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 23 (2012) (emphasis added).

97 *Id.*

98 RICHARD F. GRIMMETT, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS 6 (2012) ("Every President since the enactment of the War Powers Resolution has taken the position that it is an unconstitutional infringement on the President's authority as Commander-in-Chief.").

the resolution serves as a constraint because it forces transparency and communication between the President and Congress, and "Presidents have, for the most part, adhered to the requirements to report use of our military abroad to Congress as the statute requires," providing Congress a "vehicle for asserting its war powers."[99] Other members of Congress believe that the resolution does not go far enough to regulate the President's unilateral uses of force, and yet others believe that the sixty-day countdown clock goes too far in limiting the President's conduct of foreign policy.[100] Even so, generally "none of the President, Congress, or the courts has been willing to initiate the procedures of or enforce the directives in the War Powers Resolution."[101] Indeed, there have been calls for WPR reform for nearly as long as the WPR has existed.

However, as the next Part argues, the WPR remains a key statutory framework for regulating presidential war powers and serves as a constraint on the President. While the term "hostilities" under the WPR has suffered decades of erosion by executive branch interpretations, reconceptualizing the meaning of the term can allow Congress to strengthen its ability to check ever-expanding presidential war powers.

99 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 8.; Weed, Cong. Rsch.Serv., *supra* note 60, at 1.

100 Weed, Cong. Rsch. Serv., *supra* note 60, at 1 (describing the argument of some members of Congress and executive branch officials that "the President needs more flexibility in the conduct of foreign policy and that the time limitation in the War Powers Resolution is unconstitutional and impractical").

101 *Id.* at ii. For a summary of alleged WPR violations dismissed in court on standing grounds, see Oona Hathaway & Geoffrey Block, *How to Recover a Role for Congress and the Courts in Decisions to Wage War*, Just Security (Jan. 10, 2020), https://www.justsecurity.org/68001/how-to-recover-a-role-for-congress-and-the-courts-in-decisions-to-wage-war.

II. CONSTRAINTS ON PRESIDENTIAL WAR POWERS

This Part describes how the law, and not solely politics, serves as a constraint on presidential powers. Section II.A discusses the theoretical foundation for this view and argues that certain mechanisms of legal constraint work better than others. Section II.B uses OLC's expansive views of presidential war powers to illustrate how relying on the executive branch to internalize norms is ineffective as a mechanism of legal constraint. Section II.C explains that the WPR, as the existing legal framework for regulating war powers, has been subjected to executive branch interpretations of "hostilities" that circumvent statutory requirements. Section II.D illustrates how the executive branch has narrowly interpreted "hostilities" through two examples: the 2011 Libya operation and the 2020 airstrikes that killed Iranian general Qassem Soleimani.

A. *How the Law Constrains*

This Section argues that law can constrain the President's discretion in authorizing uses of force, a view supported by Curtis Bradley and Trevor Morrison, among others.[102] With limited guidance on the scope of the President's and Congress's war powers in the text of the Constitution, the development of the law in this area has been dictated by the push and pull of historical practice. This kind of law, informed by historical practice, can serve as a constraint on presidential powers. Justice Frankfurter famously observed in *Youngstown* that historical practice is part of the interpretation of presidential powers,[103] and other scholars have similarly noted that it is "the 'court of history,' an accretion of interactions among the branches, that gives rise to basic norms governing the branches' behavior in the area."[104]

102 *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 979 (2009) ("[T]he thought that officials holding constitutionally constituted offices might be wholly unconstrained by the Constitution proves incoherent . . . . The most important question is not whether the Constitution constrains, but how."); Curtis Bradley & Trevor Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1097 (2013).

103 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

104 Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1355 (1993) (reviewing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)); *see also* Henry P. Monaghan, *Presidential War-*

However, the historical practice has been one-sided: Congress has often been reluctant to push back on the President's expanding powers,[105] and courts have been reluctant to resolve war powers disputes between the political branches, meaning that it is the historical practice of the executive that has predominantly shaped the law of war powers.

One perhaps cynical view is that the President's war powers have been shaped solely by the political process.[106] Scholars often lament the lack of genuine legal limits on the President and the fact that even supposedly politically-insulated offices like OLC offer no meaningful checks on presidential policymaking, as evidenced by the Bush-era OLC's torture memos.[107] The absence of judicial review in this area certainly makes it easier to throw our hands up and say that the law fails to constrain. In fact, Bruce Ackerman warns that "politics and communications," "bureaucratic and military organization," and "executive constitutionalism" risk turning the role of Commander in Chief into "a vehicle for demagogic populism and lawlessness."[108] Other scholars like Eric Posner and Adrian Vermeule argue that whatever constraints the President faces are purely non-legal, and that it is "politics and public opinion," rather than law, that check

Making, 50 B.U. L. Rev. 19, 25–27 (1970) (observing that Presidents have used force as necessary to achieve their foreign policy objectives, and that Congress has rarely objected on legal grounds); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 Yale L.J. 845, 873–76 (1996) (reviewing Louis Fisher, Presidential War Power (1995)).

105 *See* Curtis Bradley & Trevor Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097, 1112 (2013) ("Part of the concern here is that Congress by itself often seems either unable or unwilling to provide adequate checks on executive power.").

106 *See id.* at 1099 ("[A]ny apparent consistency between presidential behavior and purported legal norms might simply be the result of political and policy considerations, not any constraint imposed by law." (citing Bruce Ackerman, The Decline and Fall of the American Republic (2010))).

107 *See id.* at 1097–99, 1101, 1112 ("It is often easier—or at least more familiar—to talk meaningfully about law if there is a reasonable prospect that the actions in question will face judicial review."). The torture memos were a controversial series of opinions issued by OLC in 2002 and 2005 advising the executive branch on the permissibility of the CIA's use of "enhanced interrogation techniques" against detained members of al-Qaeda. Allen S. Weiner, *The Torture Memos and Accountability*, ASIL Insights (May 15, 2009), https://www.asil.org/insights/volume/13/issue/6/torture-memos-and-accountability. The memos provided expansive interpretations of executive authority and found that these techniques, including the use of waterboarding, did not violate the Convention Against Torture or the federal criminal statute implementing the Convention. *Id.* The memos were effectively rescinded by President Obama via executive order shortly after he took office in 2009. *Id.*

108 Ackerman, *supra* note 106, at 4, 68.

the President.[109] They contend that any factors that ostensibly constrain presidential action lack status as norms, resulting in weak "normative justification for [their] continued existence if political or other extralegal factors pull in a different direction."[110] In part, this kind of skepticism of "practice-based" law originates from "post-Watergate cynicism about the behavior of government officials, including the extent to which they are likely to act based on internalized norms"[111]—a cynicism exacerbated in the last few years by the Trump Administration's disregard for such norms.[112]

In contrast, Bradley and Morrison note that "the interrelationship of law and politics does not by itself negate the importance of law" and term the historical gloss in this area "practice-based constitutional law."[113] Practice-based law may constrain the President's actions simply through a recognition that law is necessary to justify policy decisions and through public discourse on presidential power framed in legal terms.[114] As Bradley and Morrison argue, the law acts as a constraint "when it exerts some force on decisionmaking because of its status as law."[115] Moreover, the executive branch's justification of policy decisions in legal terms "might be puzzling if

109 *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 15 (2010).

110 *See* Bradley & Morrison, *supra* note 105, at 1112. Some scholars argue that a certain institutional arrangement may simply be the result of successful coordination that benefits the interests of both the executive and Congress. *See* Fallon, *supra* note 102, at 993; Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1002 (2008) ("Precedents may just be patterns of behavior that parties recognize as providing focal points that permit cooperation or coordination."). This kind of "coordination game theory" model is commonly seen in international law, where neither true judicial review nor enforcement exists. *See, e.g.*, Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1793, 1827 (2009) (analyzing the lack of judicial review and enforcement in international law).

111 Bradley & Morrison, *supra* note 105, at 1113.

112 *See, e.g.*, Tom McCarthy, *Donald Trump and the Erosion of Democratic Norms in America*, GUARDIAN (June 2, 2018), https://www.theguardian.com/us-news/2018/jun/02/trump-department-of-justice-robert-mueller-crisis (describing situations in which "norms governing justice department independence are being tested"); *see also* Josh Chafetz & David Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1432 (2018).

113 Bradley & Morrison, *supra* note 105, at 1128.

114 *See id.* at 1130, 1140 (arguing that "debates about alleged breaches of legally normative conventions will be surrounded by analysis couched in legal terms, whereas debates about potential breaches of other conventions will not").

115 *Id.* at 1122 ("By contrast, if the legal status of a rule can never be the deciding factor in motivating presidential action—if, for example, the rule is always subordinated to policy or political considerations when it conflicts with them—then the rule does not operate as a constraint.").

the law were not playing any constraining role."[116] Specifically, Bradley and Morrison describe three mechanisms of legal constraint: *norm internalization* by executive branch actors, *external sanctions* for violations of norms, and the existence of *public dialogue* on the President's authority, framed in legal terms.[117] While it is possible to determine instances of genuine, reasonable disagreement about the *content* of the law,[118] any accusations, by Congress or the public, that the President is acting outside of constitutional or statutory bounds on questions of war powers is "virtually always contested" by executive branch actors.[119]

This Article supports the view that the law can constrain the President's war powers and argues that some mechanisms of legal constraint work better than others in limiting these powers. In considering Bradley and Morrison's mechanisms of constraint in reconceptualizing the meaning of "hostilities," this Article argues that the second and third of these mechanisms—external sanctions and public legal dialogue—operate most effectively in limiting presidential discretion on war powers. By proposing a definition to provide clearer standards of what constitutes an introduction of U.S. forces into "hostilities," this Article posits that Congress can raise the political costs of the President's precarious legal arguments, as well as more clearly identify potential violations of the WPR to temper executive branch discretion.

As the weakest mechanism for constraining the President on matters of war powers, norm internalization is the process by which an actor internalizes the normative force of a legal rule.[120] Bradley and Morrison argue that OLC is able to internalize legal norms due to its tradition of adhering to its own precedents across administrations, which "give[s] it some distance and relative independence from the immediate political and policy preferences of its clients across the executive branch."[121] OLC may not

116 *Id.* at 1100.

117 *See id.* at 1132–45 (describing these mechanisms).

118 *See id.* at 1116 ("[I]t is at least sometimes possible to distinguish between legitimate disagreement about the law and noncompliance with the law, even on issues of presidential power for which the law is heavily influenced by historical practice.").

119 *Id.* at 1114–15.

120 *See id.* at 1132. *See generally* H.L.A. Hart, The Concept of Law 1–2 (2d ed. 1994) (describing law as practice that becomes normatively binding).

121 Bradley & Morrison, *supra* note 105, at 1133–34 ("[E]stablished traditions treat OLC's legal conclusions as presumptively binding within the executive branch, unless overruled by the Attorney General or the President . . . ."); *see also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1455–57 (2010) (detailing the process of norm internalization within OLC). *But see* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676, 728 (2005) (questioning OLC's ability to constrain presidential decision-making

always act as a blank check for the President, as it "does not always say yes [to affirming the President's policies], and the absence of an OLC opinion in the President's favor likely makes it more difficult for him to pursue that course of action."[122] For example, norm internalization may explain the Bush White House's position on a warrantless surveillance program. When the White House pushed to implement the program despite refusal from the Attorney General, Deputy Attorney General, and head of OLC to certify the legality of the program unless certain changes were made, these top officials threatened to resign, resulting in the White House subsequently making the changes.[123] Bradley and Morrison describe this episode as Justice Department officials' internationalization of institutional norms "that not only takes law seriously as a constraint, but that insists on a degree of independence in determining what the law requires."[124]

However, as the next Section details, norm internalization does not truly constrain the President's expanding war powers. This is perhaps due to the confluence of several factors: little textual guidance from the Constitution on the division of war powers and a subject matter (national security) with incentive for the President to overreach and Congress to abdicate decision-making to the President.[125] A dearth of textual guidance on war powers from the Constitution resulted in OLC and other executive branch officials having an outsized role in developing norms in this area in the first instance,[126] and Congress has been reluctant to exert its institutional power to challenge the President on questions fraught with political consequences.[127] While these norms may on the surface seem to constrain presidential decision-making—for example, OLC advises the President to follow the law—the "law" here is the result of the executive branch's own interpretations.[128] Successive presidential administrations have been consistently resolute in their understandings of the meaning of "hostilities" in the WPR, resulting

when there are gaps in the judiciary's doctrine development).

122 Bradley & Morrison, *supra* note 105, at 1126.

123 *See id.* at 1136.

124 *Id.* at 1136–37.

125 For example, Oona Hathaway describes how members of Congress are content to allow the President to bear the brunt of political risk on questions of war, noting how "the lesson many learned from the Democratic primary in 2008, during which Hillary Clinton paid a steep political price for her vote five years earlier to authorize the war in Iraq, was that it is best to avoid taking hard votes on the use of force if at all possible." Oona A. Hathaway, *How to Revive Congress' War Powers*, TEX. NAT'L SECURITY REV.: POL'Y ROUNDTABLE (Nov. 14, 2019), https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/#essay4.

126 *See* Bridgeman & Pomper, *supra* note 56, at 6.

127 Hathaway, *supra* note 125.

128 Bradley & Morrison, *supra* note 105, at 1101, 1106.

in the entrenchment of executive branch interpretations of the law.[129] For example, in the 2011 Libya operation, the administration relied on its own interpretation of "hostilities" to argue that it had no obligation to withdraw troops after sixty days.[130] As this episode illustrates, war powers reform cannot rely solely on executive branch norm internalization to produce checks on presidential discretion.

Instead, imposing external sanctions for violations of norms would be more effective for bringing the law to bear on the President. According to Bradley and Morrison, external sanctions that constrain the President's actions do not have to be formal and can even exert pressure through the political process.[131] Accusations of illegal conduct could "enable the President's congressional opponents to impose even greater costs on him through a variety of means, ranging from oversight hearings to, in the extreme case, threats of impeachment."[132] The opposition party in Congress can attempt to impose these political costs by criticizing unilateral presidential authorizations of force in the media. As legal theorists like Fred Schauer have suggested, "law violation increases the political penalty for those official actions that are or turn out to be unacceptable on policy or political grounds."[133] External sanctions work as a legal constraint when the costs of non-compliance with a norm outweigh the benefits. In some instances, partisan politics often exert the most pressure, with Congress's "institutional checks . . . operat[ing] to facilitate the constraining effect of law."[134] External sanctions on norm violations, which can include "[c]riminal trials . . . lawyer scrutiny, reporting requirements, inspector general and congressional investigations, Accountability Board proceedings, prosecutorial and ethics

129 *Id.*; Koh Hearing, *supra* note 33, at 6–7 (noting that the "Executive Branch has repeatedly articulated and applied these foundational understandings" of the meaning of "hostilities" since State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin R. Hoffmann articulated them in 1975).

130 Koh Hearing, *supra* note 33, at 3–11; Bradley & Morrison, *supra* note 105, at 1148.

131 *Id.* at 1137.

132 *Id.* at 1138; *see also* William G. Howell & Jon C. Pevehouse, While Dangers Gather: Congressional Checks on Presidential War Powers xx, xxiii (2007) ("[T]he partisan composition of Congress regularly, but not uniformly, influences the presidential use of force—impacts appear most pronounced when presidents contemplate larger-scale military initiatives where certain systemic imperatives are not present."); Douglas L. Kriner, After the Rubicon: Congress, Presidents, and the Politics of Waging War 147 (2010).

133 Frederick Schauer, *The Political Risk (If Any) of Breaking the Law*, 4 J. Legal Analysis 83, 85 (2012); *see also* Bradley & Morrison, *supra* note 105, at 1138–39 ("[T]he political cost of pursuing an ultimately unpopular policy initiative (such as engaging in a war) goes up with the perceived illegality of the initiative.").

134 Bradley & Morrison, *supra* note 105, at 1140.

investigations, civil trials, FOIA processing and disclosures, public criticism and calumny, and elections" can all impose "various forms of psychological, professional, reputational, financial, and political costs on those held accountable."[135]

In addition to external sanctions, public legal dialogue can also impose constraints on presidential unilateralism in the area of war powers.[136] In public defenses of its policy decisions, the executive "almost always endeavors to argue that its actions are lawful—and to rebut criticisms to the contrary."[137] Indeed, legality's salience is evident in the executive branch's "decision to devote resources to producing credible legal defenses of executive actions."[138] OLC's perceived insulation and adherence to opinions across administrations reflect the understanding that "OLC's opinions are most valuable if they appear to take the law seriously."[139] Even if legal rules are invoked for political reasons, a President who does so may be incentivized to adhere to those legal principles in the future.[140] As Jack Goldsmith has noted, the public can serve as a powerful constraint on the executive by watching and holding presidential actions accountable.[141] Goldsmith has acknowledged that "[w]ar has become hyper-legalized" and that "[a]s law in war has grown, the Commander in Chief has lost the relative control he used to have over its interpretation and enforcement."[142] Moreover, he has

135 JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 235 (2012).

136 Bradley & Morrison, *supra* note 105, at 1140. Bradley and Morrison note that the boundaries of their three categorized mechanisms are porous and can in some instances operate interdependently—for example, "practices followed out of fear of external sanctions can become internalized as a result of habit" and "the internalization of a norm associated with a practice can plausibly affect the likelihood that actors with an interest in the practice will impose external sanctions for violations." *Id.* Likewise, this Article treats these mechanisms as distinct categories with the possibility of some overlap.

137 *Id.*

138 *Id.* at 1143.

139 *Id.* at 1142.

140 *See* Fallon, *supra* note 102, at 1002 ("[E]xternal constraints not only reinforce, but also help shape, officials' perceptions of their obligations."); Jon Elster, *Strategic Uses of Argument*, *in* BARRIERS TO CONFLICT RESOLUTION 236, 250 (Kenneth Arrow et al. eds., 1995) (calling this phenomenon the "civilizing force of hypocrisy").

141 GOLDSMITH, *supra* note 135, at 207 ("Empowered by legal reform and technological change, the 'many'—in the form of courts, members of Congress and their staff, human rights activists, journalists and their collaborators, and lawyers and watchdogs inside and outside the executive branch—constantly gaze on the 'one,' the presidency.").

142 *Id.* at 224. Goldsmith notes further that activist groups often criticize the President "in the language of law, and [bring] lawsuits in the United States and abroad to challenge his actions." *Id.* at 225.

described how public pressures challenged certain Bush-era counterterrorism policies and "force[d] the government to recalibrate its counterterrorism policies and accountability mechanisms constantly based on ever-changing information and ever-changing legal and political restraints."[143] All of these considerations of legality impose costs on the President, which can limit certain decisions, including decisions to use military force.

As mechanisms of legal constraint, external sanctions and public legal dialogue could act as powerful limits on presidential decision-making by increasing the costs of the President's noncompliance, especially when clear legal guidance exists, and could shape public opinion enough to constrain the President's decisions. Other reform proposals discussed in Section III.B have also gestured at how external sanctions might constrain the President. Matthew Waxman, for example, proposes for Congress to actively shape public opinion on the President's engagement in overseas conflicts.[144] This Article goes beyond past proposals by offering a clarification of "hostilities" designed to allow Congress and the public to channel these mechanisms of constraint and identify instances of presidential unilateralism inconsistent with the WPR. As the next Section explains, the weak self-imposed executive branch constraints illustrate how norm internalization by executive branch actors has minimal effect on the law's constraining force.

B. *Empty Executive Branch Constraints*

Congressional action to reform the WPR is necessary because current self-imposed executive branch limits on war powers have not resulted in actual, meaningful limits on the President. When the President commits U.S. armed forces abroad, the initial inquiry of whether the President can do so pursuant to his Article II authority alone without congressional authorization stems from an Obama Administration OLC opinion on the March 2011 Libyan airstrikes. The opinion describes a two-part framework for analyzing whether a military intervention rises to the level of "'war' in the constitutional sense" that would require congressional authorization: (1) whether the military action is in "the national interest" and (2) what the "nature, scope and duration" of the conflict is like.[145]

143 *See id.* at 232.

144 *See* Matthew C. Waxman, *War Powers Oversight, Not Reform*, Tex. Nat'l Security Rev.: Pol'y Roundtable (Nov. 14, 2019), https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/#essay2.

145 Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 33, 37–39 (2011) ("[T]he President's legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national

As scholars have noted, neither part of this test meaningfully constrains the President. The first part of the test is an inquiry into whether the President could "reasonably determine that such use of force was in the national interest."[146] If so, then it is more likely that the military activity was within the President's constitutional powers. This reasoning echoes the rationale supplied in the first mention of a national interest test in a 1941 OLC opinion by Attorney General Robert Jackson. Jackson noted that pursuant to his constitutional authority, the President "has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States."[147] Moreover, the President may extend his authority "to the dispatch of armed forces outside of the United States . . . for the purpose of protecting American lives or property or American interests."[148] Subsequent executive branch practice adopted this standard.[149] According to OLC, the national interest is relevant because the President has "independent authority" and "unique responsibility" as Commander in Chief to take military action "'for the purpose of protecting important national interests,' even without specific prior authorization from Congress."[150] In the case of the Libyan airstrikes, OLC found at least two national interests at stake: "preserving regional stability and supporting the UNSC's credibility and effectiveness."[151]

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interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring prior specific congressional approval under the Declaration of War Clause."). Assuming the President has the underlying Article II authority to use force under this test, the WPR countdown clock then restricts the period in which the President can use such force without congressional authorization. *See* War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555 (1973).

146 Authority to Use Military Force in Libya, 35 Op. O.L.C. at 20.

147 Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58 (1941).

148 *Id.*

149 *See* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 5, 6 (2018) (arguing that this historical practice "points strongly in one direction" as there have been "well over 100 instances of military deployments without prior congressional authorization").

150 Authority to Use Military Force in Libya, 35 Op. O.L.C. at 27–28.

151 *Id.* at 34. In a 2018 Trump Administration opinion, OLC found that the following interests identified by the President satisfied the national interest test: "the promotion of regional stability, the prevention of a worsening of the region's humanitarian catastrophe, and the deterrence of the use and proliferation of chemical weapons." April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. at 11.

As Curtis Bradley and Jack Goldsmith argue, this national interest test does not constrain presidential action in any meaningful way.[152] In a 1992 opinion asserting the President's authority to provide humanitarian assistance in Somalia, OLC refers to historical practice and the "American interests" mentioned in Jackson's 1941 opinion to identify two national interests in Somalia: "protecting the lives of Americans overseas and upholding the recent United Nations resolutions regarding Somalia."[153] However, OLC fails to provide in this opinion—or any subsequent opinion—criteria to determine *which* interests qualify as national interests sufficient to support presidential use of force. The national interest test, then, is no test at all. Any interest suggested by the President could satisfy the test, as "there is nothing at all in OLC's analysis that would permit it to reject an asserted interest by the president in using force."[154]

The second prong of OLC's framework—the "anticipated nature, scope and duration" test—is also a weak constraint on the President. This test asks whether a use of force constitutes a "war" within the meaning of the Constitution, as judged by the mission's anticipated nature, scope, and duration.[155] If a use of force does not rise to the level of "war," then the President may dispatch armed forces without prior congressional authorization. However, Bradley and Goldsmith note that the nature of modern war, conducted through airstrikes and drones, means that military engagements abroad will generally not rise to the level of war in the constitutional sense that requires prior authorization by Congress.[156] For instance, OLC concluded that due to their natures, scopes, and durations, neither the Libyan nor Syrian airstrikes were "wars" that required congressional authorizations, and that in fact the Syrian operation fell "far short of the kinds of engagements approved by prior Presidents under Article II."[157] This is despite the fact that both operations had significant

152 *See* Curtis Bradley & Jack Goldsmith, *OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force*, Lawfare (June 5, 2018), https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force.

153 *Id.*

154 *Id.* (" . . . at least absent overwhelming and unambiguous evidence that the interest was pretextual, and probably not even then.").

155 *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. at 33 (posing the question of "whether the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring prior specific congressional approval under the Declaration of War Clause").

156 *See* Bradley & Goldsmith, *supra* note 152 ("Modern presidents . . . rely heavily on drones, manned airstrikes, and other short-term or relatively limited 'fire from a distance' as their principal mechanisms for using force abroad.").

157 April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 19–20 (2018); Authority to Use Military Force in Libya, 35 Op. O.L.C. at 37.

consequences: The Libyan airstrikes "cost more than $1 billion, involved thousands of air sorties, and drove a foreign leader from power" and the Syrian airstrikes "threatened greater escalation" due to the presence of both U.S. and Russian troops in Syria.[158] It certainly would have been more faithful to the Founders' conception of Congress's role in declaring war had Congress been involved in authorizing both operations.

As the next Sections illustrate, although an existing congressional check on the President—the WPR—allows Congress to regulate use of force decisions, this too has been subject to executive branch interpretations that have eroded its requirements.

C. *The War Powers Resolution Framework and the Narrowing of "Hostilities"*

While the WPR, as a congressional check on executive war powers, remains an important limit on the President, one particular flaw of the resolution is the elasticity of the term "hostilities." Under the resolution, only the introduction of U.S. armed forces into hostilities or imminent hostilities triggers the resolution's sixty-day termination clock.[159] But "hostilities" lacks hard definitions, which means that Presidents have interpreted the term to avoid triggering any congressional oversight under the resolution. The consequence is that unless Congress can muster the votes to override a presidential veto of a resolution directing the President to terminate the use of force abroad, Congress "may be unable to stop military engagement abroad once it has begun using the mechanism of the WPR alone, so long as the president believes that the military engagement in question does not constitute 'hostilities.'"[160]

The legislative history of the WPR reveals that the ambiguity in the meaning of "hostilities" was intentional. Senator Jacob Javits, one of the resolution's principal sponsors, noted that the drafters intended the resolution "to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it."[161] But the term was still intended to be broad. The accompanying House report used the term "hostilities" instead of "armed conflict" because the former was considered broader in scope, as "hostilities" encompassed situations of

158 Bradley & Goldsmith, *supra* note 152.

159 War Powers Resolution, Pub. L. No. 93-148, §§ 4(a), 5(b), 87 Stat. 555, 555–56 (1973).

160 Brian Egan & Tess Bridgeman, *Top Experts' Backgrounder: Military Action Against Iran and US Domestic Law*, JUST SECURITY (Jan. 3, 2020), https://www.justsecurity.org/64645/top-experts-backgrounder-military-action-against-iran-and-us-domestic-law.

161 *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations*, 92d Cong. 28 (1971).

"clear and present danger of armed conflict."[162]

However, the meaning of "hostilities" under the WPR has been contested over the years.[163] Harold Koh, as Legal Adviser to the State Department in the Obama Administration, argued that "the question whether a particular set of facts constitutes 'hostilities' for purposes of the Resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions."[164] This interbranch practice, however, like in other areas of war powers, has consisted primarily of the executive branch's assertions of its interpretation of "hostilities." Since the passage of the WPR, successive administrations have deviated from and narrowed Congress's conception of "hostilities." In 1975, the Ford Administration defined "hostilities" as situations "in which units of the U.S. armed forces are *actively engaged in exchanges of fire* with opposing units of hostile forces."[165] A 1980 OLC opinion noted that the term "should not be read necessarily to include sporadic military or paramilitary attacks on our armed forces."[166] In August of 1981, following an attack by two Libyan jet fighters on U.S. naval forces in the Gulf of Sidra, U.S. forces fired back and downed the Libyan aircraft.[167] The Reagan Administration determined that this situation did not rise to the level of "hostilities" under the WPR—and thus did not trigger the resolution's countdown clock—because no further action by Libya was expected.[168] Similarly, in June 1984, U.S. aircraft operating in Saudi airspace assisted Saudi aircraft in shooting down two Iranian aircraft in the Persian Gulf.[169] The extent of U.S. involvement included providing the Saudis with target location and assisting with aircraft refueling.[170] The Reagan Administration determined that this was a "one-time, unanticipated incident"[171] and again argued that this did not rise to the level of "hostilities"

162 H.R. Rep. No. 93-287, at 7 (1973).

163 *See Koh Hearing*, *supra* note 33, at 4 ("[A]s virtually every lawyer recognizes, the operative term, 'hostilities,' is an ambiguous standard, which is nowhere defined in the [WPR].").

164 *Id.* at 5.

165 *See* Letter from Monroe Leigh, *supra* note 93, at 38–39 (emphasis added). The Ford Administration also defined "imminent hostilities" as situations of "serious risk from hostile fire." *Id.* at 39.

166 Presidential Power to Use Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 194 (1980).

167 *See* Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 279 (1984).

168 *Id.* ("The Administration expected no repetition of the incident and anticipated no further action by Libya to violate the rights of the vessels and aircraft of this Nation to travel in international waters and airspace.").

169 *Id.* at 280.

170 *Id.*

171 *Id.* ("It was determined subsequently that this one-time, unanticipated incident did not trigger the WPR because of the absence of hostilities.").

within the meaning of the WPR.

Even when members of Congress have disagreed with executive branch characterizations of the meaning of "hostilities," Congress has had little incentive to maintain sustained pushback against the President when the term retains such flexibility, and eventually Congress acquiesces to the executive branch's interpretation. Political theorist John Rourke notes that "[s]ometimes the urge to achieve unity is so strong that any degree of dissent comes under suspicion,"[172] and Congress is especially sensitive to any public perception of hampering American military activity. For example, on August 24, 1982, with the United States participating in a multinational peacekeeping force in Lebanon, President Reagan transmitted a forty-eight-hour report detailing this activity to Congress.[173] The report did not specify whether Section 4(a)(1) of the WPR (introduction of armed forces into "hostilities" or "imminent hostilities") or another prong had triggered the reporting requirement.[174] By September 1983, with the situation in Lebanon intensifying, members of Congress publicly announced that they believed U.S. armed forces were engaged in hostilities and that the sixty-day clock had begun to run.[175] At the time, there were "1,600 U.S. marines equipped for combat on a daily basis and roughly 2,000 more on ships and bases nearby; U.S. marine positions were attacked repeatedly; and four marines were killed and several dozen wounded in those attacks."[176] But any further debate on the meaning of "hostilities" was forestalled when Congress began to consider a resolution authorizing retention of U.S. armed forces in Lebanon,[177] ultimately granting authority for the mission in Lebanon to continue.[178] As the next Section explains through two examples, the term

172 JOHN T. ROURKE, PRESIDENTIAL WARS AND AMERICAN DEMOCRACY: RALLY 'ROUND THE CHIEF 8 (1993).

173 Overview of the War Powers Resolution, 8 Op. O.L.C. at 279.

174 *Id.*

175 *Id.*

176 *Koh Hearing*, *supra* note 33, at 9 n.15; *see also* Richard Bernstein, *2 Marines Killed in Lebanon and 14 Others Are Wounded as Beirut Fighting Spreads*, N.Y. TIMES (Aug. 30, 1983), https://www.nytimes.com/1983/08/30/world/2-marines-killed-in-lebanon-and-14-others-are-wounded-as-beirut-fighting-spreads.html?_r=0.

177 Overview of the War Powers Resolution, 8 Op. O.L.C. at 279–80 ("Debate over whether § 5(b) had been triggered by those events became academic, however, because Congress moved to consider and enact a resolution specifically authorizing the retention of United States Armed Forces in Lebanon.").

178 Charlie Savage, *Iran and Presidential War Powers, Explained*, N.Y. TIMES (Jan. 6, 2020), https://www.nytimes.com/2020/01/06/us/politics/war-powers-resolution-iran.html ("[L]awmakers granted authority for that mission to continue for 18 months."). In his signing statement, Reagan stated that his approval of the bill "should not be interpreted as a concession that the War Powers Resolution could constrain his

"hostilities" has been narrowly interpreted by the executive branch in order to use unauthorized force in situations in which the drafters of the WPR would have intended the President to seek congressional authorization.

D. *Case Studies*

Two incidents illustrate how the executive branch has narrowed the meaning of "hostilities" in order to avoid triggering the WPR's sixty-day countdown clock: the 2011 Libya operation and the 2020 strike that killed Iranian general Soleimani.

i. Libya and the Executive Branch Interpretation of "Hostilities"

In March 2011, the United States, along with a NATO coalition, began enforcing a no-fly zone over Libya in order to end the Gaddafi regime's attacks on Libyan civilians.[179] Over the next several months, these forces launched a series of airstrikes over Libya.[180] State Department Legal Adviser Harold Koh, testifying before Congress as to the legality of the Libyan operation, cited OLC precedent and presented a theory of limited engagement, which he argued barred the applicability of the "hostilities" trigger of the WPR's sixty-day clock.[181] Despite internal disagreements within the Obama Administration about the legal arguments justifying the strikes,[182] Koh claimed that situations in which the nature of a mission, exposure of U.S. armed forces, risk of escalation, and military means are limited do not constitute engagements in "hostilities."[183] In a June 2011 report justifying the President's authority to use force in Libya, the Administration

authority as commander in chief." *Id.*

179 Dan Bilefsky & Mark Landler, *As U.N. Backs Military Action in Libya, U.S. Role Is Unclear*, N.Y. Times (Mar. 17, 2011), https://www.nytimes.com/2011/03/18/world/africa/18nations.html.

180 Charlie Savage & Thom Shanker, *Sources of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. Times (Jun. 20, 2011), https://www.nytimes.com/2011/06/21/world/africa/21powers.html.

181 *See Koh Hearing*, *supra* note 33.

182 *See* Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. Times (June 17, 2011), https://www.nytimes.com/2011/06/18/world/africa/18powers.html (reporting that contrary to Koh's analysis, Department of Defense General Counsel Jeh Johnson and acting head of OLC Caroline Krass believed that the Libya operations amounted to "hostilities").

183 *See Koh Hearing*, *supra* note 33, at 7–11. Emphasizing the importance of historical practice, Koh noted that "[a]pplication of [WPR] provisions often generates difficult issues of interpretation that must be addressed in light of a long history of military actions abroad." *Id.* at 5.

again argued that the operations were "distinct from the kind of 'hostilities' contemplated by the Resolution's 60 day termination provision" because the "U.S. operations [did] not involve sustained fighting or active exchanges of fire with hostile forces, nor [did] they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by these factors."[184] Further, Koh noted that the nature of the mission in Libya was limited because "U.S. forces [were] playing a constrained and supporting role in a NATO-led multinational civilian protection operation."[185]

However, there were several dissenting voices in Congress that contended "hostilities" had in fact triggered the WPR's sixty-day clock, characterizing the United States's role as anything but limited. House Speaker John Boehner said at the time: "They're spending $10 million a day, part of an effort to drop bombs on Gadhafi's compounds. It just doesn't pass the straight-face test in my view, that we're not in the midst of hostilities."[186] Representative Brad Sherman argued that "when you're flying Air Force bombers over enemy territory, you are engaged in combat."[187] Similarly, Senator Richard Lugar, during a congressional hearing on Libya, resisted Koh's notion that the United States merely played a supporting role in the operations, noting that "the broader range of airstrikes being carried out by other NATO forces depend on the essential support functions provided by the United States."[188] Further, Senator Lugar rejected the argument that U.S. operations were not significant enough to constitute hostilities because NATO flew most of the missions, stating:

> [t]he fact that we are leaving most of the shooting to other countries does not mean the United States is not involved in acts of war . . . . [T]he language of the War Powers Resolution clearly encompasses the kinds of operations U.S. military forces are performing in support of other NATO countries.[189]

184 U.S. DEP'T OF STATE & U.S. DEP'T OF DEF., UNITED STATES ACTIVITIES IN LIBYA 25 (2011).

185 *Koh Hearing*, *supra* note 33, at 7.

186 *See* David Welna, *At 90 Days, Libya Conflict Has Washington Divided*, NPR (June 18, 2011), https://www.npr.org/2011/06/18/137265761/who-has-war-powers-washington-debates.

187 *See* Angie Drobnic Holan & Louis Jacobson, *Are U.S. Actions in Libya Subject to the War Powers Resolution? A Review of the Evidence*, POLITIFACT (June 22, 2011), https://www.politifact.com/article/2011/jun/22/are-us-actions-libya-subject-war-powers-resolution.

188 *Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. 5 (2011) (statement of Sen. Richard Lugar) [hereinafter *Lugar Statement*].

189 *Id.* at 6.

The situation on the ground supported the conclusions of Lugar and other members of Congress that the U.S.'s involvement meant that there was an engagement in "hostilities." At the time, the Supreme Allied Commander of NATO was Admiral James Stavridis, an American officer who commanded NATO forces from other countries to "engage[] on a much more sustained basis in 'exchanges of fire.'"[190] Moreover, Ivo Daalder, U.S. Permanent Representative to NATO, observed that "the United States led in this operation . . . It led in the planning of the operation, it led in getting the mandate for the operation, and it led in the execution of the operation."[191] Koh's reasoning that "a war without United States boots on the ground can proceed indefinitely without Congressional approval" simply stretched the meaning of "hostilities" too far, leading to the risk that "with drone warfare now expanding . . . national-security decision-making stands to become the sole province of the executive."[192] Journalist Paul Starobin remarked at the time that Koh's interpretation of "hostilities" had him "stretched out on a legal limb so long and so thin that one can almost hear it cracking."[193]

One conclusion we can draw from this episode is that regardless of Koh's thin legal grounding in interpreting "hostilities," this interpretation has become the accepted precedent for subsequent airstrikes. After the Libya operations, Congress did not mount much of an attempt to resist the Obama Administration's interpretation.[194] In areas where practice-based law governs, the law changes based on executive branch practice, and "actions supported by minimally plausible legal defenses might over time be understood to exert a gravitational pull on the best understanding of the law."[195]

The second conclusion is that this episode neatly illustrates Bradley and Morrison's theory of how the law can constrain the President through external sanctions and public legal dialogue. The Obama Administration relied on public justifications of legality, especially its interpretation of "hostilities" in the WPR, in order to defend U.S. involvement in Libya.[196]

190 *See* Holan & Jacobson, *supra* note 187.

191 Ivo Daalder, U.S. Permanent Representative to NATO, Remarks to the Press on Libya and Operation Unified Protector (Sept. 8, 2011), https://web.archive.org/web/20151005093309/http://nato.usmission.gov/libya-oup-90811.html.

192 Paul Starobin, *A Moral Flip-Flop? Defining a War*, N.Y. Times (Aug. 6, 2011), https://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html.

193 *Id.*

194 *See* Bradley & Morrison, *supra* note 105, at 1146 ("[T]here was no serious effort in Congress to force the President to comply with the letter of the Resolution.").

195 *Id.* at 1148.

196 *Id.* at 1147–48 (noting a reliance on legal justifications despite "a low likelihood of

This is significant because if the law had no constraining power on the executive branch, it is unclear why the Administration relied on legal rather than "humanitarian or other policy or political grounds," especially as these legal arguments imposed costs and "exposed the Administration to criticism from those who disagreed with the analysis."[197] With top officials like Koh publicly testifying to the legality of the operation, the Administration in fact went to "considerable lengths" to defend its actions on legal grounds.[198] The law could have been even more significant in constraining the President's actions had "the potential illegality of the operation . . . increased its political costliness to the Obama Administration."[199] If U.S. forces had become mired in Libya instead of executing limited strikes, the politics of publicly justifying the operations could have played an even greater role in the President's decisions. In Part III, this Article follows this thread and argues that redefining "hostilities" under the WPR would allow Congress to channel external sanctions and public legal dialogue in order to raise the political costs of the President's decisions to use force.

ii. The Soleimani Strike and the Intermittence Theory

The January 2, 2020, drone strike at Baghdad International Airport that killed Iranian general Qassem Soleimani[200] illustrates how plainly the expansion of the President's unilateral authority to use force has stretched the definition of "hostilities."[201] Although the Trump Administration's report to Congress on the strike was classified,[202] it is likely the Administration defaulted to arguments that "hostilities," if they occurred, ceased when the strike was completed, stopping the clock on the sixty-day withdrawal requirement.[203]

judicial involvement in the issue").

197 *Id.* at 1148.

198 *See id.*

199 *Id.* at 1147.

200 Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 2, 2020), https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html.

201 *See* Pomper, *supra* note 15 ("[I]t could well be that the administration's unauthorized strike on Iranian General Qassem Soleimani . . . is remembered less for the congressional resistance it has spawned than for the decline in congressional war powers that it so neatly encapsulates.").

202 *See* Press Release, Nancy Pelosi, Speaker of the House of Representatives, Pelosi Statement on White House's War Powers Act Notification of Hostilities Against Iran (Jan. 4, 2020), https://www.speaker.gov/newsroom/1420.

203 *See* Tess Bridgeman, *The Soleimani Strike and War Powers*, JUST SECURITY (Jan. 6, 2020), https://www.justsecurity.org/67921/the-soleimani-strike-and-war-powers/ ("[T]hat argument here would ignore the facts already unfolding in the direction of more

In the past, the executive branch has relied on an "intermittence theory" to deal with situations of potential "hostilities," whereby the executive branch "reports military engagements that could be seen to comprise ongoing hostilities as discrete events."[204] This practice occurred, for example, during the Tanker Wars of the 1980s, during which the United States began protecting Kuwaiti vessels in the Persian Gulf from Iranian attacks.[205] The Reagan Administration reported activity in the Persian Gulf as discrete events rather than one continuous conflict, a practice seen as "an 'end run' around the 60-day termination clock."[206] After the January Soleimani strike, commentators suggested that "the Trump Administration would look to utilize this same type of approach" with regards to the increasing tensions with Iran.[207]

The intermittence theory distorts the meaning of "hostilities" in the WPR by excluding the likelihood of future escalation in its assessment of whether "hostilities" exist. In the case of the Soleimani operation, rather than repelling a sudden attack in self-defense, the unauthorized strike, as part of the escalation against Iran following the death of an American contractor in Iraq in December 2019, instead invited the possibility of further escalation.[208] Indeed, shortly after the strike, U.S. officials "braced for potential Iranian retaliatory attacks, possibly including cyberattacks and terrorism, on American interests and allies."[209] U.S. military personnel had to be relocated outside Iraq,[210] and Iran's counterstrike on January 8th injured a handful of service members.[211] According to Stephen Pomper, this incident reveals how "the executive branch has abandoned the traditional

violence and new troop deployments, as well as any future hostilities that are quite likely to occur over what may be an extended period of time.").

204 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 24.

205 *See* Todd Buchwald, *Anticipating the President's Way Around the War Powers Resolution on Iran: Lessons of the 1980s Tanker Wars*, Just Security (June 28, 2019), https://www.justsecurity.org/64732/anticipating-the-presidents-way-around-the-war-powers-resolution-on-iran-lessons-of-the-1980s-tanker-wars.

206 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 24.

207 *See* Buchwald, *supra* note 205.

208 Crowley, Hassan & Schmitt, *supra* note 200.

209 *Id.* Following the strikes, Senator Christopher Murphy questioned on Twitter: "[D]id America just assassinate, without any congressional authorization, the second most powerful person in Iran, knowingly setting off a potential massive regional war?" Chris Murphy (@ChrisMurphyCT), Twitter (Jan. 2, 2020), https://twitter.com/ChrisMurphyCT/status/1212913952436445185.

210 *See* Pomper, *supra* note 15.

211 *See* Kevin Baron, *Eleven US Troops Were Injured in Jan. 8 Iran Missile Strike*, Defense One (Jan. 16, 2020), https://www.defenseone.com/threats/2020/01/eleven-us-troops-were-injured-jan-8-iran-missile-strike/162502 (reporting that eleven American service members were injured and sent out of Iraq for treatment).

constitutional rule that such unilateral force can be used only to repel a sudden attack."[212]

This episode is another illustration of how the executive branch's own interpretation of "hostilities" is ineffective as a legal constraint on the President's military decision-making. The Trump Administration could easily have invoked historical interpretations of "hostilities," which have excluded limited strikes,[213] to argue that this strike did not constitute an engagement in "hostilities," thus barring the application of the WPR to tensions with Iran. It is difficult to imagine the current executive branch interpretation of "hostilities" acting as a limit on similar future strikes.

However, this episode is enlightening in that both the House and Senate passed resolutions directing President Trump to seek congressional authorization before further engagement with Iran, based on the premise that the Trump Administration had in fact entered into ongoing "hostilities."[214] The fact that Congress has "resisted presidential action and framed its resistance in explicitly legal terms"[215] indicates that the WPR is not entirely without constraining force, especially when acting upon the President through external sanctions, such as raising political costs, and public legal dialogue. Congress's recent actions certainly indicate that it will not always acquiesce to the executive branch's interpretation of "hostilities." Congress may be increasingly motivated to exercise its ability to check unconstrained presidential war powers, and it can do so by reconsidering the WPR's definition of "hostilities" and creating clearer legal guidance, as the next Part proposes.

212 Pomper, *supra* note 15 (emphasis omitted).

213 *See supra* Section II.C (discussing the executive branch's historic practice of narrowing the meaning of "hostilities"); *supra* Section II.D (discussing the precedent of excluding airstrikes from the definition of "hostilities").

214 Catie Edmondson & Charlie Savage, *House Votes to Restrain Trump's Iran War Powers*, N.Y. TIMES (Jan. 9, 2020), https://www.nytimes.com/2020/01/09/us/politics/trump-iran-war-powers.html; Edmondson, *supra* note 1.

215 Bradley & Morrison, *supra* note 105, at 1150–51 ("When members of Congress from the President's own party join in a legal objection . . . it might be fair to infer that concern for the law itself provides a greater part of the motivation for the objection.").

III. The Meaning of "Hostilities"

As Part II demonstrated, the executive branch's self-imposed limits on presidential power do not offer meaningful constraints on the President. In arguing that presidential unilateralism should and can be curbed by the law, this Article proposes that it is necessary for Congress to act to strengthen the WPR, an existing check on the President. With the concept of "hostilities" in the WPR facing its own limitations, this Article aims to clarify and reconceptualize the term. The proposed definitions in this Part are motivated by the desire to create guidance that would allow Congress to more clearly identify situations of presidential overreach. These proposals differ from other reform proposals described in Section III.B by incorporating past executive branch practices that have the potential to act as some limitation on presidential decision-making.[216] While the executive branch may continue to push the boundaries of statutory constraints, it would be more difficult to do so when faced with standards that incorporate previous executive branch precedent. A reconceptualization of "hostilities" is especially important at the present moment, as the transition of U.S. leadership to a new President who has in the past supported curtailing presidential war powers may provide Congress with the political will to make these changes.

Section III.A discusses the importance of redefining "hostilities," Section III.B examines past reform proposals, including those that have discussed the meaning of "hostilities," and Section III.C presents two proposals for reconceptualizing "hostilities."

A. *The Importance of New Definitions*

As the key framework for regulating the balance of war powers between Congress and the President, the WPR serves as a source of constraint on the President. Yet the lack of clear parameters of what constitutes "hostilities" under the resolution has allowed the executive branch to put forth its own concept of "hostilities" that impedes Congress's involvement in regulating presidential uses of force. Clarifying and reconceptualizing "hostilities" under the WPR is crucial for "rejuvenat[ing] the resolution as a more effective institutional constraint."[217]

Rethinking "hostilities" is important for several reasons. First, the term's ambiguity remains a key gap in the text of the resolution. A lack

216 *See infra* Section III.C.ii.

217 *See* Hathaway, *supra* note 125.

of clarity has led to several instances of public disagreement between the President and Congress about whether the President introduced U.S. armed forces into situations of active or imminent hostilities.[218] When the WPR was first drafted, the exact meaning of "hostilities" was not contested—Congress intended for the definition of "hostilities" to be flexible in order to allow the President to respond to a range of situations into which U.S. armed forces could be introduced.[219] But the original intent of Congress was not for the term to be interpreted as narrowly as the executive branch currently interprets it, as part of the reason for the original passage of the WPR was the Nixon Administration's bombing of Cambodia.[220] Although those airstrikes did not involve "'sustained fighting or active exchanges of fire with hostile forces,' the presence of U.S. ground troops, or substantial U.S. casualties," the operation still engaged in the kind of hostilities the drafters of the WPR envisioned that Congress would have a role in authorizing.[221]

However, since the passage of the resolution in 1973, Congress and the President have developed opposing definitions of the term "hostilities."[222] Successive Presidents have taken a narrow view of the kinds of activity that constitute hostilities in order to avoid triggering the WPR's sixty-day withdrawal mandate,[223] engaging in a wide range of military activity—often past the sixty (or ninety) day mark—without labeling these activities as "hostilities."[224] These include operations in Lebanon in 1982–83, the 1983 invasion of Grenada, the 1986 Gulf of Sidra incident, the April 1986 bombing of Libya, the 1987–88 Persian Gulf Tanker War, and the 1989 invasion of Panama.[225] More recently, the Obama Administration claimed that the 2011 Libya airstrikes did not constitute "hostilities" under the WPR despite the existence of "a naval force of 11 ships and engage[ment] in an extensive bombing campaign that included striking 100 targets in just 24 hours."[226] In contrast, members of Congress have put forth a broader view of what constitutes "hostilities." For instance, the April 2019 House resolution invoking the WPR to withdraw U.S. participation in Yemen's

218 *See supra* Section II.C.

219 *See supra* notes 160–61 and accompanying text.

220 *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations*, 92d Cong. 28 (1971).

221 *See Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. 5 (2011) (statement of Louis Fisher) [hereinafter *Fisher Statement*].

222 *See supra* Section II.C.

223 *Id.*

224 *See supra* Section II.D.

225 *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 49 (1993).

226 Hathaway, *supra* note 125.

civil war defined "hostilities" as the House understood it.[227] The resolution noted that the term "includes in-flight refueling of non-United States aircraft conducting missions as part of the ongoing civil war in Yemen," and found that "[s]ince March 2015, members of the United States Armed Forces have been introduced into hostilities between the Saudi-led coalition and the Houthis, including providing to the Saudi-led coalition aerial targeting assistance, intelligence sharing, and mid-flight aerial refueling."[228] If Congress wishes for its conception of "hostilities" to serve as the standard and act as a constraint on the President, it would be worth redefining the term as it exists in the WPR.

Second, redefining "hostilities" is important in order to realign the modern practice of presidential war powers with the original intent of the resolution, which was to ensure that Congress had a role in regulating decisions to commit U.S. armed forces abroad.[229] Placing more oversight power with Congress, a larger deliberative body, would act as a constraint on rash decision-making.[230] Reform of the WPR, with clearer legislative mandates, would "help to constrain military adventurism"—Congress is slower to act, more sensitive to costs, and faces more procedural hurdles.[231] Moreover, congressional oversight may not simply produce *slower* decisions, but better-reasoned decisions. In other areas of law, the conventional wisdom is that interbranch deliberation is an advantage, as the process of consensus-building creates "consistent and sustainable security policy."[232]

Thus, a better definition of "hostilities" would serve as a more robust check on the President's unilateral uses of force. For one, clearer language would allow Congress to more easily identify when the President's actions are inconsistent with the WPR's requirements and raise the political costs of making shaky legal arguments that stretch the meaning of "hostilities" to an unrecognizable degree. Moreover, clearer guidance on "hostilities" would allow Congress to more forcefully shape public dialogue over military policymaking. A more coherent definition of activities that constitute "hostilities"—and trigger the WPR's withdrawal mandate—would mean that in public debates, Congress would no longer have to defer to a meaning defined by decades of executive branch practice.

227 *See* Friedman & Hansen, *supra* note 10.

228 Hathaway, *supra* note 125.

229 *Id.*

230 *Lugar Statement*, *supra* note 188, at 4 ("There is a near uniformity of opinion that the chances for success in a war are enhanced by the unity, clarity of mission, and constitutional certainty that such an authorization and debate provide.").

231 *See* Waxman, *supra* note 144.

232 *Id.*

B. *Past War Powers Resolution Reform Proposals*

With the WPR's long-standing and contested status, there has been a range of reform proposals throughout the years. Past reforms have addressed various aspects of the WPR, including clarification of the term "hostilities" in the resolution.[233] Whether scholars and legislators believe that the WPR has gone too far or not far enough in restricting the President has depended on their constitutional inclinations—whether they believe war powers should reside primarily with the President or Congress.[234] This Section focuses on a cross-section of past proposals that have favored limits on the President. Each of these proposals has aimed to strike a balance between providing the President flexibility in responding to a range of combat situations and guidance on when the President can use force without prior congressional authorization. In the next Section, this Article builds off of this balancing act in the literature and aims to tip this balance toward less presidential discretion and more guidance on which situations constitute "hostilities" that trigger the sixty-day withdrawal requirement.

Some past reform proposals have called for a comprehensive overhaul of the WPR. In 1993, John Hart Ely proposed a "Combat Authorization Act" that would authorize the courts to hear suits from members of Congress who wanted to start the countdown clock (shortened to twenty days in his proposal) if they believed hostilities were imminent.[235] The courts would have the authority to determine whether hostilities were actually imminent, and if so (assuming Congress had not authorized the operation), funds for the operation would automatically be cut off after the clock runs down.[236] More recently, in 2007, the National War Powers Commission, headed by former Secretaries of State James Baker III and Warren Christopher, conducted a comprehensive review of war powers.[237] The Commission ultimately recommended repealing the WPR and replacing it with the War Powers Consultation Act,[238] and in 2014, Senators John McCain and Tim Kaine introduced the War Powers Consultation Act,

233 For a full discussion of past reform proposals, see NATIONAL WAR POWERS COMMISSION, APPENDIX ONE, *supra* note 24, at 11.

234 *Id.* at 2 ("[H]ow an individual resolves the constitutional questions surrounding the allocation of war powers can have a significant impact on the range of options that he or she is willing to consider with respect to reform proposals.").

235 *See* Ely, *supra* note 225, at 65.

236 *Id.*

237 *See How America Goes to War*, MILLER CTR. (Jan. 21, 2021), https://millercenter.org/issues-policy/foreign-policy/national-war-powers-commission.

238 *See id.*

based on the work of the Commission.[239] The Act differed from the existing WPR by requiring the President to consult with Congress before deploying U.S. troops into "significant armed conflict," defined as combat operations lasting, or expecting to last, more than a week.[240] Both of these proposals, however, faced sessions of Congress that lacked the will to overhaul the existing structure of the WPR.

Other proposals have focused on reforming specific language within the WPR. In 1998, then-Senator Biden proposed substituting the definition of "use of force" for "hostilities" in the WPR and requiring a report when force is used.[241] More recently, Oona Hathaway has suggested redefining "hostilities" to align with "armed conflict,"[242] a term that under international law marks conflict between states or between states and non-state actors, because "armed conflict" is better defined under both international and domestic law. Further, Hathaway proposes redefining "hostilities" so that the WPR's countdown clock continues to run as long as there are "active hostilities" as a matter of international law.[243] Using "active hostilities" as the benchmark would count the entire longer conflict as an "introduction into hostilities" under the WPR, thus triggering the withdrawal requirement if Congress does not authorize the use of force within sixty days. This proposal aimed to put an end to the executive branch's use of discrete event reporting to circumvent the WPR's withdrawal requirement by counting individual incidents within a longer conflict as discrete episodes, thus stopping and starting the clock over the life of the longer conflict.[244] Additionally, Hathaway suggests that a new definition of "hostilities" should address allied operations and clarify that defense of partner forces constitutes imminent

239 *Id.*; War Powers Consultation Act, S. Res. 1939, 113th Cong. (2014).

240 *See* National War Powers Commission, Appendix Eight: Text of the War Powers Consultation Act of 2009, at 2 (2008) ("For purposes of this Act, 'significant armed conflict' means (i) any conflict expressly authorized by Congress, or (ii) any combat operation by U.S. armed forces lasting more than a week or expected by the President to last more than a week.").

241 *See* S. 2387, 105th Cong. (1998) (sponsored by Sen. Joseph Biden); Joseph R. Biden, Jr. & John B. Ritch III, *The War Powers Resolution at Constitutional Impasse: A 'Joint Decision' Solution*, 77 Geo. L.J. 367, 401–02 (1988).

242 *See* Hathaway, *supra* note 125 ("Hostilities ought to be defined as 'armed conflict' or a 'clear and present danger of armed conflict . . . or perhaps even, 'armed conflict as that term is understood under international law.'").

243 *See id.* at 49 n.125 ("Under the international law of armed conflict, the authority to detain those captured during the conflict continues only as long as 'active hostilities' are ongoing.").

244 *See, e.g.*, *supra* Section II.D.ii (describing how following the Soleimani strikes the Trump Administration claimed that hostilities ended once the strikes on Iran were completed).

involvement in hostilities.[245] This suggestion emerged in response to the Trump Administration's adoption of the view that the 2001 Authorization for the Use of Military Force authorizes the use of military force to defend partner states from attack.[246] In fact, the Administration's position was that it had the authority to "defend the Syrian Democratic Forces in Northern Syria from attack by Syrian forces (and even Russian or Turkish forces)"[247] without prior congressional authorization. While this policy was ultimately reversed, and it's unclear whether subsequent presidential administrations would adopt this line of argument, Hathaway notes that "[t]his is a novel legal position that no prior administration had embraced and it had the potential to embroil the United States in escalating hostilities without any clear congressional intent — or even notification to Congress, because it putatively falls within an existing congressional authorization."[248]

Finally, some proposals have focused on Congress reasserting its institutional power rather than reforming the language of the resolution. Matthew Waxman has proposed that Congress can assume a greater role in regulating the President's uses of force through public appeals and shaping public opinion.[249] These tools, he argues, are particularly effective because they can be "wielded by individual members, especially [those] in key committee positions" rather than mobilizing Congress as a whole.[250]

The lesson of these past WPR reform proposals is that as it currently stands, the elasticity of the term "hostilities" provides the executive branch colorable arguments in avoiding the WPR's requirements. However, this Article argues that it is possible to redefine "hostilities" to provide clearer guidance on what does or does not constitute "hostilities," creating more effective legal constraints on the President. The next Section presents two novel proposals for reconceptualizing "hostilities" that have been missing from previous calls for WPR reform.

245 Hathaway, *supra* note 125.

246 *Id.*

247 *Id.* ("The administration never sought congressional approval for the use of such defensive force, because it claimed that the [sic] it fell within the 2001 authorization for the use of military force.").

248 *Id.*

249 Waxman, *supra* note 144.

250 *Id.* ("In recent years, Congress' foreign policy and defense committees have atrophied, holding fewer oversight hearings than in the past. A first step to boosting influence is ensuring that foreign relations, armed services, and intelligence committee members have adequate experience and resources, as well as a commitment to shaping and auditing security strategy.").

C. *Reconceptualizing "Hostilities"*

This Article proposes reconceptualizing "hostilities" in the following two ways. The first proposal concerns what this Article terms "partner missions"—missions at the express invitation of another state, pursuant to UN authorization, or with a coalition like NATO. This Article clarifies that U.S. participation in partner missions is an indicator that the mission is narrow, but participation in a partner mission is not on its own sufficient to show that U.S. forces have not engaged in "hostilities." This Article then argues that "hostilities" can still exist where the United States plays a supporting role in a partner mission and must be reframed to encompass not only situations where U.S. forces participate in active exchanges of fire, but where they use or are subject to lethal force. The second proposal concerns the question of whether the WPR's sixty-day clock runs for the duration of a conflict. In order to limit the executive branch's practice of reporting military activity as discrete missions in order to toll the WPR clock, this Article proposes considering the following criteria in determining whether U.S. armed forces have been introduced into ongoing hostilities: (1) whether there is a risk of harm to U.S. forces from exchanges of fire, taking into consideration the likelihood of sustained violence occurring over an extended period of time, as indicated by factors like internal rules of engagement; and (2) whether there is regular use of force by or against U.S. forces, taking into consideration additional troop deployments.

i. Partner Missions and U.S. Armed Forces in Supporting Roles

Historically, the executive branch has cited participation in partner missions—missions at the express invitation of another state, pursuant to UN authorization, or in a coalition like NATO—as reason to believe that U.S. forces have not been introduced into "hostilities." Political scientists William Howell and Jon Pevehouse note that Presidents often cite obligations to international partners to bolster domestic legal justification for uses of force, as well as to rally public opinion.[251] For instance, Truman cited UN obligations in initiating U.S. involvement in Korea, and Clinton cited NATO obligations in launching airstrikes in Kosovo.[252]

There are two ways of interpreting the meaning of the executive branch's practice of citing to international authority as justification for uses of force. First, this practice could mean that the executive branch believes

251 *See* Howell & Pevehouse, *supra* note 132, at xvii–xviii.
252 *See id.*

that partner missions, which provide international legal authority for uses of force, also provide the President domestic legal authority for engaging U.S. armed forces without congressional involvement. For example, past administrations have claimed that missions at the express invitation of another state do not fall within the "hostilities" contemplated by the WPR. In a 2004 opinion justifying the President's deployment of fifty Marines to protect the U.S. Embassy in Port-au-Prince, Haiti, from political unrest, OLC argued that whether the deployment was at the "express invitation of the government of Haiti" was relevant to the question of whether the situation was one of "involvement in hostilities."[253] Similarly, Presidents have also claimed that missions authorized by the UN do not involve "hostilities." In a March 2011 forty-eight-hour report on Libya, President Obama excluded any mention of the introduction of U.S. forces into "hostilities," and noted that U.S. forces began operations as "authorized by the [UN] Security Council."[254]

Both the "express invitation" and "UN authorization" rationales are exceptions under international law to the UN Charter's near-absolute prohibition against the use of force.[255] This prohibition stems from Article 2(4) of the UN Charter, which bars "the threat or use of force against the territorial integrity or political independence of any state."[256] One exception to this prohibition is the use of force in the territory of a state with the state's

253 Deployment of U.S. Armed Forces to Haiti, 28 Op. O.L.C. 30, 34 (2004). This distinction has also found support outside of the executive branch. In 2011, journalists Charlie Savage and Mark Landler noted that unlike the Libya strikes, prior operations that arguably did not constitute hostilities involved "peacekeeping missions in which the United States had been invited in, and there were only infrequent outbreaks of violence — as in Lebanon, Somalia and Bosnia." Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), https://www.nytimes.com/2011/06/16/us/politics/16powers.html.

254 Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *in* 1 PUB. PAPERS OF PRES. BARACK OBAMA 280–81 (Mar. 21, 2011). Later, in a June 2011 report, the Obama Administration echoed this argument, contending that the Libya operations were consistent with the WPR because "U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution." U.S. DEP'T OF STATE & U.S. DEP'T OF DEF., UNITED STATES ACTIVITIES IN LIBYA, *supra* note 184, at 25.

255 *See generally* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 13–14 (2013); U.N. Charter art. 42.

256 U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

consent;[257] another is the use of force pursuant to UN Security Council authorization.[258] Does having a stronger international legal justification for the use of force affect whether U.S. armed forces are introduced into "hostilities" within the meaning of the WPR? This Article suggests that the answer is no.[259] To be sure, having a stronger international legal justification for uses of force abroad addresses one concern with unilateral presidential action: rash policymaking. Coordination with another state or international organization could result in a consensus-building process that produces sounder missions. But justifications for the use of force under international law do not address the constitutional question that the drafters of the WPR intended to resolve—affirming *Congress's* role in regulating U.S. uses of force.[260] Congress represents a reflection of American public opinion, regardless of what international partners think about policy, and the drafters' belief was that "the President should not engage in ventures that will lead to protracted conflicts that the Congress and the American people will not sufficiently support."[261]

257 *See* Deeks, *supra* note 255, at 35 (describing instances of one state's use of force in another state's territory with consent).

258 U.N. Charter art. 42 ("[The Security Council] may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

259 Nor does international legal authority provide justification that the mission falls within the President's Article II authority in the first place. *See* Louis Fisher, *Obama's U.N. Authority?*, Nat'l L.J. (Apr. 18, 2011), http://www.loufisher.org/docs/wplibya/authority.pdf ("Under the U.S. Constitution, there is only one source for authorizing war. It is not the Security Council or NATO. It is Congress.").

260 *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, § 2(a), 87 Stat. 555, (1973) ("It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . .").

261 *See* Buchwald, *supra* note 205; *see also Fisher Statement*, *supra* note 221, at 44 ("As I have explained in earlier studies, it is legally and constitutionally impermissible to transfer the powers of Congress to an international (U.N.) or regional (NATO) body."); Fisher, *Obama's U.N. Authority?*, *supra* note 259; Louis Fisher, *Sidestepping Congress: Presidents Acting Under the U.N. and NATO*, 47 Case W. Rsrv. L. Rev. 1237, 1267, 1271, 1279 (1997). It does not make much sense to peg domestic justification for use of force to the international legal justification, which could mire the United States in conflicts in which Congress and the American public would resist becoming involved. For instance, if humanitarian intervention develops as another exception to the international prohibition on uses of force, humanitarian intervention as a lawful justification for use of force under international law should not necessarily mean that such uses of force are justified under U.S. law. *But see* Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 Hous. L. Rev. 971, 1004–28 (2016).

Instead, a better, alternative reading of the executive branch's reliance on international legal authority is that partner missions are proxies for *narrow* missions that the executive branch has traditionally claimed do not constitute "hostilities." During the Libya hearing, Koh argued that the United States played a "constrained and supporting role in a multinational civilian protection mission" in part because the operation was "authorized by a carefully tailored U.N. Security Council Resolution."[262] However, he agreed that international legal justification alone was not sufficient to justify the legality of the Libya strikes, but rather, the "nature and degree of international support might bear on factors that are relevant to the War Powers analysis."[263]

This Article agrees with this interpretation of executive branch practice and makes two contributions expanding on this idea. First, U.S. participation in partner missions does not automatically mean that U.S. armed forces have not been introduced into "hostilities." The President can in fact commit troops to a partner mission that constitutes introduction into hostilities if the mission is not sufficiently narrow. For example, in the Libya conflict, while the Administration extensively cited NATO leading the operation as part of the reason why the situation did not constitute active or imminent hostilities,[264] U.S. involvement was not merely in a supporting role. The United States was in fact "doing most of the heavy lifting in the conflict short of pulling all the triggers."[265] As discussed in Section II.D.i, the Supreme Allied Commander, in command of NATO military operations, was a U.S. Navy Admiral.[266] Additionally, according to a U.S. Department of Defense memo, "[a]lthough it [was] working under NATO, the US [was] by far the largest contributor to [the] operation," supplying nearly a billion dollars in funding and "about 75% of reconnaissance and refueling missions."[267] Moreover, during the Libya congressional hearing, Senator Lugar argued that characterizing the United States as playing a supporting

262 *Koh Hearing*, *supra* note 33, at 3.

263 *Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. 60 (2011) (written answers submitted by Harold Koh, Legal Adviser, U.S. Dep't of State).

264 *See Koh Hearing*, *supra* note 33, at 3 (arguing that the operation was consistent with the WPR because "U.S. armed forces would transition responsibility for leading and conducting the mission to an integrated NATO command"); *Lugar Statement*, *supra* note 188, at 6 ("The administration's report also implies that because allied nations are flying most of the missions over Libya, the United States operations are not significant enough to require congressional authorization.").

265 Jack Goldsmith, *Problems with the Obama Administration's War Powers Resolution Theory*, LAWFARE (June 16, 2011), https://www.lawfareblog.com/problems-obama-administrations-war-powers-resolution-theory.

266 *Supra* Section II.D.i; Holan & Jacobson, *supra* note 187.

267 Goldsmith, *supra* note 265.

role "underplays the centrality of the United States contributions to the NATO operations," noting that "United States war planes have reportedly struck Libya air defenses some 60 times since NATO assumed the lead role in the Libya campaign."[268]

Second, this Article argues that situations in which U.S. armed forces play a noncombat supportive role and are not responsible for "pulling the trigger" can still constitute "hostilities" under the WPR. For example, in supporting Saudi Arabia in its coalition strikes in Yemen, the United States's role included "air-to-air refueling; certain intelligence support; and military advice."[269] The Trump Administration insisted that U.S. forces were present in Saudi Arabia solely for support.[270] Some senators, siding with the Administration, have similarly argued that the President's actions were consistent with the WPR because U.S. troops were not involved in "direct military action" against rebel Houthi forces.[271] Other members of Congress have argued that U.S. activities in Yemen amounted to "hostilities," with one Senate resolution proposing to define "hostilities" to include "refueling of non-United States aircraft" in Yemen.[272]

This Article proposes to reconceptualize "hostilities" to encompass situations not only where U.S. forces are participating in active exchanges of fire, but where they *use or are subject to lethal force*. As discussed in Section II.C, the executive branch has historically defined "hostilities" as "situation[s] in which units of U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces."[273] In Yemen, the Trump Administration contended that U.S. support of the Saudi coalition did not constitute an introduction into "hostilities" because U.S. personnel were not actively engaged in exchanges of fire with hostile forces.[274] However, this strays from

268 *Lugar Statement*, *supra* note 188, at 5–6 ("The fact that we are leaving most of the shooting to other countries does not mean the United States is not involved in acts of war. If the United States encountered persons performing similar activities in support of al-Qaeda or Taliban operations, we certainly would deem them to be participating in hostilities against us.").

269 WEED, CONG. RSCH. SERV., *supra* note 60, at 55.

270 *See id.*

271 *See id.* at 58. Moreover, they argued that the U.S. has many similar support operations overseas, and characterizing the actions in Yemen as "hostilities" would result in the President needing Congress's approval for all of these support activities. *Id.*

272 *Id.* at 58–59.

273 Letter from Monroe Leigh, *supra* note 93, at 38–39.

274 *See* WEED, CONG. RSCH. SERV., *supra* note 60, at 55. The Administration has emphasized the fact that U.S. troops are in a supporting role and do not "command, coordinate, accompany, or participate in the movement of coalition forces in counter-Houthi operations," and do not "accompany[] the KSA-led coalition when its military forces are engaged, or [when] an imminent threat exists that they will become engaged, in

Congress's original intent, which was that the WPR's withdrawal mandate would be triggered by circumstances in which no exchanges of fire have occurred but "where there is a clear and present danger of armed conflict."[275]

This Article's proposed definition is more consistent with the original conception of "hostilities," which was intended to be much broader than how the executive branch has interpreted the term through the years. Situations where U.S. forces use or are subject to lethal force would encompass circumstances in which American soldiers face enemy forces and operate under the danger of exchanges of fire, or in which "U.S. armed forces are equipped for combat in a foreign country where an opposing military might be expected to take an adversarial stance at some point in the near future against such U.S. armed forces" (as in Yemen, for example).[276] This definition envisions that there exist situations where U.S. armed forces serve non-combat support roles and yet are still considered to have been introduced into hostilities, triggering the WPR's countdown clock. Importantly, in clarifying the scope of "hostilities," this definition allows Congress and the public to more clearly identify instances of potential presidential actions inconsistent with the WPR, ultimately serving as a constraint on any attempts to skirt the WPR's requirements.

ii. "Hostilities" and Intermittence

Another method by which the executive branch has circumvented the WPR's requirements is through the practice of categorizing military activity narrowly as discrete events, as explained in Section II.D.ii.[277] Even if these activities were considered "hostilities" within the WPR, each intermittent event throughout the course of a longer continuous conflict would restart the countdown clock, with each instance falling under the sixty-day time limit. By starting and stopping the clock through discrete events, the President never has to face the possibility of withdrawing troops when time is up. Jack Goldsmith suggests that this kind of discrete mission reporting "fits reasonably well with the text of the WPR, though of course not with its spirit."[278]

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hostilities." *Id.* at 63.

275 *See* H.R. REP. NO. 93-287, at 7, 19 (1973).

276 WEED, CONG. RSCH. SERV., *supra* note 60, at 61–62.

277 *See supra* Section II.D.ii (describing how following the Soleimani strikes the Trump Administration claimed that hostilities ended once the strikes on Iran were completed).

278 Jack Goldsmith, *A New Tactic to Avoid War Powers Resolution Time Limits?*, LAWFARE (Sept. 2, 2014), https://www.lawfareblog.com/new-tactic-avoid-war-powers-resolution-time-limits.

The most prominent example of the executive branch's attempt to sidestep the countdown clock occurred during the Reagan Administration's involvement in the Tanker Wars in the 1980s. On May 17, 1987, an Iraqi aircraft fired on the USS Stark in the Persian Gulf, killing 37 U.S. sailors.[279] Subsequently, the United States began providing naval escorts to Kuwaiti oil tankers in the Gulf,[280] raising the question of whether this constituted involvement in hostilities or imminent hostilities. From September 24, 1987, to July 14, 1988, President Reagan submitted six separate forty-eight-hour reports to Congress, but none of these reports explicitly or implicitly acknowledged whether U.S. forces had been introduced into hostilities.[281] Instead, the Administration claimed that these isolated incidents, altogether spanning a period longer than sixty (or ninety) days, did not rise to the level of "hostilities" under the WPR, and even if they were considered "hostilities," no single incident exceeded the sixty-day time limit.[282] The last three reports in the series used the phrase "we regard this incident as closed" in order to indicate intent to stop the clock so that "[a]ny additional hostilities reported would . . . constitute a new incident that would trigger a new 60-day window for military engagement."[283] However, these incidents were never truly isolated events, and during this same period, U.S. naval presence in the Persian Gulf increased to include "11 major warships, 6 minesweepers, and over a dozen small patrol boats."[284]

More recently, commentators have worried that following the Soleimani strike, the Trump Administration would use this segmented approach in the ongoing conflict with Iran in order "to argue that the [WPR] is a dead letter in that it deals with a situation that's already in the past and therefore imposes no meaningful requirements on the executive."[285] But discrete event reporting by the executive branch would plainly ignore facts on the ground. During the Tanker Wars, as the situation unfolded, the number of U.S. troop deployments in the Persian Gulf *increased*, and similarly, in the context of the Soleimani strike and tensions with Iran, facts were "unfolding in the direction of more violence and new troop deployments, as well as . . . future hostilities that are quite likely to occur over what may be

279 *See* Weed, Cong. Rsch. Serv., *supra* note 60, at 16.

280 *Id.* At the time, Kuwait was still exporting oil during the Iran-Iraq War (1980–1988). Lee A. Daniels, *Oil from Persian Gulf: Little Threat Seen Now*, N.Y. Times (May 28, 1987), https://www.nytimes.com/1987/05/28/business/oil-from-persian-gulf-little-threat-seen-now.html.

281 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 24.

282 *Id.*

283 *Id.*

284 Weed, Cong. Rsch. Serv., *supra* note 60, at 16.

285 Pomper, *supra* note 15.

an extended period of time."[286]

Based on historical practice, Marty Lederman suggests that the executive branch relies on two criteria for determining whether the WPR has been triggered to start running the countdown clock: "(i) the risk of harm to U.S. forces from an exchange of fire and (ii) the regularity of the use of force by or against U.S. forces (that is, whether there are intermittent periods without the use of force . . .)."[287] For purposes of determining the running of the WPR's countdown clock, this Article agrees with the executive branch's use of these criteria. However, by proposing additional elements to refine these criteria, this Article aims to provide a better understanding of "hostilities" and the countdown clock in order to limit future legal arguments justifying the President's circumvention of WPR requirements.

This Article proposes considering the following criteria in determining whether U.S. armed forces have been introduced into ongoing hostilities: (1) whether there is a risk of harm to U.S. forces from exchanges of fire, taking into consideration the *likelihood of sustained violence* occurring over an extended period of time, as indicated by factors like internal rules of engagement; and (2) whether there is regular use of force by or against U.S. forces, taking into consideration *additional troop deployments*. These two proposed elements—the likelihood of sustained violence and additional troop deployments—are indicators that active or imminent hostilities exist, and that there is an ongoing conflict situation (rather than intermittent events).

First, gauging the likelihood of sustained violence should take into account rules of engagement (ROE), internal orders to military personnel that reflect the executive branch's assessment of the risk of danger and violence to U.S. forces.[288] Commentators have mentioned that ROE "represent a key factor in assessing whether the Executive Branch considers hostilities to be 'clearly indicated by the circumstances.'"[289] For example, in 1981, the Reagan Administration conducted freedom of navigation operations in the Gulf of Sidra, off the coast of Libya, in order to contest Libya's claim that the Gulf was within its territorial waters.[290] Presumably to avoid escalation

286 *See* Bridgeman, *The Soleimani Strike and War Powers, supra* note 203.

287 *See* Marty Lederman, *The War Powers Clock(s) in Iraq*, JUST SECURITY (Sept. 8, 2014) (emphasis omitted), https://www.justsecurity.org/14513/war-powers-clocks-iraq. However, the executive branch has not indicated whether these criteria are necessary or sufficient factors. *Id.*

288 *See* J. Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U. L.J. 57, 66 (2007) (describing how ROEs are "fashioned to take circumstances into consideration, e.g., the probability of hostilities").

289 *Id.* at 67.

290 *Id.* at 65; Howell Raines, *President Defends Libyan Encounter as 'Impressive' Act*, N.Y. TIMES

with Libya, the Administration maintained that it did not know for certain that the situation would be one of active or imminent hostilities.[291] However, when the Navy requested changes in ROE in order to fire on Libyan planes that targeted American planes, the Administration denied the request on the grounds that changing the ROE would have signified that the United States understood hostilities to be imminent.[292] Here, the ROE was an indicator of the executive branch's understanding of whether "hostilities" existed.

Similarly, following a terrorist attack in Lebanon in October 1983 that killed 241 U.S. Marines, the Long Commission, established to investigate the incident, criticized the military's failure to change the peacetime ROE to prepare for a more hostile environment.[293] The report noted that "for any ROE to be effective, they should incorporate definitions of hostile intent and hostile action which correspond to the realities of the environment in which they are to be implemented,"[294] with commentators observing that "it seems clear that the administration knew that the Marines had been placed in a situation where hostilities were at least imminent, if not ongoing."[295] Certainly, ROE do not have to be the only factor in determining the likelihood of sustained violence occurring over an extended period of time—this kind of analysis will necessarily be fact-dependent. However, ROE are good signifiers of this likelihood, which in turn indicates the risk of harm to U.S. forces. If there is indeed such a risk, even the executive branch, based on its historical use of this criteria, will have a much harder time denying that U.S. forces are facing ongoing hostilities within the meaning of the WPR.

Second, whether the President has ordered additional troop deployments into a situation should inform the determination of the regularity of the use of force by or against U.S. forces (in other words, whether there are intermittent periods without the use of force). According to Lederman, operation-specific airstrikes will often be "interrupted by periods during which there is no clear indication of any further, imminent involvement of U.S. forces in hostilities,"[296] meaning that under the WPR, the clock might indeed toll during those periods. However, the presence

(Aug. 21, 1981), https://www.nytimes.com/1981/08/21/world/president-defends-libyan-encounter-as-impressive-act.html.

291 *See* Atwood, *supra* note 288, at 66.

292 *See id.*

293 *Id.* at 66–67.

294 U.S. Commission on Beirut, Dep't of Def., Report of the DOD Commission on Beirut International Airport Terrorist Act, October 23, 1983, at 32–33, 47–48 (1983).

295 Atwood, *supra* note 288, at 67.

296 Lederman, *supra* note 287.

of troops remaining in a situation would indicate ongoing rather than intermittent hostilities, because "[e]ven if that deployment were intended only for a discrete, time-limited operation, if the troops remained in the country thereafter and there is a clear indication that they would have further imminent involvement in hostilities, the clock would continue to run even though their designated operation has ended."[297] This scenario happened during the Reagan Administration's involvement in Lebanon, where the Administration contended that U.S. personnel in Lebanon had not been introduced into "hostilities."[298] However, in late 1983, around the same time that U.S. forces used airstrikes over Lebanon against Syrian forces,[299] *two thousand additional* Marines were sent to Lebanon.[300] While the airstrikes were a discrete event, the additional troop deployments were a strong indicator that there was regular, rather than intermittent, use of force in Lebanon. It satisfied the executive branch's criteria for determining the existence of ongoing hostilities, and the WPR's countdown clock would have covered the entire episode. By clarifying whether discrete events constitute continuous engagements in "hostilities," this standard can limit the executive branch's practice of interpreting intermittent action as separate operations. Ultimately, clearer standards would allow Congress to utilize political pressure and public opinion to constrain presidential actions that circumvent WPR requirements.

297 *Id.*

298 Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 279 (1984).

299 *See* Bernard E. Trainor, *'83 Strike on Lebanon: Hard Lessons for U.S.*, N.Y. TIMES (Aug. 6, 1989), https://www.nytimes.com/1989/08/06/world/83-strike-on-lebanon-hard-lessons-for-us.html.

300 *See War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, Int'l Sec., & Sci. of the Comm. on Foreign Affs.*, 99th Cong. 64 (1986) (statement of J. Brian Atwood, Dir. of the National Democratic Institute).

Conclusion

This Article's proposals reconceptualize the meaning of "hostilities" under the WPR and provide clearer standards on the types of military activity that trigger the resolution's withdrawal mandate. These proposals operate under the view that presidential unilateralism is not normatively attractive and that Congress should assume a greater role in use of force decisions. Despite the executive branch's existing practice of interpreting its powers broadly and statutory restrictions in the WPR narrowly, law, and not solely politics, can act as a constraint on the President. Accordingly, this Article's proposals aim to strengthen the WPR in order to allow Congress to maximize legal constraints on the President.

These proposals provide Congress with the opportunity to increase the political costs of espousing thin legal justifications for involvement in serious conflicts like Libya or Yemen. With recent resolutions calling for an end to hostilities in Yemen and Iran demonstrating renewed political will, Congress may be more motivated to utilize the WPR framework in order to constrain the President. Louis Fisher's remark twenty-five years ago certainly still holds true today: "Contemporary presidential judgments need more, not less, scrutiny."[301]

301 Fisher, *supra* note 23, at 186.